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[2024] PBRA 209

Application for Reconsideration by Marston

Application

1. This is an application by Marston (the Applicant) for reconsideration of a decision of an oral hearing panel (OHP) dated 19 August 2024. The decision was not to direct 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 dossier now consisting of 560 pages, the application for reconsideration dated 27 September 2024, and the decision of the OHP.

Request for Reconsideration

4. The application for reconsideration is dated 27 September 2024.

5. The grounds for seeking a reconsideration are set out below. The application for reconsideration was in narrative form. The application was eligible and valid, however legal advisers should consider numbering and listing individual grounds and appending short reasons supporting each ground to ensure that all arguments are addressed. I have listed the grounds, as reflected in the application, below.

Background

6. The Applicant is serving a sentence of imprisonment for public protection. The sentence was imposed in September 2008. The offences were arson and burglary. The Applicant was 31 years old at the time of sentence. The Applicant's tariff expired in October 2010. He was 47 years old at the time of the oral hearing (OH). He had been released and recalled on two earlier occasions.

7. The index offence was arson. The Applicant set fire to containers in a town centre. The Applicant had earlier convictions for the offence of arson. The Applicant was reported to suffer from mild learning difficulties.

Current parole review

8. The matter was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether he should be released or in the alternative whether a recommendation for a transfer to open conditions should be made. The hearing was adjourned part heard to secure further information.

9. The panel consisted of an independent chair, an independent co-panellist and a psychologist member. Evidence was taken at the OH from a prison offender manager, the current and former community offender managers (COMs), a prison instructed psychologist and the Applicant. The Applicant was legally represented.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 19 August 2024 the test for release and the issues to be addressed in making a recommendation to the Respondent 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

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)).

13. 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**.

Irrationality

14. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined in **Associated Provincial Houses Ltd -v- Wednesbury Corporation 1948 1 KB 223** by Lord Greene in these words: *"if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere".* The same test applies to a reconsideration panel when determining an application on the basis of irrationality.

15. In **R(DSD and others) -v- the Parole Board 2018 EWHC 694 (Admin)** a Divisional Court applied this test to parole board hearings in these words 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."

16. In **R(on the application of Wells) -v- Parole Board 2019 EWHC 2710 (Admin)** Saini J set out what he described as a more nuanced approach in modern public law which was *"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".* This test was adopted by a Divisional Court in the case of **R(on the application of the Secretary of State for Justice) -v- the Parole Board 2022 EWHC 1282(Admin).**

17. As was made clear by Saini J this is not a different test to the Wednesbury test. The interpretation of and application of the Wednesbury test in Parole hearings as explained in **DSD** was binding on Saini J.

18. It follows from those principles that in considering an application for reconsideration the reconsideration panel will not substitute its view of the evidence for that of the panel who heard the witnesses.

19. Further while the views of the professional witnesses must be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. The panel must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.

Procedural unfairness

20. 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.

21. 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.

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

Error of law

23. 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.

24. 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.

25. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin),** and **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:

    (a) the progress of the prisoner in addressing and reducing their risk;
    (b) the likeliness of the prisoner to comply with conditions of temporary release
    (c) the likeliness of the prisoner absconding; and
    (d) the benefit the prisoner is likely to derive from open conditions.

26. 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.*"

27. 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

28. The respondent made no representations.

Grounds and Discussion

Ground 1

29.The Applicant's legal adviser submits that it is irrational to expect the Applicant to complete an offending behaviour programme in prison custody because of his cognitive difficulties and the absence of appropriate interventions to meet those difficulties.

Discussion

30.The role of a Parole Board panel is to assess risk. Part of that assessment may involve analysing the nature and effectiveness of any behavioural work that might be undertaken or has been undertaken in any particular case. The decision about undertaking behavioural work is entirely one for the prisoner, the prison and those advising the prisoner. The role of the panel is not to direct, expect or require any particular behavioural work to be undertaken by any prisoner. Equally the availability or otherwise of behavioural interventions is a responsibility of the prison service. This ground therefore does not amount to irrationality in the sense set out above.

Ground 2

31.It was irrational of the panel not to release the Applicant on the basis that there would at some stage (in the future) be behavioural work available for the Applicant to undertake in the community.

Discussion

32.As indicated above, the role of the panel is to analyse the evidence presented at the hearing, to make a risk assessment, and to apply the statutory test. In this case, the panel decision makes it clear that the panel took the view, as did other professionals, that core risk reduction work had not been completed. The panel made it clear that it had determined that, upon its assessment, for this reason and others, the Applicant's risk was such that the Applicant did not meet the statutory test for release. The panel therefore declined to direct release. This ground does not, in my view, amount to irrationality in the sense set out above.

Ground 3

33.It is submitted on behalf of the Applicant that it was wrong for the OHP to suggest that the appropriate intervention to address the Applicant's risk was not available in the community.

Discussion

34.In this case, the panel received mixed views from the professionals as to how the Applicant could address the outstanding issues relating to risk. Various programmes and interventions were discussed. Some interventions were not available in the community. A psychologist suggested that in the shorter term, risk could be managed in the community, however, in the longer term the view expressed was that the Applicant should engage in a behavioural intervention to address his risk. In essence, it was being suggested that the Applicant should be directed for release on the understanding that, at some future date, he would undertake necessary risk reduction work. This was not a position supported by the COMs (two gave evidence). They took the view that there was core risk reduction work to be completed and that work could only be completed in custody, prior to release. The panel was entitled (and obliged) to make its own independent assessment of risk. It would be highly unusual for a panel to direct release, contingent upon undertaking core risk reduction work in the future. The decision of the panel, therefore, was not surprising. I do not find that this view by the panel amounted to irrationality in the sense set out above.

Ground 4

35.It is submitted that the panel should have adjourned the hearing in order to explore how long it would have taken for behavioural work to be made available to the Applicant in the community.

Discussion

36.At paragraph 4.3 of the decision letter the panel set out a schedule of the factors taken into account in coming to a conclusion that the Applicant did not meet the test for release. There were a number of factors, one of which included the determination that outstanding core risk reduction work had not been undertaken. It is clear, therefore, from the panel's decision that this was not a case where the panel took the view that it would have been appropriate to direct release of the Applicant, even if risk reduction work was able to be offered (in the community) on a fixed date in the future. The panel had decided that there was outstanding core risk reduction work, which, by inference meant that the work would be completed in custody and thereafter a risk assessment undertaken. In the circumstances, therefore, I do not find that this ground amounts to irrationality in the sense set out above.

Ground 5

37.It is submitted that the decision was irrational because the witnesses had accepted that the risk of serious harm posed by the Applicant was not imminent, and that there was a robust risk management plan in place.

Discussion

38.As indicated above, the panel set out, in a schedule, the reasons why it had come to a conclusion that the Applicant did not meet the test for release. The panel accepted the view that the risk of serious harm (to known adults), if it occurred, would be high, but was not imminent. The panel did not accept the view that the risk management plan was sufficient to manage the risk of serious harm in the community. Whilst imminence of serious harm is an important factor in conducting a risk assessment, a Parole Board panel is obliged to look holistically at the evidence of risk and to come to a conclusion upon the entirety of the evidence. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it, and having regard to the fact that it saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel. I do not find in this case that it is manifestly obvious that there are compelling reasons for interfering with this decision - for that reason the application is refused.

Decision

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

HH S Dawson
18 October 2024