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[2024] PBRA 230

Application for Reconsideration by Bayle

Application

1. This is an application by Bayle (the Applicant) for reconsideration of a decision of an oral hearing panel (OHP) dated 15 October 2024. The hearing took place on 2 October 2024.The decision was not to direct release, but to recommend progression to an open prison.

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 717 pages, the decision of the OHP, the reconsideration application drafted by the Applicant's legal adviser and the response by the Secretary of State (the Respondent).

Request for Reconsideration

4. The application for reconsideration is dated 30 October 2024.

5. The grounds for seeking a reconsideration are set out below.

Background

6. The index offence was manslaughter, the victim was the Applicant's partner. The Applicant assaulted the partner in her home in circumstances where the Applicant had suspected infidelity. The Applicant's partner was punched and then strangled. The Applicant then set fire to the home. He later indicated that he was attempting to end his own life by the fire. He also later indicated that in the circumstances he was overcome by the heat and escaped. The Applicant initially contended that he had no memory of the violence or the fire setting. Later in counselling sessions in prison he had more recollection. The sentencing judge was clear that he had become "obsessive" about the victim. The judge described the extensive injuries to the victim's face, neck, chest, head and upper back. The injuries indicated a large number of blows and application of pressure.

7. The Applicant was sentenced to life imprisonment with a minimum sentence of 2 years and 142 days. He was released on licence in April 2015. He was recalled in December 2016. The recall occurred in circumstances where he had committed a further offence.

8. The further offence occurred in December 2016, when in the community; the Applicant assaulted two victims causing grievous bodily harm. He had taken cocaine and alcohol. He has said that following a night of drinking and taking substances he had invited the victims back to his accommodation. Later, whilst there, he was unable to find his wallet. He believed one of the guests had taken it and confronted the person. He took a knife from the kitchen and attacked the male victim.

9. The judge's sentencing remarks describe the extensive violence to the male victim before he woke up and secondly to the female victim just as she woke up and saw him attacking the male victim. She tried to pull him away from the male victim. He grabbed her by the neck, pushed his thumb into her windpipe and stabbed her in the face. The judge said that the scene was "terrifying to contemplate." Both victims were covered in blood and had been stabbed in the face.

Current parole review

10. This was the Applicant's third review following the Applicant's recall to prison. The Applicant was aged 40 at the time of the oral hearing decision.

11. The Applicant was aged 24 at the time of committing the original index offence of manslaughter. The oral hearing took place in October 2024. The OHP consisted of an independent chair, a further independent member and a psychiatrist member. Evidence was given by a prison instructed psychologist, a prison offender manager and a community offender manager. The Applicant was represented by a solicitor. The Applicant gave evidence.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 15 October 2024 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)

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**.

Irrationality

16. 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.

17. 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."*

18. 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).**

19. 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.

20. 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.

21. 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

22. 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.

23. 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.

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

Error of law

25. 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.

26. 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.

Other

27. 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.

28. 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.*"

Reconsideration as a discretionary remedy

29. 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 Secretary of State

30. The Respondent made no representations.

Grounds and Discussion

31. This reconsideration application was drafted in narrative form with a substantial number of individual issues upon which the Applicant's legal advisers made comments and criticisms. I have dealt with the points as they appeared to me to be referenced in the narrative. For ease of reading I have divided the points into grounds although the narrative was not so divided.

Ground 1

32. It is submitted by the Applicant's legal adviser that the panel were incorrect in deciding that the lapse into "offence paralleling behaviour" (which led up to the offences committed on life licence) occurred "reasonably quickly". It is submitted that he had been on licence for at least one year before lapsing.

Discussion

33. This is not a strong point with respect. The Applicant was on licence for an offence of manslaughter, an offence which involved the application of excessive and fatal force and was associated with substance misuse. To lapse into substance misuse and alcohol misuse within a year of release on licence was highly concerning and was in my estimation appropriately identified by the panel as a relapse which occurred "reasonably quickly" following release on life licence.

Ground 2

34. It is contended by the Applicant's legal adviser that the panel failed to acknowledge that the Applicant undertook work associated with violence reduction (albeit not direct violence reduction programmes), following his recall to prison.

Discussion

35. I have considered this point. The panel accepted the views of professionals that no further core risk reduction work was advised (the Applicant had undertaken such work during his first period in prison following the commission of the index offence of manslaughter). The panel's position was set out in paragraph 3.7 of the decision. The panel remained concerned that the Applicant had not "*yet sufficiently consolidated his skills (and been properly tested) to be released back into the community. This led the panel to consider that a period of further testing would be beneficial in this case, not least given the seriousness of [the Applicant's] risk profile which the panel considers to be underestimated by the risk scores provided*."

36. The panel therefore acknowledged that no further work in relation to violence had been undertaken and accepted that the advice was that core work had been completed in the past. However the panel noted that since the core work had been undertaken, and following the Applicant's release on licence, very serious further offences of violence had been committed while the Applicant was in the community. The panel's emphasis was on the behaviour of the Applicant in the community (he had progressed well in prison). This was the background to the panel's view that the Applicant's risk remained at a level that required him to be detained, albeit in the less restrictive environment of an open prison. It does not appear to be irrational, in my determination, for the panel to conclude that the Applicant should consolidate his earlier learning, and be tested in the community with the strict oversight of the open prison regime. The particular issue being the Applicant's risk around stress and emotional pressures leading to alcohol and drug misuse.

Ground 3

37. It is contended by the Applicant's legal adviser that the panel were wrong to conclude that the Applicant's insight into his use of violence was "under developed".

Discussion

38. This is a general point by the panel, however it is noted in the dossier that the Applicant had accepted that he had developed a form of "tunnel vision" (in the community), and had felt that he was able to manage his risk of violence as long as he was not in an intimate relationship (as he was prior to the index offence). The panel's overall concern was that the Applicant's insight and ability to self-regulate had deteriorated, a point well documented and supported by the psychological evidence in the dossier. The panel, in my determination, had an evidential basis for their view that despite the work the Applicant had undertaken to manage risk, his insight and ability to apply the learning was limited. This point does not, in my view, amount to an example of irrationality in the sense set out above.

Ground 4

39. It is contended by the Applicant's legal adviser that the Applicant had (since his recall to prison) spent time on a specialist wing and engaged in psychological work aimed at behaviour monitoring, and it was therefore irrational not to direct his release, but to suggest he requires further testing in the open estate.

Discussion

40. The panel accepted that the Applicant had, following his recall, behaved positively in the closed prison environment. The panel, however, were not convinced that there was sufficient evidence to support the contention that his risk of serious harm could be safely managed in the community outside prison oversight. The panel were entitled to consider, as they did, the entirety of the evidence and reach their own conclusions about future risk. As indicated above their concerns were based upon the historical evidence of the Applicant's risk and behaviour. There was a credible evidence base for their conclusions, albeit they did not agree with the views of professionals. Their assessments were not in my determination irrational.

Ground 5

41. It is contended by the Applicant's legal adviser that the panel were wrong to suggest that the Applicant displayed "ongoing minimisation".

Discussion

42. Within the dossier and the panel decision itself the panel noted that there was a conflict between the Applicant's view of the relationship issues between the deceased victim of the index offence (prior to the commission of that offence), and that of victim. The panel were entitled to express their view. This issue did not, in my determination, materially affect the decision of the panel because they were accepting that core risk reduction work was complete.

Ground 6

43. It is contended by the Applicant's legal adviser that the panel were wrong to conclude that the Applicant's risk had been underestimated by professionals.

Discussion

44. In my determination this was the core of the panel's decision. The panel had taken a contrary view to professionals. The panel continued to have concerns about the management of the Applicant's risk in the community, but were satisfied that the risk could be managed in the restrictive environment of an open prison and (importantly) could be tested in that environment. The panel had also accepted that the Applicant had shown evidence of some further insight into his risk and insight into the circumstances which led to the recall, however the panel had understandable reservations and did not direct release. As indicated above the major concern was the ability of the Applicant to manage risk and to manage his propensity to relapse into alcohol and drug misuse (leading to violence) in stressful circumstances. In my determination this assessment did not amount to irrationality in the sense set out above.

Ground 7

45. It is contended by the Applicant's legal adviser that the panel were wrong to indicate a concern that the Applicant had become "complacent" and relapsed into alcohol use. It is submitted on behalf of the Applicant, that he became complacent only after "*a significant period of time in the community"* and in *"specific circumstances*". The period of time was as noted above around 12 to 18 months since release on life licence. The "specific circumstances" were that the Applicant had secured employment and felt he should socialise with work colleagues and began to use alcohol.

Discussion

46. Again I determine that both of these arguments on behalf of the Applicant have limitations. The panel were concerned about risk over the remainder of the Applicant's life, and were bound to make their assessment on that basis. The period of 12 to18 months (of being compliant and not using violence and alcohol) was indeed a relatively short time. The circumstances, which were said by the Applicant to have led to his relapse, were not necessarily unique or unusual (wanting to socialise with work colleagues). The panel were entitled to be concerned that the Applicant's decision to revert to alcohol use, to preserve his social relations with work colleagues, was evidence of a low threshold of desistence. This was a matter of great concern in the light of both the index offence and the subsequent offences. The argument on this ground, in my determination, does not amount to irrationality.

Grounds general

47. The Applicant's legal adviser has raised a large number of individual issues in this application. The issues illustrate examples where the panel did not support the views of the professionals. Fundamentally this was a highly concerning case in the sense that the Applicant had initially committed a grave and fatal offence involving violence. Within 18 months of being released, he again attacked two individuals in an unprovoked incident which could well have led to a further fatality. The panel were entitled to approach the decision in this case with extreme caution in the light of their duty to protect public safety, but were also bound to take account of their duty to ensure that the prisoner is treated fairly and not unnecessarily deprived of his liberty. In my determination the panel's approach was entirely rational and understandable. The decision was based upon credible evidence within the dossier, albeit that the panel did not agree with the recommendations of professionals. In the circumstances I do not direct reconsideration in this case.

Decision

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

HH S Dawson
22 November 2024