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[2024] PBRA 233

Application for Reconsideration by Badmus

Application

1. This is an application by Badmus (the Applicant) for reconsideration of a decision of the Parole Board following an oral hearing on 9 October 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 387 pages including the decision letter (DL), the subject of this application.

   b. An application dated 1 November 2024 submitted on behalf of the Applicant but also apparently drafted by him as it is written in the first person and not signed by the legal representative who appeared on his behalf at the hearing.

Background

4. The Applicant is now 32 years old. In June 2017 he was sentenced to 9 years imprisonment with an extension period of 3 years for two offences of robbery and two of possession of an offensive weapon. The robberies were committed in 2013 and 2017. His Parole Eligibility Date was 18 June 2023. His Conditional Release Date is June 2026 and his Sentence Expiry Date is June 2029. This hearing was the first since the sentence was passed. The panel at the hearing under consideration did not direct his release.

Request for Reconsideration

5. The application for reconsideration is dated 1 November 2024. Although the Applicant was represented at the hearing by a legal representative this application was submitted by a third person and the grounds are written in the first person as if they were composed by the Applicant himself.

6. The grounds for seeking a reconsideration of the case are – in summary - as follows:

   Under the heading of procedural irregularity:

   a. The panel chair attempted to "force" the Applicant's Prison Offender Manager (POM) to change his recommendation from "release" to "remain".
   b. The forensic psychologist was dishonest in her evidence at the hearing having previously indicated that she would recommend release. The panel chair "unlawfully" convinced her not to recommend release.
   c. Various events which were alleged to have occurred in prison involving the Applicant in which he had been the victim were twisted by the panel to portray him as a "violent perpetrator".

7. Under the heading of irrationality:

   a. Questions were asked in a way which consciously or unconsciously amounted to "racial profiling". The Applicant was not given sufficient opportunity to put evidence before the panel which would have refuted that perception.
   b. The Applicant's "medical conditions and disabilities" were neglected during the hearing.

Current parole review

8. This case was first referred to the Parole Board in September 2022 in view of his Parole Eligibility Date as set out above.

The Relevant Law

9. The panel correctly sets out in its DL the test for release.

Parole Board Rules 2019 (as amended)

10. 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)).

11. 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)). This is an eligible sentence.

Irrationality

12. 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."

13. 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.

14. 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 **R (Wells) v Parole Board [2019] EWHC 2710 (Admin)**.

15. 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.

16. 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".

17. 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.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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".

23. 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

24. 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.

25. 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.

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

Other

27. 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.

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.*"

The reply on behalf of the Secretary of State

29. The Secretary of State has offered no representations in respect of this application.

Discussion

30. In reality the grounds submitted – save possibly that summarised at paragraph 6a above – allege irrationality rather than procedural unfairness.

31. The applicant is a man who twice put members of the public at risk of serious harm when committing the index offences and has done so on many occasions in the past.

32. As to the individual grounds:

a. I have listened carefully to the recording of the evidence of the POM (as well as that of the other witnesses including the Applicant and his legal representative's careful closing submissions). It is by no means uncommon for professionals such as the POM, the Community Offender Manager (COM)

and psychologist(s) to hold differing views as to the suitability of a particular prisoner for release. I detected no sign of attempts by the panel to force the POM to change his (and his predecessor's) recommendation, merely proper questions – to which no objection was taken at the time – to test the recommendation.

b. Likewise I have listened to the evidence of the psychologist and put it against the contents of the report within the dossier at pp 172-198 and the passages in the DL which deal with her evidence. I detected no signs of improper pressure being brought to bear on her at the hearing – and no such suggestion was made at the time by the Applicant or his legal representative - and the DL accurately summarises the recommendations in her report (pp192-3) and the evidence she gave at the hearing which did not support his immediate release.

c. I have studied the passages in the dossier which refer to previous incidents involving the Applicant while in prison. The panel was entitled to conclude as it did that the nature of some of those incidents was an indication that the risk the Applicant would pose to the public of serious harm was still present. Nowhere in the DL are the words "violent perpetrator" used. The DL at paragraphs 2.3-2.29 accurately summarises the evidence given at the hearing and within the dossier on the question of his current risk and the relevance to it of his previous record and his behaviour in prison.

d. I have listened carefully to the evidence – including that of the Applicant himself which lasted for more than an hour – for signs that the questioning betrayed prejudicial preconceptions based on "racial profiling" of the Applicant. I found none.

e. Finally I have studied the dossier for the evidence available to the panel concerning the Applicant's medical condition or disabilities and listened to the evidence given. The Applicant referred to the narcolepsy from which he suffers on a few occasions in passing during his evidence but the references were at best peripheral to the issues which he and the panel had to address concerning the key question for the panel of the potential risk the Applicant would pose of serious harm to the public if released. The panel noted the Applicant's medical problems at paragraph 1.1 of the DL. The grounds do not set out how these should have tipped the balance in favour of a direction for release.

33. While of course this case was far from being an "open and shut" case and needed the hearing for the different opinions of the professional witnesses together with the Applicant's evidence and the assistance of his legal representative to be considered there is nothing in the conduct of the hearing or the terms of the DL to give rise to a finding that the decision can be categorised as irrational; and nothing either to indicate any procedural failure such as to trigger a decision that the case should be reconsidered. Accordingly this application must be refused.

Sir David Calvert-Smith
26 November 2024