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[2024] PBRA 99

Application for Reconsideration by Pimm

Application

1. This is an application by Pimm (the Applicant) for reconsideration of a decision of an oral hearing panel dated 3 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.

3. I have considered the application on the papers. These are the oral hearing decision, the dossier (consisting of 699 pages), the application for reconsideration (dated 12 April 2024) and a supplementary letter (dated 6 May 2024). The supplementary letter included a letter from the prison mental health team (dated 16 February 2024) and two letters from the prison psychological therapies service (dated 29 February 2024 and 30 April 2024).

Background

4. The Applicant received an extended sentence of 12 years (comprising a custodial term of eight years with four years on extended licence) on 20 July 2017 following conviction after trial for causing grievous bodily harm with intent and wounding with intent to cause grievous bodily harm. His conditional release date falls in February 2025 and his sentence expires in February 2029.

5. The Applicant was 48 years old at the time of sentencing and is now 54 years old.

Request for Reconsideration

6. The application for reconsideration has been submitted by the Applicant.

7. It argues that the decision not to release the Applicant was irrational, procedurally unfair and contained an error of law.

8. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in October 2021 to consider whether to direct his release. This is the Applicant's first parole review.

10. In April 2022, the Applicant had the telephone number of the victim of his index offence (**Ms A**) removed from his PIN list and correspondence to her was blocked. A letter from the Governing Governor dated 22 April 2022 states this was a breach of PSI 49/2011.

11. The Applicant was transferred to open conditions in August 2022.

12. However, it is reported within the dossier that the Applicant had made a payment to Ms A. It was also identified that he sent a letter to Ms A, dated 1 December 2022, which was a breach of a non-contact licence condition not to seek to approach or communicate with Ms A and family members without the prior approval of his supervising officer.

13. The Applicant signed a Release on Temporary Licence – Compact on 21 December 2022 which contained this licence condition.

14. After some delay, a three member panel of the Parole Board convened to hear the Applicant's case on 17 November 2023. The panel consisted of three members, including a psychologist specialist member. This hearing took evidence solely relating to the Applicant's return to closed conditions and the alleged inappropriate contact with Ms A. After hearing the evidence, the panel decided to adjourn for an updated psychological risk assessment (**PRA**). The hearing was to reconvene on 27 March 2024.

15. In a letter to the Parole Board dated 2 February 2024, the Applicant (amongst other things) indicated his intention to bring a claim for judicial review '*due to the inability of the Chairperson at my last Parole Hearing to read and understand the exemption under part (b) of paragraph 2.26 [of PSI 49/2011]'.* A further note from the Applicant to his Community Offender Manager (**COM**) dated 20 February 2024 states '*The Chairperson at my previous Parole Hearing didn't have the mental capacity to understand [PSI 49/2011] and she turned my Hearing into a clown show'.*

16. In light of the strength of the Applicant's feelings, and his threat of litigation in the High Court, the panel chair (while wholly rejecting his submissions) asked the Applicant, via his Prison Offender Manager (**POM**), if he wanted her to recuse herself from the hearing for fear of a perception of bias. He said he would, and a new panel chair was appointed.

17. The case proceeded to a reconvened oral hearing with a new chair on 5 March 2024. The panel included the same psychologist specialist member and independent member who sat on 17 November 2023. It heard oral evidence from the Applicant, together with his (**POM**), (**COM**), and a Senior Probation Officer (**SPO**) and an HMPPS psychologist.

18.

19. The Applicant was not legally represented throughout the hearing. The Respondent was not represented by an advocate.

20. The panel did not direct the Applicant's release.

The Relevant Law

21. 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 automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

22. 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)).

23. 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)).

24. 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

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.

Irrationality

28. 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."*

29. 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.

30. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: *Preston* [2019] PBRA 1 and others.

Error of law

31. 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.

32. 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.

The reply on behalf of the Respondent

33. The Respondent has submitted no representations in response to this application.

Discussion

Preliminary matters

34. Within the application form, the Applicant raises a number of issues which he argues are relevant to all three potential grounds for reconsideration. These are:

    a) The Parole Board's delay [in concluding his review]

b) The fact that the Applicant sued the Crown twice for non-progression
c) Pages/documents the Parole Board excluded from the Parole Board dossier
d) Ongoing judicial review proceedings
e) Full advance disclosure of all relevant documents
f) Conduct of Crown employees
g) Failure to follow Rules
h) Re-opening the original conviction
i) Medical evidence
j) Lack of support in the community, and
k) Non-recognition of good behaviour

35. The decision that is subject to reconsideration is the panel's decision not to release the Applicant. On this basis, and as a preliminary matter, I must automatically dismiss any arguments relating to delay, and any arguments based on the Applicant's legal proceedings against the Crown. Even if the Applicant's parole review had been unreasonably delayed (on which I need make no finding), this would have been immaterial in the decision-making process employed by the panel in reaching its conclusion. Similarly, matters between the Applicant and the Crown in relation to his progression would rightly have been irrelevant considerations for the panel in undertaking its independent assessment of the Applicant's risk. Therefore points (a) and (b) above are struck out in their entirely.

36. Points (c) – (k) above could potentially give rise to an arguable basis for reconsideration and therefore, in fairness to the Applicant (who does not have the benefit of legal representation), I will consider his further submissions on those matters to determine whether or not they are sustainable.

37. The application form is supplemented by a further 28 pages of written submissions.

38. The Applicant first notes an application for judicial review under reference ending 74. This appears to relate to what the Applicant refers to as a "*finding of fact hearing"* on 17 November 2023. The relevance of this to his application for reconsideration is not clear from his application. There is nothing in the panel's decision to indicate that it made any findings of fact.

39. The Applicant reiterates his grounds for reconsideration (as error of law, procedural unfairness, and irrationality) before setting out the material on which he intends to rely as follows:

a) Articles 1, 3, 5, 6, 7, 8, 13, 17, 18 and 53 of the European Convention on Human Rights (as incorporated into UK law by the Human Rights Act 1998)
b) Protocol 1, Article 1 of the European Convention on Human Rights (as incorporated into UK law by the Human Rights Act 1998)
c) Prison Service Instruction 19/2014 (Sentence Planning)
d) Prison Service Instruction 49/2011 (Prisoner Communication Services)
e) The decision of the Supreme Court in *R(Pearce and another) v Parole Board for England and Wales* [2023] UKSC 13; and
f) The findings of Baroness Nuala O'Loan in *The Report of the Daniel Morgan Independent Panel* (June 2021, HC 11).

Failure to provide a copy of the Parole Board Rules

40. The Applicant first complains that he was not provided with a hard copy of the Parole Board Rules. The Parole Board has no legal duty to provide a hard copy of the Rules so there can be no procedural unfairness or error of law on this point. Neither could this amount to irrationality on the panel's part since the matter complained of took place after the hearing.

Delay

41. The Applicant's next complaint is the length of time taken by the review. His case was referred to the Parole Board in October 2021 and the review was concluded in April 2024. While this review may have appeared to have been protracted, there is a clearly outlined set of reasons within the dossier as to stages in the review:

    a) Adjourned on the papers in February 2022, for missing reports
    b) Directed to oral hearing in March 2022
    c) Administrative cancellation due to insufficient time at the Applicant's establishment in December 2022
    d) Further directions on February 2023 relating to the Applicant's return to closed conditions
    e) Directions for a prioritised listing in July 2023
    f) Further directions in October 2023 for additional information relating to the Applicant's return to closed conditions
    g) Further directions in November 2023 for additional information relating to the Applicant's telephone records
    h) Adjourned oral hearing part heard in November 2023.

42. While the cumulative effect of these events has resulted in a protracted hearing, none of the delays have undermined the fairness or rationality of the decision not to direct the Applicant's release. Each interruption has been reasonable, explicable, and given with justifiable reasons. The Applicant argues that the overall delay deprived him of the opportunity to complete any interventions, particularly given his conditional release date in February 2025. While the Applicant may feel aggrieved, his argument that the "*Parole Board knew exactly what they [the Parole Board] were doing when kicking-the-can-down-the-road"* is unfounded and unsustainable. Neither does the protracted review period support any reasons in law why the panel's decision should be reconsidered.

Content of dossier

43. The Applicant next argues that the Parole Board has excluded the fact that he has sued the State twice to progress him though his sentence from the dossier. I note from directions of March 2022 that various representations from the Applicant were removed from the dossier on the basis that it was irrelevant to an assessment of whether his risk can be managed in the community. He was invited to make representations on the reinstatement of any such documentation. He cannot now argue that its removal was unlawful, unfair or undermined the rationality of the panel's decision.

44. The Applicant next argues the same point regarding exclusion from the dossier of what he says is evidence of good/positive behaviour, which I reject for the same reasons as set out above.

45. The Applicant next notes an application for judicial review (reference ending 18). It is not clear from his application how his application to the High Court is relevant to the decision not to release him. I understand from the High Court that case reference ending 18 is currently ongoing. Permission was initially refused but the Applicant applied for a renewal and permission, and it is listed for an oral hearing on 14 June 2024.

46. The Applicant next argues that the "*Parole Board chose to list a fraction of the courses/programmes [he has] completed in the Parole Dossier*". First, it is not the Parole Board that compiles the dossier; this is the responsibility of the Respondent, exercised via the Public Protection Casework Section (**PPCS**) under rule 16 (and the Schedule) of the Parole Board Rules. Second, as previously stated, if the Applicant felt disadvantaged by the exclusion of information from the dossier by virtue of the directions of March 2022, he was given the opportunity to object and rectify the matter.

Validity of psychology reports

47. The Applicant next argues that these is no evidence of his non-engagement apart from one instance pertaining to an addendum psychological report (dated February 2024). This report notes (at para. 2.1):

> *"[The Applicant] has not provided consent to be interviewed for this assessment and therefore it remains limited to a review of collateral information and does not contain his perspective. An International Personality Disorder Examination (**IPDE**) has not been undertaken given this relies on a structured interview… "*

48. A Stakeholder Response Form (**SHRF**) dated 1 February 2024 provides further background to this, stating:

> *"[The Applicant] has declined to consent to the IPDE assessment on the grounds that [HMPPS South Central Psychology Service has] been unable to locate his signed consent form for the [psychological risk assessment] completed…in July 2022."*

49. The February 2024 addendum report notes (at para. 2.3) that a review of case notes indicated that the Applicant provided verbal consent prior to the first meeting in May 2022, but the psychologist acknowledges that he may not have provided a signed form.

50. The Applicant reportedly took advice on "*the law surrounding acceptance*" and argued that acceptance cannot be implicit if it needs to be communicated via a prescribed method. This is simply wrong. While it may be (but is not automatically) true in relation to simple contract formation, it does not apply to the concept of obtaining informed consent to a psychological intervention or assessment. The August 2017 Practice Guidelines issued by the British Psychological Society deals

with the matter of obtaining informed consent in Chapter 6. There is nothing in here which requires consent to be provided in writing.

51. I note that the July 2022 report was based on three interviews and shorter telephone discussion. The Applicant read a draft and offered his feedback. He also provided a significant amount of documentary evidence to inform the report. He provided verbal consent prior to the first interview and returned for two more. Even if a signed consent form could not be located (or had never been produced), there is nothing that would indicate that the June 2022 report was legally invalid for lack of informed consent. It is disingenuous for the Applicant to argue otherwise.

52. The Applicant also argues that the addendum report is invalid, since it was founded on the invalid June 2022 report. As I have already found that the June 2022 report was valid, then so was the addendum. The Applicant is also reported to have read and commented on the addendum report.

53. The Applicant also states that the psychologist lied to the panel when giving evidence. It is for the panel to determine the veracity of the oral evidence it hears.

54. The Applicant argues that it was procedurally unfair to direct *"a negligent psychologist"* to produce an addendum report and given evidence. Even if there was no physical consent form from May 2022, this would not amount to negligence. If the psychologist's conduct fell below the standard of care expected of other professionals in her position, there is neither causation nor proximate damage and any claim in negligence would fail on that basis. In summary, there is nothing to undermine the reliability of any of the psychologist's written or oral evidence.

55. In his supplementary submissions of 6 May 2024, the Applicant raises further points relating to psychology. He attaches documents which he says support his assertion that he does not need any interventions.

56. The first document from the prison mental health team, dated 16 February 2024, simply stated that the Applicant has been *"added to a psychological therapy waiting list to decide on what specific service [he requires] to best meet [his needs]."* This document is irrelevant and adds no weight to his argument.

57. The next document is a letter from the prison Psychological Therapies Service, dated 29 February 2024. This confirms an appointment for an initial assessment to take place on 11 March 2024. Again, this document is irrelevant and adds no weight to the Applicant's argument.

58. The final document is another letter from the prison Psychological Therapies Service, dated 30 April 2024. First, this post-dates the oral hearing decision. Rule 28 does not empower me to re-open a provisional decision in the face of any new evidence. In any event, the letter appears to confirm that the Applicant did not meet the threshold for continued mental health support. This is fundamentally different to a programme needs assessment for risk reduction work and does not support the Applicant's assertion that it is evidence that no further interventions are necessary. As a general proposition, it is perfectly possible for a prisoner to be exhibiting stable mental health, but still needing to undertake accredited risk reduction work.

59. The Applicant repeats the submissions made in his substantive application as follows:

> "*[M]ultiple Registered Forensic Psychologists have all concluded that [he does] not need any interventions. The Parole Board's own Registered Forensic Psychiatrist also initially concluded that [he does] not need any intervention and [she] recommended him for release. However, [she] reversed her original recommendation and concluded [he needs] a one-to-one intervention before release, but only after [the Applicant] had reported [her] for failing to secure prior express written consent before conducting the original assessment".*

60. As an initial point, the psychologist is not, as the Applicant asserts "*the Parole Board's own"*. The Parole Board is an independent assessor of risk; the psychologist is a witness commissioned by HMPPS on behalf of the Respondent.

61. Although the Applicant may suspect otherwise, there is nothing in the addendum report that suggests any change in professional opinion was driven by retaliation in response to a complaint raised by the Applicant.

Sentence plan, Offender Assessment and licence conditions

62. The Applicant next argues that the "*Parole Board chose not to include reports produced in accordance with PSI 19/2014, yet chose to include reports not produced in accordance with PSI 19/2014".* PSI 19/2014 is concerned with sentence planning. The Applicant also raises concerns about aspects of the COM's evidence. This includes assertions that his COM had not produced a sentence plan or an Offender Assessment System (**OASys**) report. However, the dossier contains an OASys, dated 27 March 2024, under the COM's name, and containing a sentence plan. Although the OASys acknowledges (in section 9) addition there was no sentence planning board, it cannot be said that the COM has not produced an OASys containing a sentence plan. The dossier also contains a full list of proposed additional licence conditions, also dated 27 March 2024.

Content of dossier on the day of the hearing

63. The Applicant next argues that, at the parole hearing on 27 March 2024, his dossier comprised 527 pages whereas the panel had 585 pages. The Applicant states the panel chair asked him "*if he wanted to proceed in the full admission of a failure to comply with the mandatory duty of advance disclosure"* which left the Applicant with "*no choice but to agree to the Parole Hearing going ahead"*. He describes this as a "*gun-to-the-head decision"* since there was limited time left on the custodial part of his sentence and re-listing would involve further delay.

64. This issue is described in the 'Any other information' section of the decision as follows:

> *"[The Applicant] did not have a single document with the 585 pages in the dossier. However, he did have a previous version of the dossier and had been given all the updated reports, save for a revised OASys, which the panel also did not have, but which the COM indicated contained no new information other than*

some quotations from the [psychological risk assessment. [The Applicant] confirmed he was content to proceed on the basis of the documentation he had."

65. From this, I conclude that, at the start of the hearing, both the Applicant and the panel had the same documentation, albeit in different forms. This would have included the psychological risk assessment (whether paginated into the dossier or otherwise) and an earlier OASys (dated 21 September 2023). If the Applicant felt materially disadvantaged by this, he certainly did have a choice as to whether or not he proceeded with the hearing. I accept that the prolonged nature of his review and the pragmatic reality of listing times and conditional release dates may have influenced his decision to proceed, but that is not the same as saying he was compelled to proceed. In any event, given that the Applicant and the panel were starting from the same point, and the COM had little additional information (save repetition from the psychological risk assessment and amalgamation with the earlier OASys, both of which the Applicant had seen), I do not find procedural unfairness on this point.

Re-opening conviction

66. The Applicant next argues that the Parole Board sought to "*re-open his conviction"* noting that he has always maintained his innocence. The decision is based, as it must be, on the premise that the Applicant had been found guilty beyond reasonable doubt and therefore the account of the trial judge (who, of course, had the benefit of hearing all the evidence at first instance) is correct, regardless of the contrary views of the Applicant. The Applicant may maintain his innocence, but the panel must start from a position of guilt. The panel made this clear to the Applicant in the hearing (para. 2.9). He makes further reference to a judicial review application reference ending 75 which the context implies is related to his conviction rather than any aspect of the parole process. The Parole Board has no record of this application.

Misstatement of releases on temporary licence

67. The Applicant then thanks his POM for "*addressing her dishonesty in time for [his] Parole Hearing"*. However, he then argues that the panel "*relied on the opinion of [the POM], despite [the POM] being moved to address her dishonesty"*. He does not elaborate on this in the application. However, the decision notes that the POM had acknowledged putting incorrect information in the dossier about the Applicant's releases on temporary licence. The Applicant suggested the POM had *"lied"*. The POM said it was a genuine error. It is clear from the application that the Applicant still holds the view that the POM was wilfully dishonest. Be that as it may, it is for the panel to decide which interpretation it prefers, and there is no other evidence besides the Applicant's assertion to indicate dishonesty on the part of his POM. It was neither unfair nor irrational for the panel to conclude that the POM had simply made a mistake (which in any event had been rectified). That mistake did not undermine the POM's evidence, nor professional opinion, in any material way.

Supplementary points

68. The Applicant next argues that the panel failed to take four particular points into account (either fully or at all):

a) His desire to secure full time employment which would be hindered by the proposed licence conditions relating to designated accommodation
b) His adherence to a written undertaking not to contact the victim of the index offence
c) His need for a major operation which cannot be performed while he is in custody; and
d) His progression back to Category D status.

69. On these points:

a) The panel acknowledged this position (para. 2.17, 2.36). In any event, the needs of public protection will always outweigh the convenience of any prisoner's employment arrangements, even if any such employment is considered protective. Moreover, licence conditions are always subject to variation with the approval of the supervising officer.
b) The panel noted there was no evidence of any contact with the victim since the Applicant signed the undertaking (para. 2.2).
c) The need for surgery is documented throughout the dossier and acknowledged in the Applicant's closing submissions (para. 2.36). Again, the need for surgery that can only be done in the community is not, of itself, a reason to direct release, if, having weighed all the evidence, the panel concludes that risk cannot be managed.
d) The Applicant's categorisation within the prison estate is irrelevant if, having weighed all the evidence, the panel concludes that risk cannot be managed. To say otherwise would raise the presumption that all Category D prisoners should expect release at their next parole review; a presumption which patently ignores the Parole Board's duty to protect the public. Moreover, the categorisation of the Applicant was specifically excluded from the panel's remit by the Respondent.

70. Consequently, I find none of these four points give any arguable basis for reconsideration of the panel's decision.

Time extension

71. Finally, the Applicant notes the circumstances on which he sought an extension of the time limit for bringing a reconsideration application; these are irrelevant to its determination.

Conclusion

72. I fully understand that the Applicant is not legally represented and have, in fairness to him, carefully considered his application to determine whether or not there is any arguable basis on which the panel's decision not to release him should be reconsidered by virtue of an error of law, procedural unfairness and/or irrationality. There is not. As I have set out under each of the headings above, there is nothing in the application that persuades me otherwise. The panel's decision is correctly focussed on risk throughout and gives clear, explicable, and evidence-based reasons for its conclusion. It is clear that the Applicant is deeply unhappy with the decision, but I find no legal basis upon which it should be reconsidered.

Decision

73.For the reasons set out above, the application for reconsideration is refused.

Stefan Fafinski
17 May 2024