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[2022] PBRA 121

Application for Reconsideration by Ekezie

Application

1. This is an application by Ekezie (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 31 July 2022 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, and the application for reconsideration.

Background

4. The Applicant was sentenced on 6 December 2002 to life imprisonment following conviction after trial on four counts of rape. His tariff expired on 6 January 2012. The Applicant was 37 years old at the time of sentencing and is now 56 years old.

Request for Reconsideration

5. The application for reconsideration is dated 19 August 2022. It has been drafted by the Applicant (comprising two separate documents dated 7 August 2022 and 12 August 2022) and submitted by solicitors acting on his behalf.

6. It submits that the decision was irrational. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No submissions were made regarding procedural unfairness or error of law.

Current Parole Review

7. The Applicant's case was most recently referred to the Parole Board by the Secretary of State in January 2020 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 Secretary of State whether the Applicant should be transferred to open conditions.

8. The hearing had been adjourned on previous occasions for information from the Home Office regarding the Applicant's identity and immigration status.

9. The case proceeded to an oral hearing on 29 June 2022 before a three-member panel. The Applicant was legally represented throughout, as was the Secretary of State. The panel heard oral evidence from the Applicant's Community Offender Manager (**COM**), his Prison Offender Manager from a former establishment (**POM1**) and his Prison Offender Manager from his current establishment (**POM2**).

10. Having heard oral evidence, the panel adjourned for further submissions as a change to the rules concerning recommendations for open conditions issued by the Secretary of State was circulated while the hearing was taking place. The Applicant made further submissions. The Secretary of State declined to do so.

11. The panel did not direct the Applicant's release nor recommend a transfer to open conditions.

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

Parole Board Rules 2019

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)).

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. 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."*

17. 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.

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

The reply on behalf of the Secretary of State

19. The Secretary of State has submitted no representations in response to this application.

Discussion

20. The panel's decision was made under rule 25(1) and is therefore eligible for reconsideration under rule 28.

21. The Applicant first argues that the panel placed too much weight on the ongoing Home Office investigation into his identity, when no conclusion had been provided. While the panel in its conclusion found that, on the balance of probabilities, the Applicant was not who he claims to be (decision, para. 4.5), this was not the sole factor in the panel's decision not to release. It noted that, while the Applicant maintains his innocence (which is his right), there was no evidence to suggest that his risk had reduced other than having spent a considerable time in the high security prison estate. Professional witnesses all noted the need for a programme needs assessment to determine whether there were outstanding areas of risk and, if so, identify how they should be addressed, since all evidence of risk reduction was based on the Applicant's self-report. Even if the panel had been certain of the Applicant's identity, the fact would remain that he is an untreated sex offender with unknown areas of risk. The panel's approach to the Applicant's identity does not make its decision irrational.

22. The Applicant next argues that the panel did not effectively consider his risk factors. I disagree. The panel's decision was entirely focussed on his risk, both in terms of the risk assessment put forward by the Probation Service and the fact that there may be other, as yet unknown, risk factors in place. The panel's treatment of risk does not make its decision irrational.

23. The Applicant next argues that the Home Office has had undue influence on his parole review claiming that it "*threatened*" the Parole Board in its report of 21 January 2022. I have read the report carefully and it cannot be construed as threatening in any way. It does note that if parole was granted then the Home Office would seek to detain the Applicant under the Immigration Act 1971. This is a statement of the position of the Home Office which it is entitled to make. It does not seek to influence the Parole Board in its decision-making. The panel's agreement with the Home Office evidence does not make its decision irrational.

24. The Applicant finally argues that there has been an infringement of his rights under Article 3 of the European Convention on Human Rights. Article 3 provides that "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*"

This is an absolute (unqualified) right. The Applicant submits that the panel's decision constituted inhuman and degrading treatment and the Home Office subjected him to extreme torture during his 20 years in custody.

25. It is not within the scope of this application to consider any alleged infringements of Convention rights by the Home Office. My sole focus must be the rationality of the panel's decision.

26. I have carefully read the *Guide on the case-law of the European Convention on Human Rights – Prisoners' rights* (30 April 2022) issued by the European Court of Human Rights which contains multiple examples of treatment in prison which has been held to constitute a human rights violation.

27. While the Applicant may disagree with the panel's decision or be upset at the prospect of a further period in custody before his next review, I do not find that the decision of panel has infringed his Article 3 rights. The decision (or, more accurately, the consequence of the decision) does not amount to torture in any way within the meaning of Article 3. Therefore, the panel's decision cannot be irrational on this basis.

Decision

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

Stefan Fafinski
5 September 2022