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[2023] PBRA 154

Application for Reconsideration by Wright

Application

1. This is an application by Wright (the Applicant), for reconsideration of the decision of a Parole Board panel dated the 18 July 2023 not to direct his release.

2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair, and/or (c) that the decision contains an error of law.

3. I have considered the application on the papers. These are:

   (a) The dossier of 291 pages including the Decision Letter (DL) the subject of this application.
   (b) The grounds of appeal submitted on his behalf by his legal representative apparently dated 19 February 2021 but no doubt compiled sometime after the decision of 18 July 2023.
   (c) I have also listened to the recording of the hearing.

Background

4. The Applicant's index offence and the subsequent sentence and parole history are accurately set out in the DL. In summary:

   (a) He was sentenced to five years imprisonment with an extension period of four years on 2 February 2016 for sexual activity with a female child under 16 with penetration, and three counts of assault and battery against a second female. He was made the subject of a Sexual Harm Prevention Order under the Sexual Offences Act 2003 and a restraint order under the Prevention from Harassment Act 1997. In respect of one of those assaults he was sentenced to six months imprisonment consecutive. In addition, for an offence of harassment of the second female he was sentenced to four months imprisonment concurrent. His sentence expiry date is June 2025.

   (b) He was released on licence on 24 December 2019 and recalled to prison in September 2022.

Request for Reconsideration

5. The grounds for reconsideration are in summary that the decision not to direct release was both *'irrational'* and *'procedurally unfair'*.

   (a) It was based to a large extent at least on a number of incidents involving the Applicant and women with whom he had associated while on licence.

      i. None of those alleged incidents had resulted in criminal proceedings being brought against the Applicant.
      ii. The principles established most recently in the Supreme Court's judgment in the case of ***R(Pearce) v Parole Board [2023] UKSC 13*** concerning allegations of crime which have not led to a charge or conviction were not properly applied by the panel when it concluded, partly or principally, on the basis of those incidents, that the risk posed by the applicant to the public was such as to demand that he remain in custody. It appears that the panel gave no, or no proper, thought to those principles when it came to its decision.

   (b) The decision failed to set out properly, or at all, why it decided not to accept the unanimous recommendations of the witnesses at the hearing who recommended the Applicant's release.

   (c) *"Despite requesting for, [the psychotherapist], to attend as a witness eight weeks before the hearing, this request was denied. Understandably, [the Applicant] did not wish to delay his parole, and therefore instructing solicitors provided updated reports by [the psychotherapist] to assist the panel. [The psychotherapist] has been working with [the Applicant] since 2016 and has continually provided psychotherapy during this time. However, this work has not been referred to in the decision letter, and how it may have an impact upon risk reduction. This was not only procedurally unfair but also irrational, not to allow the witness, or at the very least have considered the work that has been undertaken during the entirety of the sentence as provided in reports. Despite this evidence being available to the panel, it was not thoroughly considered."* The passage in italics is taken verbatim from the submitted grounds.

   (d) The panel did not (properly) consider the evidence within the dossier and did not consider the essential core risk reduction work that has been undertaken by the Applicant.

Current parole review

6. The Applicant's licence was revoked on 19 September 2022 and his case was then referred to the Parole Board by the Secretary of State for Justice (the Respondent). The oral hearing took place on 17 July 2023 before a single-member panel.

The Relevant Law

7. The panel correctly set out in its Decision Letter (DL) dated 18 July 2023 the test for release.

Parole Board Rules 2019 (as amended)

8. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is 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)). This is thus an eligible decision.

Irrationality

9. 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."*

10. 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.

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

Procedural unfairness

12. 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 focuses on the actual decision.

13. 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.

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

Other

15. 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.*"

16. In addition the applicant has referred to the case of ***R(Pearce) v Parole Board [2023] UKSC 13***, an important judgment which revisited the issue raised by this hearing as by so many others, namely the way in which the Board should approach the issue of events, which, if they took place, may well have amounted to criminal offence(s) by the prisoner, but, either did not result in criminal proceedings or, if they did, resulted in acquittals. After a comprehensive summary of the way in which appellate courts have dealt with the issue of unproved allegations over the years Lord Hughes and Lord Hodge handed down a judgment with which the other three members of the Court agreed. The primary conclusion of the Court was that the current guidance given to Parole Board members on the way in which panels should consider such matters was lawful, although some amendments to it should be made.

The reply on behalf of the Secretary of State (the Respondent)

17. Surprisingly, and disappointingly, no reply has been received from the Respondent.

Discussion

18. So far as the ground summarised at paragraph 5 (a) above concerning the way in which the DL dealt with the allegations which had been made I have reviewed in detail the Supreme Court Judgment handed down by Lords Hughes and Hodge in the case of ***Pearce*** *(above),* and in particular the remarks at paragraph 83 concerning cases like the present where there are multiple similar allegations none of which have led to criminal prosecution or conviction and to the Court's summary of the current state of the law at paragraph 87 of the Judgment.

19. In this case three separate allegations had been reported to the police by three different women within a limited period of time (February 2021 to June 2022) between his release on licence and his recall to prison. There is nothing in the papers before me to suggest that there was any allegation, or even the possibility, of collusion between the complainants. However none of them, as is so often the case, wanted to pursue the matter and thus no further action was taken by the police.

20. This is just the sort of situation envisaged by the Supreme Court at paragraph 87. In the DL the panel deals with the incidents at paragraph 2 from the first to the eighth sub-paragraph and in due course explains clearly why it had come to the conclusion that the incidents taken together represented an escalation of the risk still posed by the Applicant to women.

21. In addition, I have listened to the recording of the hearing during which those allegations were discussed in detail in particular when the Applicant was giving evidence to the panel. The questions concerning the allegations were all relevant and

clearly stated to be relevant to the question of the risk posed by the Applicant of serious harm to members of the public if released.

22. I also reject the suggestion that the Decision Letter fails to explain why the panel chose not to follow the recommendations of the professional witnesses. At paragraph 4 the panel sets out in detail why it felt unable to do so.

23. I have had more difficulty considering the ground concerning the psychotherapist, and the question of whether his most recent report, which was in the dossier at pages 126-131, was properly considered in conjunction with, and in addition to, the reports of the Prison and Community Offender Managers, both of whom recommended release.

24. The Applicant had first come into contact with the psychotherapist in 2016. At that time the psychotherapist, as well as being a *'trained and practising'* psychotherapist, was the chaplain in a prison. Following his retirement in 2020 he agreed to continue to assist the Applicant. His contact with the Applicant has continued following his release, on a "*pro bono*" but "*tapering*" basis. His interest in the case and in the rehabilitation of the Applicant is clear from the fact that although a request for him to attend the hearing as a witness was refused because of the lack of time available for him to do so within the limits of the hearing, he was allowed to, and did, attend the hearing as an observer. His contact with the Applicant was thus the longest continuous contact between the Applicant and a professional in the seven years preceding the hearing.

25. The previous panel decision of 2019 directing release had also had the benefit of a report from the psychotherapist, although on that occasion too he had not given evidence in person. This report too was in the dossier for this hearing. The 2019 DL, itself within the current dossier, referred to it extensively at paragraphs 5 and 6-8. It is clear that the work done by and with the psychotherapist was then considered to be an important factor together with the evidence of the Prison and Community Offender Managers and the psychologist. It is therefore of course the case that that work had not been sufficient to prevent the difficulties which led to the Applicant's recall.

26. The psychotherapist produced a report on his continuing contact with the Applicant in January 2023 and an addendum report in June 2023, following the refusal of the Panel Chair to allow him to give oral evidence, a few weeks before the hearing. Both were added to the dossier.

27. The hearing (excluding short comfort breaks) lasted some 3 hours and 30 minutes. I have listened to the recording. I found the following references to him or his evidence during the hearing.

    a. The Applicant referred to his work with him three times during his evidence to the panel.
    b. His representative did so once during her short closing address to the panel.
    c. The Decision Letter contains a single reference to him at paragraph 3 of the DL (now p287 of the dossier). This paragraph summarises the proposed risk management plan appended to the latest COM report and continues - *"Psychotherapy would continue with [the psychotherapist] in the community."*

28. It however expresses no view on the possible value or importance of the report(s) or of the psychotherapist's past (since 2016) or proposed future work with the Applicant. It is fair to say that although a requirement for continued counselling with the psychotherapist was not thought by the Community Offender Manager to be an appropriate licence condition – no doubt because it could only be provided "*pro bono*" following the psychotherapist's retirement - it was clearly a significant factor in the evidence considered by the COM when she made the recommendation for release which was supported by the POM and the psychologist.

29. I have therefore come to the conclusion that the way the DL dealt with the psychotherapist's evidence within the DL did amount to a procedural irregularity in that the panel expressed no view one way or the other on the value of the work already done or on the possible value of further work following a direction for release with the psychotherapist, even if that was because such work had been and would continue to be voluntary and "*pro bono".* The question is therefore whether that irregularity is of such seriousness as to compel an order that the case be reconsidered by a fresh panel. In addition, the absence of any analysis within the decision as to the importance or otherwise of the psychotherapist's continuing work with the Applicant imports an element of irrationality into the decision. The Applicant and his representative clearly believed that the psychotherapist's input had been and would continue to be valuable in guiding the Applicant and thus assist in reducing the risk that he presents to the public, and the DL, in effectively ignoring it, failed to state why in the Panel's view, that input would not be sufficient to reduce that risk sufficiently to result in a direction for his release.

30. So far as the general assertion that the panel did not consider all the evidence in the dossier, I reject that ground (save to the extent I have set out in the preceding paragraph). It is clear from the recording of the hearing that the panel had thoroughly mastered the contents of the dossier and had carefully prepared its questions for the witnesses, including the Applicant, who gave evidence.

Decision

31. I have not found this decision easy. In the end I have concluded that, although it would have been preferable for the DL to summarise the psychotherapist's evidence within the dossier and to explain why in the panel's view the previous and proposed future psychotherapeutic work was not sufficient to tip the balance in favour of a direction for release, and that those failures import a degree both of procedural irregularity and irrationality, they were not of such a degree as to require an order for reconsideration. The cases cited above make it clear that not every procedural or rational error must inevitably result in a successful appeal. This case ultimately turned on the proper interpretation of the events which had led to the recall and the ability of licence conditions – which, as was effectively conceded at the hearing, could not practicably include a condition concerning the psychotherapist's input – to reduce the risk posed by the Applicant of causing serious harm.

32. Accordingly, I refuse this application.

Sir David Calvert-Smith
31 August 2023