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[2024] PBRA 120

Application for Reconsideration by Hall-Chung

Application

1. This is an application by Hall-Chung (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated the 17 May 2024 not to direct his release and not to recommend his transfer to open conditions following an oral hearing on 24 April 2024.

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 application for reconsideration, the decision and the dossier.

Request for Reconsideration

4. The application for reconsideration is dated 4 June 2024.

5. The grounds for seeking a reconsideration are as follows:

   (i) The hearing was procedurally unfair in that the panel has in its decision letter identified additional risk factors without asking the Applicant about them.

   (ii) The panel made a significant error of fact in their assessment that the Applicant had not been extensively tested in the community while in the open estate.

Background

6. On 27 July 2006 the Applicant was sentenced to imprisonment for public protection (IPP) for offences of robbery, causing grievous bodily harm (x3), and possession of a firearm with intent to cause fear of violence. The minimum period to serve before the Applicant was eligible for parole was 10 years less time spent on remand. Although the Applicant has been transferred to open conditions on two occasions he has never been released and is 8 and a half years over tariff which expired on 15 October 2015.

Current parole review

7. The case was referred to the Parole Board on 27 July 2022. The Applicant was 41 at the time of the hearing.

8. The hearing was on 24 April 2024. There were 3 panel members including a Psychologist. Evidence was given by the Applicant, a Prison Psychologist, the Prison Offender Manager (POM), and the Community Offender Manager (COM). The Applicant was represented and written submissions were made after the hearing had ended.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 24 April 2024 the test for release and the issues to be addressed in making a recommendation to the Secretary of State (Respondent) for a progressive move to open conditions.

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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

11. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28.

Irrationality

12. 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.

13. 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."*

14. In R(on the application of Wells) -v- Parole Board 2019 EWHC 2710 (Admin) set out what Saini J 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).

15. 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.

16. 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.

17. 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

18. 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.

19. 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.

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

21. 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), 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.]

22. 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.

23. 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.

24. The Secretary of State (Respondent) has made no submissions in response to this application.

Discussion

25. The Applicant is many years over tariff. Despite that the panel had to apply the same test for release as if the Applicant's tariff had only just expired. While there are dicta from the High Court to the effect that the Board must ever more anxiously consider whether it is necessary to keep the prisoner confined the longer over tariff the prisoner is, any panel will always anxiously consider the need to keep a prisoner confined when considering any parole application. Until Parliament or the Courts change the test for those over tariff, the Board will have to apply the same test for all prisoners. It is of course necessary for any panel to consider how far bad behaviour in prison is caused by frustration at the situation IPP prisoners are in and their sense of injustice rather than being an indication that it is not safe to release the prisoner.

26. While I am sympathetic to the Applicant's situation serving a sentence which has now been publicly acknowledged by the Government to be unfair, I have to apply the tests for reconsideration in accordance with the correct legal criteria.

27. When the evidence in this case is looked at as a whole, in my judgment, it would have been a surprising decision if the panel had released the Applicant into the

community. All of the professionals including the psychologist were not recommending release but a further period in open conditions. There have clearly been difficulties during the Applicant's latest time in closed conditions which are capable of supporting the opinions that it would not be safe to release the Applicant. It follows that on the evidence the only decision which may be capable of meeting the test for reconsideration is the decision not to recommend open conditions which cannot be made the subject of a reconsideration application. Having said that I will review the grounds for reconsideration.

28. **Adding risk factors without asking questions about them of the Applicant.** It is perfectly permissible for the panel to include additional risk factors when they come to consider the evidence. Some of them may have developed since the last parole hearing and in any event they are hearing the evidence afresh. While it is important that the risk factors are supported on the evidence and that the panel make proper investigations before including a new risk factor it is not necessary that they should ask the Applicant specifically about them.

29. Having considered the risk factors added most of them do clearly arise on the evidence given at the hearing or in the dossier. For example (ii) and (iv) clearly arise on the evidence and while the Applicant's mother has agree to provide accommodation, risk factor (i) clearly arises but it is one which will no doubt be satisfied on the evidence. As to (ii), at 2.8 the panel records that the Applicant himself identified associates as being one of his risk factors.

30. While complaint is made of (iv) in my judgement there was sufficient evidence to justify this risk factor. At 2.7 the panel deal with the issue relating to the psychologist; set out the Applicant's explanation and their conclusions arising out of this incident. Further questions could have been asked by the advocate if further elucidation was required.

31. In my judgment there was sufficient material on the documents and at the hearing to justify these risk factors and I do not consider that it renders the hearing unfair if they were not all specifically discussed with the Applicant during evidence.

32. Any panel which has to consider any fresh parole application will consider the risk factors afresh on the evidence that it hears.

33. **Mistake of fact in relation to the suggestion that the Applicant was not extensively tested in the community while in open conditions.** I accept that the panel appear to have misstated the number of ROTLs that the Applicant completed while in open prison. The issue is whether that mistake was material in that it affected the decision not to release. As I have already indicated I consider that on the evidence that the panel heard it would have been a surprising decision if the panel had directed release. In my judgment even with this mistake of fact the decision of the panel would have been the same. It played no material part in the outcome.

Decision

34. For the reasons I have given, I do not consider that the decision was procedurally unfair or materially affected by a mistake of fact and accordingly the application for reconsideration is refused.

John Saunders
25 June 2024