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[2024] PBRA 218

Application for Reconsideration by Noble

Application

1. This is an application by Noble (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 1 October 2024. The decision was not to direct 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 the dossier, the oral hearing panel decision, the application for reconsideration by the Applicant, and the response by the Secretary of State (the Respondent).

Request for Reconsideration

4. The application for reconsideration is dated 15 October 2024.

5. The grounds for seeking a reconsideration are set out below.

Background

6. The index offence was murder. The Applicant was sentenced to life imprisonment in 2003. The Applicant's tariff expired in 2014. The Applicant was released on licence initially by the Parole Board in 2019, he was recalled to prison in 2021.

7. The facts of the index offence were that the victim and the Applicant were in a relationship. The Applicant stabbed the victim while she was visiting his home. Multiple wounds were inflicted. The Applicant contacted the police after the murder and admitted to having killed his partner. The Applicant was unable to explain why he killed his partner and has consistently maintained that he has no memory of the incident.

Current parole review

8. The Applicant was aged 67 at the time of the review. He was 46 when sentenced. This was the second review by the Parole Board since the Applicant had been recalled.

9. The panel hearing took place in September of 2024. The panel consisted of an independent chair, a further independent member and a psychiatrist member of the Board. Evidence was received from a Community Offender Manager (COM), a Prison Offender Manager (POM) and a prison instructed psychologist. The Applicant gave evidence. The Applicant was legally represented.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 1 October 2024 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

11. 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)).

12. 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)).

13. 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

14. 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.

15. 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."*

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

17. 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.

18. 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.

19. 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

20. 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.

21. 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.

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

Error of law

23. 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.

24. 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.

Other

25. 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.

26. 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.*"

Reconsideration as a discretionary remedy

27. 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 Respondent

28. The Respondent offered no representations.

Grounds and Discussion

Ground 1

29. The Applicant's legal adviser submits that the panel failed to adequately explain why they did not follow the recommendations of the professionals in this case and direct release. The Applicant's legal advisers concede that the panel were not obliged to follow professional recommendations, however they were obliged to explain their reasons for not following them and those reasons should be sufficient to justify the conclusions.

Discussion

30. The Applicant in this case, is serving a sentence of life imprisonment for the offence of murder. The victim was a partner. The offence occurred in 2002. The Applicant's partner was stabbed when she was visiting his home. The trial judge described the offence as a brutal attack. There were multiple stab wounds. Following the murder, the Applicant, reportedly bathed the victim's body, and then placed two knives symmetrically into two of the wounds. The Applicant then wrote to the police to tell them what he had done and was lying beside the victim when the police effected the arrest. The police later attended the Applicant's home and notes were found which had been written some months before the offence. The notes were ambiguous but may have been evidence of an earlier intention to kill his partner.

31. The Applicant himself has consistently maintained the position that he has no memory of the index offence, and was unable to offer any explanation as to why he killed the victim or why he inserted the knives into her body in the manner described.

32. When appearing before the current 2024 panel of the Parole Board, the Applicant confirmed, once again, that he had no memory of the offence and that there had been no prior argument or disagreement between himself and his partner.

33. The panel noted that the analysis of risk in this case had always been difficult because of the Applicant's inability to recall the incident or to give any explanation for his actions. The hypothesis from professionals relied upon collateral information, primarily the fact that both the Applicant and his deceased partner had appeared to have suffered bereavements at the relevant time, which could have caused emotional stress and may have resulted in a deterioration in the Applicant's mental health. As a result, the best professional assessment of the background to the murder was that it was likely that it came about as a result of an extreme emotional reaction in the context of a buildup of stress.

34. The Applicant completed his tariff period in custody and was later, in 2019, released by a Parole Board panel on licence. Prior to this initial release from custody, a Parole Board panel had noted and accepted that "*the motivation for the offence has never been fully explored.*"

35. In a substantial psychological assessment, undertaken in 2017, a prison instructed psychologist suggested that the Applicant had a fragile sense of self and suffered from low self worth and low confidence and was ashamed of the offence. It was posited therefore that his lack of memory was possibly a "*self-protective*" factor.

The psychologist also conceded, that unless the Applicant became more open to discuss the factors which drove the offence, the possibility that there was a sexual element associated with the offending could not be ruled out. However, despite these reservations, the professional view, at the time. was that the Applicant could safely move to an open prison and spend time in the community on prison licence.

36. A Parole Board panel in 2017, recommended the Applicant be transferred to an open prison. He transferred in 2018.

37. In a Parole Board decision in 2019 it was noted that the Applicant had continued to demonstrate positive behaviour in prison. The Applicant had continued to be engaged in his interest in art and had been nominated for various awards. He had also supported other prisoners, both in the open prison and during his time in the closed prison estate. He was therefore considered an exemplary prisoner. The 2019 panel also acknowledged that the motivation for his offending had never been fully explored, but concluded that the hypotheses by the reporting psychologists, who made an assessment of the Applicant's personality profile, was sufficient to allow for a credible assessment, of the Applicant's risk, to be made.

38. The 2019 panel, taking account of available evidence at the time, took the view that the Applicant's risk could be safely managed in the community and he was released.

39. The Applicant was recalled to prison in 2021 as a result of concerns about his behaviour on licence. The current 2024 panel were therefore considering his release following this recall.

40. In its decision letter the current 2024 panel noted that the Applicant had been recalled as a result of two issues arising. Firstly, he had been detected, by analysis of his mobile phone, as making use of female escorts. He had accepted that he had made use of escort services and explained that he was seeking "*intimacy*". He had explained that he was using the services of escorts to seek physical closeness, having been in custody for so many years. He had commissioned escorts rather than used sex workers as he felt that escorts were attending of their own free will. He had not been open and honest with his probation officer about these meetings.

41. The second issue which arose was the finding, on a device, of images. The images were described as violent and included a woman being stabbed to the chest, and beheaded and murdered in the context of sexual violence. The Applicant explained to the panel that these images were being viewed for research purposes as he was involved in the art world.

42. The panel were concerned firstly that the Applicant had failed to disclose, in detail, to his probation officer the meetings with escorts and secondly, the panel did not think that the explanation by the Applicant relating to the brutal images were credible.

43. The Applicant's COM, POM and a prison instructed psychologist all gave evidence at the panel hearing. All were recommending that the Applicant be released once again. It was clear from the evidence and written reports that the professionals had placed substantial reliance for their recommendations (that the Applicant's risk could be safely managed in the community) upon the fact that the Applicant had

again demonstrated continuing positive behaviour in prison and upon the fact that he had committed no further criminal offences while in the community.

44. The panel took a differing view. The panel noted that the Applicant had not been open and honest with his probation officer in the community. The absence of openness was particularly concerning because it related to a failure to disclose the meetings with female escorts and the potential of developing relationships with women. In the light of the index offence, the Applicant's relationships with women were clearly a fundamental aspect of the Applicants licence conditions and of his safe management in the community. The panel were understandably concerned about future compliance in this area.

45. The panel also indicated that it did not accept the reasons put forward by the Applicant for his possession of the concerning images. The panel took the view that the images pointed towards a range of necessary discussions with the Applicant about his attitudes and beliefs. The panel took the view that the inferences to be drawn from the possession of the images (namely an interest in images of violence against women) necessitated further exploration.

46. The reality was, in this case, that there had never been a clear understanding of the motivating factors behind the index offence. The panel clearly took the view that the Applicant's decision to make contact with female escorts, coupled with the discovery of extremely worrying images, were sufficient to cause a substantial level of concern regarding risk.

47. At paragraph 4.5 of the panel's decision. The panel set out five paragraphs explaining in detail the reason for their decision not to recommend release. Briefly the five matters were: a continuing absence of understanding of the triggers and motivations leading to the index offence; a concern relating to openness and honesty in the community; the significance of the images discovered on the Applicant's mobile phone; that work in these areas was core risk reduction work and should be completed in custody; and finally that the panel were not satisfied that the Applicant had developed insight sufficient to manage his risk internally. The schedule of reasons, in my view, clearly set out the basis upon which the panel disagreed with the views of the professional witnesses.

48. Those scheduled reasons were also, in my determination, sufficient to justify the panel's conclusions. I am therefore satisfied that the test set out in the case of **R(on the application of Wells) -v- Parole Board 2019 EWHC 2710 (Admin)** has been met in this case. Accordingly, I do not find that the decision, so far as it relates to this ground, amounts to irrationality in the sense set out above.

Ground 1 (a)

49. The Applicant's legal adviser, argues that it was irrational for the panel to suggest that further risk reduction work was required to be undertaken by the Applicant without being clear as to the nature of the work suggested, additionally that the suggestion was contrary to the views of the professionals who were satisfied that no further core risk reduction work was indicated.

Discussion

50. The responsibility for planning and undertaking behavioural work in prison is one for the prisoner, liaising with his legal advisers and those supporting him in the prison. The Parole Board are specifically dissuaded (in the Respondent's reference) from recommending or prescribing any particular form of behavioural work to be undertaken by prisoners. Panels of the Parole Board will often indicate that they suggest that there is a need for further work in any particular case, however, it is for the prisoner himself, and the prison to address the nature of any work to be undertaken. In this case, the panel made it clear that the major concern was that there was an absence of understanding of the triggers and motivations which led to the index offence, and possibly led to the behaviour which brought about the recall. The clear indication from the panel therefore was that the Applicant and those who support and supervise him in the prison should consider addressing this fundamental absence of understanding and knowledge of the Applicant's risk.

Ground 2

51. The panel failed to indicate why the robust risk management plan which had been suggested by the professionals was not sufficient to manage the Applicant's risk.

Discussion

52. In this case, the panel fully accepted that there was a robust risk management plan. The plan was similar to that which was in effect when the Applicant was initially released on licence. The panel's major concern, as set out in the decision was that the external controls contained within the risk management plan were not sufficient to address the concerns about internal factors. Those factors were clearly set out in the decision, namely, an understanding of the triggers and motivations which led to the index offence.

53. The second concern was in relation to compliance and behaviour in the community. Despite the Applicant's exemplary behaviour in prison, the discovery of images of an extremely worrying nature on the Applicant's device and the discovery that the Applicant had been regularly commissioning the services of escorts were clearly matters of great concern in relation to managing risk.

54. The reality was that the panel indicated that the risk management plan alone was insufficient to manage risk. An important factor in managing risk was the Applicants own openness, honesty and insight.

Decision

55. For the reasons I have given, I do not consider that this decision was irrational and accordingly the application for reconsideration is refused.

HH Stephen Dawson
11 November 2024