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[2024] PBRA 224

Application for Reconsideration by Amoura

Application

1. This is an application by Amoura (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 17 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 application for reconsideration drafted by the Applicant's legal adviser and the oral hearing panel decision.

Request for Reconsideration

4. The application for reconsideration is dated 28 October 2024.

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

Background

6. The Applicant pleaded guilty in the Crown Court to offences of robbery, rape, and sexual assault by penetration, he was sentenced (following an appeal) to an indeterminate sentence of detention for public protection (DPP). The minimum DPP term was set at 3 years, less 889 days spent in custody on remand, his tariff expired in 2013. He was 17 years old at the time of committing the offences.

7. The Applicant, with others, approached a 25 year old woman in the street. She was threatened with a knife and her bag taken. She ran away but was chased by the Applicant, who brought her to the ground and attacked her by stabbing her to the body and head on multiple occasions. The Applicant then committed the offence of rape upon the victim. The victim was seriously psychologically and physically affected by the incident.

Current parole review

8. The Applicant was aged 31 at the time of the Oral hearing. The panel members included an independent chair, a psychologist member of the Board and a judicial member of the Board. The panel considered a dossier consisting of 1164 pages. The panel received evidence from a prison offender manager (POM) a community offender manager (COM) and a prison instructed psychologist. Members of the Applicant's family and prison staff observed the hearing. A victim statement was read. It was noted that the Applicant was subject to a deportation order and his appeal rights had been exhausted. The Home Office were pursuing deportation and awaiting documents from an embassy. The professional witnesses were not recommending release.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 17 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)

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. 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)).

12. 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

13. 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 22**3 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.

14. 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."

15. In **R(on the application of Wells) -v- Parole Board 2019 EWHC 2710 (Admin)** 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).**

16. 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.

17. 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.

18. 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

19. 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.

20. 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.

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

Error of law

22. 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.

23. 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.

Reconsideration is a discretionary remedy

24. 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 (the Respondent)

25. The Respondent made no representations.

Discussion

Ground

26. The Applicant's legal adviser submits a single ground, namely that the parole board decision letter failed to reflect the totality of the evidence because there was a failure to explicitly record in writing, within the decision letter, that the written closing submissions by the legal adviser had been considered. It is therefore submitted that the parole board decision not to direct release was procedurally unfair. The Applicant's solicitor quotes the parole Board decision making framework. The Applicant's legal adviser concludes with the following comment. "*In conclusion, it is submitted that given that the Parole Board Decision Letter fails to reflect that all evidence was considered, namely that the Written Closing Submissions were considered,"*

Discussion

Closing submissions as evidence.

27. As indicated above, the Applicant's solicitor appears to be submitting that closing submissions should be treated as evidence and should be considered by the panel as such. Closing submissions made in panel hearings, and indeed in court

proceedings generally are an analysis by, the advocate (or the prisoner), of the evidence presented at the hearing. The closing remarks are invariably accompanied by representations and submissions upon that evidence and, importantly, arguments in support of the contention being advanced by the advocate (in parole hearings likely to be arguments supporting a direction for release or for an open prison recommendation). Closing submissions should not and do not amount, in law, to evidence. This matter has been recently acknowledged in **Jarvis v Metro Taxis 2024] EWHC 1452 (KB)** the case related to a point concerning civil appeal rules, however the decision of the appeal judge, which was unchallenged, was as follows *"On 17 July 2023, Mr Jarvis's appeal came before His Honour Judge Craig Sephton KC. The judge allowed the appeal on the basis that, while the district judge had noted at the start of the hearing that Mr Simpson was not giving evidence but would make submissions, he subsequently treated Mr Simpson's submissions as evidence.".* The decision determined that treating submissions as evidence was wrong in law.

General

28. Whilst closing submissions may not be evidence, that is not to say they do not form a significant part of a hearing. They must be considered by a panel as part of the totality of information taken into account in reaching its decision. In my determination the crucial factor to consider is whether the panel did fairly take account of the issues raised in the submissions.

29. I am not persuaded, however, that there exists a procedural requirement upon a panel to specifically cite the submissions or repeat the submission points individually within a decision.

30. The Applicant's solicitor raised the following points in the written submissions made to the panel:

- That the Applicant was an enhanced prisoner
- That he had gained prison employment.
- It was submitted that he had greater insight into his behaviour.
- That the Applicant had a positive relationship with his family and partner.
- That no further core risk reduction work was suggested
- That he had been exposed to trauma as a child.
- That he was now more open and willing to discuss the index offence
- That he had a sense of hopelessness that there had been a period of 11 months since he was convicted of assaulting another prisoner.
- That he had committed himself to his Christian faith.
- That it was not essential for him to move to a specialist prison wing to address psychological issues.
- That it was highly likely that he would not be deported

31. The panel's decision addressed these matters as follows:

- At paragraph 1.5 of the decision. The panel acknowledged that the Applicant felt hopeless and could not see a way forward in terms of his sentence.
- At paragraph 2.5 of the decision, the panel acknowledged that the Applicant had a shared Christian faith, which played an important role in his life.

- In the concluding remarks at paragraph 4.1. The panel noted that the Applicant had made considerable progress in recent times in terms of insight despite his poor record in the past; the panel also accepted that he had been open and well reasoned in giving his evidence; that he had been engaging with staff; however in the panel's view, there was further risk reduction work to undertake, particularly in relation to sexual offending; that there was a suggested progression pathway in relation to managing risk in the future; that he had support from a partner and other members of his family; that the Applicant's position relating to deportation was complex and unresolved

32. It is clear that all the points raised by the advocate in the closing remarks were addressed within the decision by the panel. The panel also noted in the decision letter itself that the written closing submissions had been received by the panel three days before the decision was published. Whilst the panel did not specifically repeat any reference to the closing remarks within the decision itself, I am satisfied on balance, that the closing remarks were read and considered by the panel because the panel addressed all the issues that had been raised and noted the receipt of the closing remarks in the document itself.

33. In **Oyston [2000] PLR 45, at paragraph 47 Lord Bingham** said in addressing the issue of decision letters: *"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*."

34. I fully accept that as a matter of courtesy and reassurance panel chair's often specifically reference the closing remarks by legal advisers and may address one or all of those remarks and make comments upon them. Whilst this may be a useful approach, I am, as indicated above, not persuaded that an absence of this approach could lead to a finding that the decision was procedurally irregular or unfair.

35. The reasons why the panel reached their conclusion are comprehensively argued within the decision and are supported by the evidence received in that decision. I therefore do not order reconsideration in this case.

Decision

36. For the reasons set out above, I do not consider that the decision was irrational and/or procedurally unfair and accordingly the application for reconsideration is refused.

HH S Dawson
14 November 2024