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[2024] PBRA 91

Application for Reconsideration by Burnside

Application

1. This is an application by Burnside (the Applicant) for reconsideration of a decision of an oral hearing panel dated 25 March 2024 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 (consisting of 382 pages), and the application for reconsideration (dated 12 April 2024).

Background

4. The Applicant received an extended sentence of seven years (comprising a custodial term of four years with three years on extended licence) on 24 November 2017 following conviction for arranging/facilitating the commission of a child sex offence to which he pleaded guilty. His sentence expires in August 2024.

5. The Applicant was 46 years old at the time of sentencing and is now 52 years old.

6. He was released on licence on 7 April 2021 following an oral hearing, His licence was revoked on 3 March 2022, and he was returned to custody on 8 March 2022.

7. He was further convicted on 16 March 2022 for breach of sexual harm prevention order and received a further two month custodial sentence.

Request for Reconsideration

8. The application for reconsideration has been submitted by solicitors acting for the Applicant.

9. It argues that the decision not to release the Applicant was irrational and/or procedurally unfair.

10. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

11. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether to direct his release. This is the Applicant's first recall on this sentence and his second parole review since recall.

12. On 17 August 2023, a provisional decision not to direct the Applicant's release was made on the papers. An application was made on his behalf requesting an oral hearing in line with the principles set out in *Osborn v Parole Board; Booth v Parole Board; In re Reilly* [2013] UKSC 61.

13. This was granted and the case proceeded to an oral hearing on 5 March 2024. The panel consisted of three members, including a psychologist specialist member. It heard oral evidence from the Applicant, together with his Prison Offender Manager (**POM**), Community Offender Manager (**COM**) and an HMPPS psychologist. The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate.

14. The panel did not direct the Applicant's release.

The Relevant Law

15. 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

16. 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)).

17. 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)).

18. 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**.**

Procedural unfairness

19. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore,

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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; and/or
    (e) the panel was not impartial.

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

Irrationality

22. 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."

23. 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.

24. 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 Respondent

25. The Respondent has submitted no representations in response to this application.

Discussion

Irrationality

26. It is first submitted that the panels' decision was irrational since:

    a) It is impossible to accept that the panel could prefer the evidence of the COM (who had limited knowledge of the Applicant) over that of the HMPPS psychologist (who was an '*expert witness*').

b) The panel failed to take the psychologist's evidence into account in assessing that the Applicant had limited insight into his own risk factors (since he was better able to articulate his insight in the less stressful setting of the interview with the psychologist than in a parole hearing).

c) The panel did not discharge its common law duty to give reasons as set out in *R(Wells) v Parole Board* [2019] EWHC 2710 (Admin)**.**

d) The Applicant did not present an imminent risk and the panel should have considered how public protection is better served in the long term by having a period of time being supervised in the community.

27.As is acknowledged in the application, panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in *DSD*, they have the expertise to do it. However, following *Wells*, a panel should clearly explain its reasons for departing from recommendations and its stated reasons should be sufficient to justify its conclusions. Put another way, I must consider whether there is an unexplained evidential gap or leap in reasoning which fails to justify the panel's conclusion.

28.As a preliminary matter, putting the extent to which the COM and the psychologist knew the Applicant to one side, it is unfair to suggest that the psychologist's evidence should be preferred (as an '*expert*') over that of the COM. Both the COM and the psychologist are professional witnesses, and their areas of expertise are different.

29.Moreover (and again putting relative knowledge of the Applicant aside), it is entirely possible to accept that the panel preferred the evidence of the COM over that of the psychologist *provided that* the decision gives clear, cogent, and evidence-based reasons for doing so.

30.On point (a), it is also submitted that there is a contradiction in the decision since:

a) Para. 2.20 states "*The COM told the panel that she did not believe that [the Applicant] had met the Parole Board test for release…but when questioned by the legal representative, said she wasn't in a position to give a firm recommendation*"; but

b) Para. 4.6 states "*…the COM… did not recommend release".*

31.Para 2.20 leads me to an understanding that the COM initially did not recommend release, but, on reflection, acknowledged this was not a firm recommendation either way. While para 4.6 is more emphatic, it is not inaccurate. There is nothing in para 2.20 which says that the COM did recommend release. While she was unsure about not recommending release and would not offer a firm opinion, this does not mean that she was, in fact, recommending release. Although I accept that para. 4.6 might

not reflect the totality or context of the COM's view, it does not, in itself, establish irrationality on the part of the panel.

32. The panel rightly acknowledges that the psychologist's professional opinion in favour of release was not without caution. This caution is evident from her report which notes "*Whilst I would like to test [the Applicant's] ability to manage his risk and engage with licence conditions in less secure conditions, this is not going to be possible [due to the proximity of his sentence end date]. I therefore cautiously support [his] release into the community as I believe he has now completed [an accredited intervention] and developed more appropriate strategies to manage his risk".*

33. In essence this is saying that the psychologist would prefer further testing in the less secure conditions of the open prison estate, but the impossibility of this happening through lack of means the Applicant should move directly to the community. This is a very guarded view which, in my view, overlooks the public protection test. The psychologist would prefer further testing in less secure conditions. It is not unreasonable for the panel to conclude that the impracticability of that does not trump the statutory test.

34. In relation to insight, I note the psychology report which notes that the Applicant "*demonstrates good insight into his offending and strategies he can use to manage unhealthy sexual interests"*. While the Applicant may have been better able to articulate this insight outside the setting of a parole hearing, that does not mean that the panel should discount any view it may legitimately form having heard his evidence.

35. In any event, the Applicant's insight (or lack thereof) is not the sole reason given by the panel for not directing his release.

36. Finally, while I note that there was no assessment of imminence, the psychologist also noted that "*risk would quickly escalate if [the Applicant] were to experience offence related thoughts / fantasies that he were unable to manage".* While the panel must consider risk over an indefinite period (following *R(SSJ) v Parole Board* [2022] EWHC 1292 (Admin) and *R(Dich) v Parole Board* [2023] EWHC 945 (Admin))**,** if it concludes that a prisoner does not meet the test for release at the time of the hearing, then that is the end of the matter. It may well be true that the Applicant's risks would not have been imminent at the point of release, but the panel considered that too much weight had been placed by witnesses on his ability to manage and seek support. This is a conclusion that the panel was fairly entitled to make.

37. Consequently, there is no irrationality, and the first ground for reconsideration fails.

Procedural unfairness

38. It is also submitted that the panel's decision was procedurally unfair since the panel should have adjourned once it was ascertained that the POM and COM had limited knowledge of the Applicant.

39. The Applicant was legally represented throughout and if it was felt that the Applicant was being disadvantaged at the time by the quality of answers from either witness,

or that they were simply agreeing with propositions put to them by the panel, then an objection should have been raised at the time. It is not sustainable to argue that proceedings were retrospectively unfair by virtue of the quality of oral answers given by witnesses. If the panel felt the oral evidence before it was inadequate, it could have adjourned. It was not required to, neither was it invited to do so.

Decision

40. For the reasons I have given, I find the decision not to release the Applicant was neither irrational nor procedurally unfair and accordingly the application for reconsideration is refused.

Stefan Fafinski
09 May 2024