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[2024] PBRA 127

Application for Reconsideration by McEnteggart

Application

1. This is an application by McEnteggart (the Applicant) for reconsideration of a decision of an oral hearing dated 25 May 2024 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 Decision Letter
   - The Application for Reconsideration
   - The Dossier, which currently contains 298 numbered pages, ending with the Decision Letter

Request for Reconsideration

4. The application for reconsideration is dated 17 June 2024.

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

   (1) Irrationality

   The panel has made an evidential leap by concluding that the Applicant is not suitable for release on the basis that he remains an untreated sex offender.

   (a) The panel, while acknowledging the principle that an accredited programme is not necessarily a pre-condition to release, did not apply it.
   (b) The Applicant has had treatment in the form of one-to-one work with his former Prison Offender Manager (POM).
   (c) The panel gave insufficient consideration to the progress the Applicant has made.
   (d) There is no evidence that the risk factors identified have not been reduced.

(2) Procedural unfairness

The panel has given insufficient reasons for its decision.

(a) The panel did not identify specifically the gaps it stated there to be in the Applicant's insight.
(b) The panel asserts that there is outstanding core risk reduction work relating to the Applicant's sexual violence, whereas sexual violence is not a risk factor, but rather the potential result of risk factors.
(c) The panel's finding that any deterioration and emergence of live risk factors would not necessarily be noticed and addressed under the risk management plan is not justified.
(d) The panel did not explain its conclusion that the risk of contact sexual offending should be assessed as High, rather than, as the OASys assessment stated, Medium.

Background

6. The Applicant is now 25 years old. In November 2017, when he had just turned 19, he received an extended determinate sentence of 15 years, made up of a custodial period of 10 years and 5 years extended licence. His Parole Eligibility Date was 28 October 2023. His Conditional Release Date is in February 2027. His sentence expires in February 2032.

7. In February 2014 he arranged to meet and then raped a 13 year old girl. In July 2014 he touched the same girl's vagina without her consent. In May 2014 he raped a 12 year old girl. The jury convicted him of those offences. He pleaded guilty to sexual intercourse with a 14 year old girl with her consent when he was 15, to offences of exchanging intimate images with that girl, and to inciting another girl to send him an image, which he shared with at least one other male. After being arrested and interviewed for these offences, in 2016, when he was 17, he raped another 15 year old girl while she was asleep. He pleaded guilty to this offence after the jury had been empanelled and her best evidence interview played to the jury.

Current parole review

8. This was the first review of the Applicant's case. The Secretary of State (the Respondent) asked the Parole Board to consider release, and that was the outcome sought by the Applicant. The panel consisted of a judicial member of the Parole Board as chair and a psychologist Parole Board member. The panel heard evidence from the Prison Offender Manager (POM), a psychologist based at the prison and the Community Offender Manager (COM). The Applicant gave evidence. He was legally represented. The Respondent was not represented, and made no submissions to the panel.

9. The hearing took place on 8 May 2024. The panel considered information relevant to the effect of the offending on the victims.

The Relevant Law

10. The panel correctly sets out in its decision letter the test for release.

Parole Board Rules 2019 (as amended)

11. Rule 28(1) of the Parole Board Rules provides the types of decision and sentence which are eligible for reconsideration. This is an eligible decision and sentence.

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) the judge (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) (the case of *Johnson*).

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. 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.*"

The reply on behalf of the Secretary of State

22. The Respondent has indicated that he does not wish to make any response to this Application.

Discussion

23. The Applicant complains that the panel made an evidential leap in concluding that he did not pass the test for release. This is presumably a reference to the words of Saini J. cited above. What the panel in fact did was to decide that the work he had done, one-to-one work with his former POM, was not of sufficient breadth and intensity to address his treatment needs. That was a conclusion open to the panel on the evidence: the current POM described this as "*a good start*". The current POM went on to say that the Applicant had started to address the factors leading to the index offences. It follows that the panel was entitled to take the view that there is more work that needs to be done on reducing the Applicant's risk. The POM said as much: "*lifestyle and peer influences required further work*"'.

24. The question the panel had to answer was whether it was satisfied that it was no longer necessary for the Applicant to remain in custody for the protection of the public. An evidence-based finding that there is more work to be done points towards the answer to that question being no, although, of course, the panel must consider all the evidence. If risk-reduction work can be done in the community, the panel is obliged to consider whether the Applicant could safely be released before such work was done: this panel did so.

25. The panel did consider the progress the Applicant had made, and set it out in plain terms in the Decision Letter. The complaint that it gave insufficient consideration to that progress amounts to a disagreement with the panel's conclusions, rather than an argument against their rationality: see under Irrationality above.

26. The assertion that there is no evidence that the risk factors have not reduced puts the matter backwards (I avoid using any terms such as the burden of proof). The panel, in order to direct release, had to be satisfied that the risk had reduced sufficiently for the Applicant to be safely released. On the evidence, it was entitled not to be so satisfied.

27. The issue under the heading Procedural Unfairness is that the panel did not adequately explain its reasons. The panel cited a psychologist's report dated June 2023 in which the psychologist (who gave evidence to the panel) commented that the Applicant continues to objectify women. His lifestyle at the time of the index offending centred around sex with girls, he would tell them anything in order to seduce them, and had learned this from the older people in his peer group. He told the panel he was in competition with 5 or 6 of his friends to see who could achieve the most sexual conquests. He admitted that there were several other girls in respect of whom he was not charged.

28. In the light of that evidence the panel was entitled to conclude, as it did, that the Applicant's primary risk was the potential that he may engage in future sexual violence towards females in the community, with either contact or non-contact offences. The index offences include both contact and non-contact offences.

29. The panel's finding that, despite the Applicant's exemplary conduct in custody, the restricted conditions of the prison environment cannot replicate conditions in the community, and his behaviour is therefore of only limited assistance when assessing risk on release, is reasonable, evidence-based and adequately explained.

30. The COM's evidence was that in her view the OASys assessment of the risk of further sexual contact offences as Medium should be replaced with High. The OASys assessment is an actuarial one, based on specified factors such as the record of convictions, and may not take account of the matters set out in paragraph 27 above. The COM was entitled to come to the conclusion she did, as was the panel, and the panel explained its reasoning adequately.

31. The suggestion that sexual violence is not a risk factor, but rather the potential result of risk factors, seems to be a purely semantic argument. The Applicant committed a number of offences involving sexual violence. A potential to commit acts of sexual violence is manifestly a risk factor which needs to be addressed.

32. The panel was fully aware of the circumstances of the index offences, and was entitled to draw the conclusion from them that the Risk Management Plan proposed might not pick up signs that the Applicant's risk was increasing.

33. Overall, I cannot find the grounds advanced for reconsideration to be made out.

Decision

34. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

Patrick Thomas KC
15 July 2024