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[2024] PBRA 208

Application for Reconsideration by Hurley

Application

1. This is an application by Hurley (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 20 September 2024. The decision of the panel 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 (356 pages), the application for reconsideration drafted by the Applicant's legal advisers and the Secretary of State's (the Respondent) response.

Request for Reconsideration

4. The application for reconsideration is dated 29 September 2024.

5. The grounds for seeking a reconsideration are as set out below. The application was in a narrative form, I have identified the grounds and set them out below.

Background

6. The Applicant was aged 23, at the time of sentence. The Applicant was convicted after trial of the offence of murder. The victim was the Applicant's former partner. The Applicant and his former partner had been separated for some months. There have been allegations of harassment and stalking associated with the Applicant. The evidence convicting the Applicant was circumstantial. The Applicant has maintained a denial of responsibility for the offence. The matter was appealed, and appeals have been rejected. The Applicant was 53 years old at the time of the oral hearing.

7. The Applicant had initially been released on licence in 2014. He was recalled in 2018, following an altercation with a partner. He was released again in September 2018. He was recalled a second time in April 2021. The recall related to a failure to disclose a relationship with a female. The Applicant's position was that his association with the female was friendship rather than a relationship. A panel, however, were satisfied that the recall was based upon information about a

significant relationship and, therefore, that the recall was appropriate. In December 2022 a Parole Board panel considered the Applicant's position and declined to direct release. The panel concluded that on the basis of the evidence received at that time the Applicant had asserted that he would not comply with licence conditions relating to exclusion zones.

Current Parole review

8. The referral to the Parole Board, by the Respondent, requested that the Parole Board consider directing the release of the Applicant and if not released any recommendation relating to open conditions. As indicated above, this was the second review since the Applicant had been recalled in 2018.

9. The Parole Board panel consisted of three members. An independent chair, an independent co-panellist and a judicial co-panellist. Evidence was received at the hearing from a prison instructed psychologist, the prison offender manager, and the community offender manager. The Applicant was represented by counsel.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 20 September 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. 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

26. 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

27. The Respondent made no representations.

Grounds and Discussion

Ground 1

28. The Counsel for the Applicant argues that it was irrational for the panel to conclude that it was not safe to release the Applicant before the completion of core risk reduction work. It is argued firstly that two earlier panels had released the Applicant

(without the work being undertaken or completed) and secondly that the professionals view at the most recent hearing was that the core risk reduction work could (and should) be completed in the community.

Discussion

29. 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 effect 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 if they failed to do just that. As was observed by the divisional court in **DSD**. They have the expertise to do it.

30. However, if the panel make a decision, contrary to the opinions and recommendations of professional witnesses, or indeed of an earlier panel. It is important that it should explain clearly its reasons for doing so **per R (Wells) v Parole Board 2019 EWHC 2010**

31. So far as decisions of earlier panels are concerned, I do not support the contention that a subsequent panel is bound by any earlier panel's decision as to release (or not to release). The evidence to a Parole Board panel is unique to any particular hearing and will inevitably be reviewed and reconsidered at each hearing. The fact that on an earlier occasion a Parole Board panel took the view that the Applicant's risk could be managed in the community could not possibly bind all panels in the future, neither could a decision by an earlier panel that the risk could not be managed, be binding. The facts of recalls themselves and the circumstances surrounding recalls, as well as further information, which may emerge over time, will mean that the evidential basis of making a decision also changes. It is also the case that psychologists and other professionals can take different views about risk and their views will obviously and appropriately, be considered.

32. In this case, the Applicant himself seems to have accepted (through his legal advisers) that there was core risk reduction work which had to be completed in order to ensure that the Applicant's risk could be managed in the community. That core risk reduction work included work in relation to trauma. It also involved some form of work which would address the fundamental risk in this case, which was the risk posed to those in a partnership with the Applicant (in the light of the index offence and concerns about relations with women arising subsequently).

33. Although the term "*core risk reduction work"* is not scientifically defined. The term itself, as applied in Parole Board cases, refers to behavioural work which is essential to complete to reduce and manage risk, and which therefore must be completed before the prisoner can be finally risk assessed and a decision made as to whether that prisoner meets the test for release. The behavioural work proposed by the professionals, which was referred to as core risk reduction work, was considered to be "*essential*" and had to be completed in relation to managing the Applicants risk. The panel, as noted in its decision letter, was well aware of this position and was also aware that professionals took the view that the Applicant could be released and the core work completed at some future date. This panel took the view that the risk reduction work had to be completed before a realistic assessment of the Applicant's

risk in the community could be finalised. As none of that work had been undertaken or completed the panel, not surprisingly, came to the conclusion that, on the basis of the evidence presented to them at the current hearing, the Applicants risk could not be managed in the community. By its very nature the test for release cannot be met if a prisoner is considered to be a person who requires further core risk reduction input and has not completed that input. The panel, if they had directed release in those circumstances, would in essence be postulating that the Applicant's risk could be safely managed in the community at some future date, subject to the completion of risk management interventions. The test does not allow for a contingent release, based upon completing risk reduction work in the community. The test clearly requires that the panel be satisfied that the protection of the public is the foremost consideration at the point of release.

34. It is further argued in this case that accessing some of the appropriate work in the prison system would be difficult if not impossible. Whilst this is a concern for the Applicant and his legal advisers, the Parole Board panel were not obliged to release the prisoner because an appropriate intervention could not be easily accessed within the prison system. That would again be an inappropriate and unlawful decision based on the test for release. The panel were also specifically directed within the Respondent's referral letter (as is the case in all referrals) not to make any recommendations about "*specific treatment needs or offending behaviour work required*".

35. An added consideration in this case was that the panel doubted the commitment of the Applicant to undertaking core risk reduction work in the community. The panel also doubted that the appropriate work could be accessed or undertaken in the community. Despite the confidence of professionals (who took the undertakings by the Applicant at face value). The panel had legitimate grounds for concern about the Applicant's commitment to undertaking behavioural work in the community. The Applicant himself had made it clear that he was not prepared to move prisons in order to undertake any work, and the general view of the panel was that the Applicant was only prepared to undertake work if he (rather than those assessing his risk) had concluded that the work was useful and appropriate. The Applicant was perfectly entitled to adopt a position concerning risk reduction work, however, the panel's views relating to commitment were based upon evidence within the dossier itself. The panel had noted that the Applicant had a poor regard for professionals generally, a factor which would have made a commitment to core risk reduction work in the community extremely challenging.

36. Where a panel arrives at a conclusion exercising its judgment based on the evidence before it, and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision. In this case I do not accept that there is evidence of it being manifestly obvious that there are compelling reasons for interfering with this decision. The decision was fully explained within the decision letter itself and is based, in short, upon the fact that the panel took the view that a substantial and important amount of risk reduction work remained unaddressed. Once undertaken a panel would then be in a better position to make a final judgement as to whether the Applicant's risk could safely be managed in the community.

Ground 2

37. The Applicant's legal adviser, argues that it was irrational for the panel not to accept the Applicants submissions as to proportionality and necessity in relation to the imposition of exclusions within licence conditions.

Discussion

38. A decision to impose or not to impose licence conditions is not an eligible basis for a reconsideration application. However, the overall decision to release or not to release may be properly subject to an application for reconsideration in circumstances where the decision to release or not to release was entirely or substantially based upon the issue of licence conditions. This is clearly not applicable in this case. The panel made various comments in the decision letter as to why they took the view that the proposed revised exclusion zone may be proportionate. However, it is clear that the submissions relating to licence conditions had no impact upon the panel's final decision not to direct release. Any arguments relating to proportionality in relation to licence conditions would be entirely open to be considered by a fresh panel at some future date, but do not impact upon the overall decision of this panel.

Decision

39. 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.

HH Stephen Dawson
18 October 2024