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[2022] PBRA 112

Application for Reconsideration by Morrison

Application

1. This is an application by Morrison (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 3 August 2022 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, and the application for reconsideration.

Background

4. The Applicant was sentenced on 20 November 2009 to life imprisonment following conviction after trial on two counts of rape of a female child under 13. At the same time, he was also sentenced to imprisonment for 12 months following conviction on two counts of engaging in sexual activity in the presence of a child under 13. His tariff expired on 20 November 2018. The Applicant was 48 years old at the time of sentencing and is now 61 years old.

Request for Reconsideration

5. The application for reconsideration is dated 13 August 2022. It has been drafted by the Applicant and submitted by solicitors acting on his behalf. His solicitors have added some further submissions.

6. It submits that the decision was irrational. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No submissions were made regarding procedural unfairness or error of law.

Current Parole Review

7. The Applicant's case was most recently referred to the Parole Board by the Secretary of State in February 2021 to consider whether or not it would be appropriate to direct his release. If the Board did not consider it appropriate to direct release it was invited to advise the Secretary of State whether the Applicant should be transferred to open conditions.

8. The case proceeded to an oral hearing on 11 July 2022 before a two-member panel. The Applicant was legally represented throughout. The panel heard oral evidence from the Applicant's Community Offender Manager (COM), his Prison Offender Manager (POM) and a HMPPS psychologist.

9. Having heard oral evidence, the panel adjourned for information concerning three adjudications from 2018. This was provided.

10. The POM and COM recommended release. The psychologist recommended a transfer to open conditions. The panel did not direct the Applicant's release but recommended a transfer to open conditions.

The Relevant Law

11. 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 (as amended)

12. 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)).

13. 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)).

14. 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

15. 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."*

16. 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.

17. 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 Secretary of State

18. The Secretary of State has submitted no representations in response to this application.

Discussion

19. The panel's decision was made under rule 25(1) and is therefore eligible for reconsideration under rule 28.

20. The Applicant first argues that the panel did not give him full credit for the rehabilitation work he has undertaken since 2008.

21. The panel's decision notes the offending behaviour work that the Applicant has undertaken throughout his sentence (decision, paras. 2.3 – 2.4). It refers to the POM's view of this work (decision, paras. 2.9 – 2.10) the psychologist's view of the work (decision, para. 2.13). It gives its view of the offending behaviour work (decision, para 4.2) as follows:

> *"While serving his sentence, [the Applicant] has completed some in-depth therapy, and other risk reduction work. However, he has not addressed his sexual offending directly because he maintains his innocence. Since his last review, he completed [another intervention] to address general sexual offending, with good reports…"*

22. It cannot therefore be said that the panel did not consider the offending behaviour work as part of the evidence before it. However, the panel concluded that, notwithstanding this, the Applicant needed to be tested further in open conditions prior to possible future release. It is a matter for the panel to decide how much weight to give to evidence, provided that its conclusion is rational based on the evidence before it.

23. The HMPPS psychologist, who was well aware of the offending behaviour work completed by the Applicant, nonetheless recommended open conditions rather than release.

24. It is true, as the Applicant argues, that the POM and COM were supportive of release. However, where there is a difference of opinion, it is a matter for the panel to decide which of the professional witnesses to follow. To say otherwise would undermine the panel's role as an independent assessor of risk.

25. As an aside, the Applicant's solicitor contends that all professional witnesses considered that the Applicant's risks could be managed in the community. The HMPPS psychologist did not.

26. The Applicant contends that, for health reasons, a move to open condition would "*do nothing"* for him, as a range of medical conditions would make it hard for him to work or complete releases on temporary licence (ROTL) and that "*being in the community will offer [him] a great deal more than being stuck in a Cat D prison*". (His solicitor essentially argues the same point).

27. However, in **R (Secretary of State for Justice) v Parole Board [2022] EWHC 1281 (Admin)(Johnson)** the High Court held (at para. 19):

> *"The statutory test to be applied by the Board does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The goal of the test is simple. It is to protect the public.*

28. Although **Johnson** concerned an extended determinate sentence and the Applicant is serving a life sentence, the main principles from **Johnson** insofar as they relate to the statutory test for release may be applied to the Applicant's case as the wording of the test for release is the same, even though they are derived from different statutes: extended determinate sentences under section 246A(6)(b) of the Criminal Justice Act 2003 (as amended) and life sentences under section 28(6)(a) of the Crime (Sentences) Act 1997.

29. The reasons put forward by the Applicant and his solicitor are entirely focussed on benefit to the Applicant. The decision also records views of both POM and COM to the effect that open conditions would be difficult for the Applicant. These are not reasons upon which the panel could lawfully favour release.

30. Finally, the Applicant's solicitor also notes that the Applicant's risks are not considered to be imminent.

31. Regarding imminence of risk, **Johnson** states (at para. 31):

> *If an offender poses no risk, the protection of the public will not require his confinement. That does not mean the Board is to ignore anything other than immediate or imminent risk…*

32. In other words, the Board must consider risks over the long term as well as the risks that may arise immediately or imminently on a prisoner's release. This requires the Board to consider whether risks might arise in the longer term as well as in the shorter term. For life sentenced prisoners (like the Applicant) the Board must always consider risk over an indefinite period.

33. The legal test of irrationality is such that the decision must be so illogical that no sensible person (i.e. no other panel) could arrive at it. I find that this test is not met. The panel's logic is clear and the fact that the Applicant disagrees with the panel's independent analysis of the evidence does not mean that it becomes irrational as a matter of law.

Decision

34. For the reasons I have given, I do not find the decision was irrational and accordingly the application for reconsideration is refused.

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