[2022] PBRA 169

the Parole Board
working with others to protect the public

Application for Reconsideration by Ddin

Application

1. This is an application by Ddin (the Applicant) for reconsideration of a decision of an oral hearing dated 24 October 2022 not to direct release.

2. Rule 28(1) of the *Parole Board Rules* 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the 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 Decision Letter dated 24 October 2022
    - Representations on behalf of the Applicant dated 6 November 2022
    - The dossier, which now runs to 411 numbered pages, ending with the Decision Letter

Background

4. The Applicant is now 33 years old. In 2011, when he was 22, he received an extended sentence of imprisonment of 12 years, consisting of an 8 year custodial term and an extended licence period of 4 years, for two counts of wounding with intent to cause grievous bodily harm, and counts of affray and criminal damage. These index offences arose out of an affray in a public house, the jury deciding that he glassed two people. The Applicant said he hit one or both of the victims in retaliation, but did not use a glass or bottle, and was therefore not responsible for their injuries and not guilty of the s18 offences.

5. The sentence expiry date is 23 May 2023. The Applicant has been released and recalled three times since his automatic release in May 2015. Most recently he was released by direction of the Parole Board (on the papers) on 9 December 2020 and recalled on 4 January 2021.

6. The Applicant had previous convictions for public order offences, and also for criminal damage and motoring matters.

Request for Reconsideration

7. The application for reconsideration is dated 6 November 2022.

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

   (1) Irrationality on the ground that the panel failed properly to consider the appropriateness of recall.
   (2) Procedural impropriety on the grounds that the release test was not properly applied: the panel failed properly to apply the test for release, and failed properly to apply the presumption in favour of release.

Current parole review

9. The Secretary of State (the Respondent) referred the Applicant's case to the Parole Board for consideration of release.

10. On 13 October 2022 an oral hearing panel of the Board, consisting of two independent members and one psychiatrist member of the Board, heard evidence. The witnesses were the previous Prison Offender Manager (POM), the current POM, a psychologist instructed on behalf of the Applicant, and the Community Offender Manager (COM). The Applicant also gave evidence. He was represented throughout by a solicitor. The panel, the POM and the psychologist were in the hearing room at the prison with the Applicant, the representative and the COM attended remotely, by video link.

11. A witness whose attendance had been directed did not attend. No point is taken about this in this Application. The panel declined to admit evidence of a decision letter in relation to another prisoner. Again, there is no complaint about this.

The Relevant Law

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

13. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

    "The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the

risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."

Parole Board Rules 2019 (as amended)

14. Under Rule 28(1) of the *Parole Board Rules* 2019 the only types of decisions which are eligible for reconsideration are those concerning whether the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is 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)).

15. 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)).

Irrationality

16. 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."*

17. 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.

18. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

19. In **R (Wells) v Parole Board [2019] EWHC 2710 (Admin)** Saini J. articulated a modern approach to the issue of irrationality: *"A more nuanced approach in modern*

public law is 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 respect 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. … [T]his approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury *… but it is preferable in my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion."*

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

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

The reply on behalf of the Secretary of State

22. The Secretary of State for Justice has stated that he does not wish to make any representations about this Application for Reconsideration.

Discussion

23. The panel was obliged to consider whether the decision to recall was appropriate: **R (Calder) v Secretary of State for Justice [2015] EWCA Civ 1050**. However, the correctness or otherwise of the decision to recall does not necessarily impact on the entirely separate decision the panel had to take, making its own decision on all the evidence: whether it was no longer necessary for the protection of the public that the prisoner should be confined.

24. The arguments raised are that the evidence showed no increase in the Applicant's risk of serious harm as a result of the recall events, and that there was an alleged failure adequately to consider alternatives to recall in circumstances where his hostel bed had been withdrawn due to his conduct. The COM, who was not involved at the time, thought the recall was appropriate, due to the Applicant's non-compliance, cannabis use and aggressive behaviours. There was an evidential basis for the panel's conclusion that the recall decision was appropriate, and it cannot be said to be irrational in the sense discussed above. Even if the conclusion on recall could, contrary to my view, be described as irrational, it formed at most a part, and a small part, of the decision not to direct release, which had to be based on the panel's assessment of risk in the community, not the correctness or otherwise of the decision to recall.

25. The Application asserts, as Ground (2), that the panel did not apply the test for release properly. This is particularised, and I will deal with the particulars.

26. First, the complaint is that the panel's finding that the Applicant had little insight into his offending behaviour is incorrect. The panel based its finding (at Paragraph 2.18 of the Decision Letter) on the high degree of denial, minimisation and externalisation of blame both in terms of his previous offending, recall and time since his recall. His POM concluded that he lacked insight into his risk as he only identified negative associations as one of his risk factors. The panel discussed all of this in detail. It was a finding based on the evidence to which the panel was justified in coming. The fact that the Applicant disagrees with this conclusion does not make it, or a decision not to release based on it, irrational.

27. Next, the Applicant argues that, although the panel identified outstanding treatment need, the witnesses took the view that this could be undertaken in the community, and that the panel was wrong to assess his risk as imminent. These two matters obviously run together: if the risk is imminent, work needs to be done before release, not after. Otherwise the public is at risk until the work is completed.

28. The panel considered that the Applicant remains a High risk both to public and known adults. It accepted that there was no evidence of the violence that led to the index offences recurring, but considered that his denial of the index offences, the lack of formal work to address his risk and his tendency to blame external factors for his own risk-related behaviours meant that his risk is not fully understood and therefore difficult to predict. There are many unknown factors which make it difficult to identify any potential warning signs in the community. The panel therefore concluded that there would be imminence to his risk were the Applicant to be in the community.

29. This was an evidence-based conclusion, that the Applicant could not safely be released into the community with a view to undertaking further treatment. It cannot be stigmatised as irrational.

30. The next complaint is that the panel did not have sufficient information about possible accommodation, and should have adjourned for further information. The panel described the situation as complicated. The Applicant regarded designated accommodation as not the right place for him. The COM regarded such accommodation as the last resort, but said nowhere else was available. The panel considered the suitability of a relative's house as an alternative, but there were risks to that, which the panel discussed.

31. It does not appear from the dossier, which includes written submissions advanced after the hearing dealing with the issue of accommodation, or the Application, that any request for an adjournment was made on the Applicant's behalf.

32. The complaint that the panel should have adjourned is, in the circumstances, misconceived.

33. The final complaint is that the panel failed properly to apply what is described as "the presumption in favour of release." There is no such presumption.

34. I take this to be a reference to the case of **R (Sim) v Parole Board [2003] EWCA Civ 1845**. It is true that in his judgment in that case (with which the other members of the Court agreed) Keene LJ used the word presumption, saying that the presumption of an extended sentence being passed "*is that during the extension period the offender need not be in custody*." However, the Court went on to explain what that means in the context of a Parole Board decision following recall during such a sentence. At Paragraph 44: "*If after hearing all the evidence the Board remains genuinely unsure whether the prisoner needs to be detained or not, … the prisoner in that situation would be at liberty*." At Paragraph 51:"*The Board has to be positively satisfied that continued detention is necessary in the public interest if it is to avoid concluding that it is no longer necessary.*" In other words, it is only if the Board is unsure that any so-called "presumption" may come into play.

35. In this case the panel was not unsure. The panel concluded positively that it remains necessary for the protection of the public that the Applicant remains confined, and said so in terms: see Paragraph 41.13 of the Decision Letter.

36. This complaint too is misconceived.

Decision

37. 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
23 November 2022