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[2023] PBRA 122

Application for Reconsideration by Mullaney–Bond

Application

1. This is an application by Mullaney-Bond (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 1 June 2023. 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, and/or (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 dossier consisting of 1100 pages; the application for reconsideration submitted by the Applicant's legal representative; the decision letter dated 1 June 2023 and the response submitted by the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent).

Background

4. On the 7 April 2004 the Applicant was sentenced in relation to the following offences; buggery of a male child (2 offences); gross indecency with a child (2 offences); indecent assault of a child (4 offences) and making and possessing indecent images of children (5 offences of each). The Applicant was aged 34 when convicted. The Applicant was sentenced to a determinate sentence comprised of 15 years imprisonment followed by a licence extension period of 8 years.

5. The Applicant was noted to have an extensive history of criminal offending and a substantial number of offences prior to committing the index offences, although no earlier sexual offences were recorded.

Request for Reconsideration

6. The application for reconsideration is undated but was received by the Parole Board on 16 June 2023.

7. The grounds for seeking a reconsideration are set out below.

Current parole review

8. This was an annual review by the Parole Board of the Applicant's position. The Applicant had been released and recalled on three previous occasions since his initial release.

Oral Hearing

9. The review was conducted by an independent Chair of the Parole Board, a psychology member of the Parole Board and an independent third member of the Parole Board (who was a psychologist). Oral evidence was given by the Prison Offender Manager (POM), and a Community Offender Manager (COM). The Applicant was represented by a solicitor.

10. A dossier consisting of 1076 pages was considered.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 1 June 2023 the test for release.

Parole Board Rules 2019 (as amended)

12. Pursuant to Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that 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)), 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. 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. 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."

15. 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.

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

Procedural unfairness

17. 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.

18. 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.

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

20. 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.*"

21. 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.

The reply on behalf of the Respondent

22. The Respondent made representations upon one point, namely the issue relating to the correct sentence being served by the Applicant. They confirmed that the Applicant was serving a Discretionary Conditional Release sentence (DCR). The effect of this sentence was a custodial period of 15 years followed by an extended licence period of 8 years.

Reconsideration grounds and discussion

Ground 1

23. The Applicant was not serving an extended determinate sentence (as referred to by the panel in the decision letter) and the risk period under consideration was wrongly cited as "*indefinite*".

Discussion

24. The Applicant's solicitor indicates that the identifying name of the sentence being served by the Applicant was incorrect. The Applicant's sentence being technically a determinate sentence with an extended licence period. No specific point is made by the Applicant as to how this misidentification is said to impact on the panel's decision.

25. Additionally, it is noted that the panel also indicated that the risk period that they were considering was '*indefinite*'.

26. The Applicant's solicitor correctly indicates that the Divisional Court, in the case of **R Dich and Murphy [2023] EWHC 945 (Admin)**, explained the approach that should be adopted when considering the appropriate risk periods of fixed term prisoners. The Court indicated that the Parole Board *Guidance* document should not use the word indefinite, although the court did not indicate that oral hearing panels are precluded from using the term in their decision letters.

27. At paragraph 15 the Court in **Dich and Murphy** indicated as follows, "*The decision in Johnson makes it clear that a risk posed by a prisoner serving an extended sentence after the expiry of the custodial term is capable of being relevant to the need for public protection. The reasoning applies equally to a risk posed after the expiry of the sentence. However, nothing in Johnson suggests that such a risk is always relevant to the statutory test. Its relevance on the facts of a particular case will depend on the question of whether the risk can be avoided or reduced by continued confinement before the sentence expiry date. There must be a causal link. Johnson was such a case because confinement would prevent grooming, which was a precursor to sexual assaults. Although the particular facts of Johnson were unusual, it is not uncommon for a prisoner to present no imminent risk but for there to be evidence that on release he will start preparing for some criminal activity. In those circumstances, it may be necessary for the protection of the public that he is confined until he has to be released due to the expiry of the sentence*."

28. The position so far as determinate prisoners are concerned is that the statutory test is unchanged. However, where the risk of harm is likely to arise in the future (after the sentence expiry date), a prisoner's continued detention will only be lawful if incarceration would reduce the risk to the public after the sentence expires, (for example by enabling behavioural work to be undertaken that might reduce the risk post release). The statutory test for release does not involve a temporal element. An oral hearing panel, considering a determinate prisoner's case, are therefore obliged to consider risk in the future (indefinitely). However, the important caveat in the case of determinate prisoners, is that where the risk of serious harm is posed post release, there must be a causal link between the decision to detain and any future (post release date) risk of serious harm.

29. In this case the panel at paragraphs 4.3 and 4.5 of the decision letter made clear that they determined the Applicant had very little understanding of the triggers and motivation for his offending; that he had few obvious protective factors and that he demonstrated little evidence of internal controls. The panel found that the Applicant had not addressed his risks by undertaking risk–focused interventions.

30. The panel's determination therefore was that the risk of serious harm would remain high before, and subsequent to, the Applicant's sentence expiry date. The panel therefore applied the correct test, over the correct time period, to their assessment of risk. The panel also correctly noted that the assessment of risk was not bound by the sentence expiry date.

31. Accordingly, I reject the submission on the Applicant's behalf that the decision was irrational or unlawful on the basis of the risk period considered by the panel.

Ground 2

32. It was unfair to add a second psychologist member to the panel.

Discussion

33. The Applicant's solicitor does not develop any reasoning for the Applicant's view that the presence of two panel members with a psychology discipline affected the decision of the panel. The matter can be taken shortly. All individual members of the Parole Board enjoy equal status as members. Within the cohort of Parole Board members are specialist members (mainly psychologists and psychiatrists). Specialist members take a dual role. They may be appointed to a panel to assist with their particular specialism, however specialist members are often called upon to act as general co-panellists and many specialist members act as Chairs of Panels.

34. In this case a specialist psychology member was appointed to the panel, a second co-panellist also happened to be a psychology member, although this member sat in the capacity of an independent member, as noted in the decision. This complaint therefore has no merit.

Ground 3

35. The panel relied upon a document prepared by the COM which contained errors.

Discussion

36. In the case of **E v Secretary of State for the Home Department [2004] QB 1044** the issue of mistakes of fact in proceedings were examined. The court set out the preconditions for any conclusion that a mistake of fact amounted to irrationality: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and*

the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.". In **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, the court indicated that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence"* of what is asserted to be the true picture.

37. Again, the errors referred to are not cited within the reconsideration review. However as indicated above, the panel at paragraph 4.2 of the decision letter, indicated the basis of their decision not to order release. The reasons were:

    a) The Applicant's lack of understanding of the motivations and triggers leading to the index offences;
    b) The fact that there remained a need for offence focused work to be undertaken;
    c) The Applicant's relationship with his COM was poor and his compliance when in the community was poor;
    d) There were few obvious protective factors identifiable; and
    e) The Applicant demonstrated limited internal self-management controls.

38. None of these issues have any obvious connection to any apparent errors in probation documents. In this case there is no evidence that any apparent mistake of fact played any part in the panel's reasoning. I therefore determine that this ground does not amount to procedural unfairness or irrationality in the meaning set out above.

Ground 4

39. The Applicant did not commit further offences prior to this recall. He also disputes associating with another sex offender.

Discussion

40. The decision letter in this case acknowledges that the Applicant had not committed offences whilst on licence and prior to recall. However, the panel noted that the Applicant's behaviour on licence caused concerns, particularly in the realm of compliance. The Applicant had a poor relationship with his COM and took the view that the appointed COM should be replaced. The panel took the view that the Applicant had not demonstrated the capacity to develop an open, honest and trusting working relationship with his COM. The absence of further offences on licence is clearly one of many factors required to be balanced by the panel in reaching their conclusion. The panel were, however, bound to consider the entirety of the evidence in this case. The absence of further convictions was one of many factors referred to in the decision and clearly appropriately considered by the panel.

Ground 5

41. The panel inappropriately referred to the Applicant's (offence) history "*in its totality*" providing clear evidence of his capacity to cause serious harm to the public.

Discussion

42. The Applicant's solicitor notes that the panel have referred to the Applicant's offending history "*in its totality*" and asserted that the offending history provides "*clear evidence*" of the Applicant's "*capacity to cause serious harm*".

43. The Applicant's past offending was extensive (106 offences), however taken individually the offences do not immediately appear to evidence behaviour which might raise a concern about a risk of serious harm. Two of the previous offences related to violence (assault occasioning actual bodily harm), although not of the most serious category of violent offending.

44. Of more concern, and cited by the panel, were an extensive list of non-compliance incidents and offences. Clearly compliance, in the light of the index offences, was a key consideration in terms of the management of the Applicant's risk.

45. I therefore accept that taken in isolation the offending record of the Applicant outside the realm of the index offences would be unlikely to trigger concerns of serious harm. However, in my determination the point is irrelevant. The gravity and seriousness of the index offences are the relevant issue in this case. The panel made it clear that it was in relation to those offences that their decision was focused. Again, I am not persuaded that these references materially affect the decision of the panel such as to say that the decision was irrational in the sense set out above.

Ground 6

46. References in the dossier to historical matters.

Discussion

47. The Applicant's solicitor indicates that his client takes issue to a (historical) reference in the dossier to the finding of pornographic images on a computer and a reference to cross allegations made by the Applicant and another of sexual abuse.

48. Whilst this matter is referenced in the decision, I note that the panel made no findings in relation to the matter and indeed specifically note in the decision that the Applicant had told the panel that it was, in fact, he (the Applicant) who had raised child protection matters with the police. It appears therefore that this issue had no impact upon the decision of the panel and again I determine that it cannot amount to irrationality in the sense set out above.

Ground 7

49. The Applicant's solicitor also notes a number of matters with which the Applicant "*took issue*" including:

    a) The absence of evidence that the Applicant had been in contact with sex offenders;

b) A concern that the Applicant had been told of a misdiagnosis of a serious illness (rather than a declaration himself that he had been misdiagnosed);
c) A dispute about the frequency of contact with his POM;
d) A dispute about whether his arm was as affected by disability as it appeared;
e) An argument that he should be transferred to a category C prison;
f) A complaint that no one in prison had asked him to complete behavioural work, arguing that the absence of evidence of intervention work was the responsibility of others.; and
g) A technical point relating to the contact restrictions in the community.

Discussion

50. I have carefully considered these matters. Having read the decision of the panel and the basis upon which they concluded that it remained necessary for the Applicant to be detained, it is apparent that none of these matters had any bearing upon the risk assessment or the decision of the panel. Accordingly, they cannot in my determination amount to examples of either procedural irregularity or irrationality.

Ground 8

51. The panel Chair, at the conclusion of the hearing, indicated that a decision had been made implying an absence of reflection or discussion with panel members.

Discussion

52. I have considered this point. I note that the Applicant was represented by a barrister at the hearing. There is no indication in the complaint that the representative overheard any comment by the Chair. It would be unimaginable that an experienced barrister would overhear such a comment and not make an objection either at the time or later to the instructing solicitor. I note also two further matters, firstly the Applicant by his own evidence suffers from hearing difficulties which may explain a mishearing of a comment. Additionally, the oral hearing process is procedurally circumscribed. At the conclusion of every hearing the panel meet separately, discuss the issues and reach a conclusion. That conclusion is committed to a draft decision which is then rechecked by panel members. In the light of this clear and embedded procedural process I have concluded that the Applicant is likely to have misheard or misunderstood a comment by the Chair and incorrectly interpreted it. On that basis I do not find this is a matter which amounts to procedural irregularity.

Decision

53. In all the circumstances therefore, I conclude that the decision in this case was not irrational in the legal sense set out above and that the decision was not procedurally unfair. I therefore refuse the application for reconsideration.

HH S Dawson

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