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[2023] PBRA 135

Application for Reconsideration by McIntosh

Application

1. This is an application by McIntosh (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 22 June 2023 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. 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, the dossier, and the application for reconsideration.

Background

4. The Applicant received an extended determinate sentence consisting of a 12-year custodial period with a seven-year extended licence period on 22 December 2015 following conviction for rape. His parole eligibility date passed in January 2023. His conditional release date is in January 2027 and his sentence ends in January 2034.

5. The Applicant was 46 years old at the time of sentencing and is now 54 years old. This is his fist parole review.

Request for Reconsideration

6. The application for reconsideration is dated 12 July 2023 and has been drafted by solicitors acting for the Applicant.

7. It argues 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

8. The Applicant's case was referred to the Parole Board by the Secretary of State in May 2022 to consider whether or not it would be appropriate to direct his release.

9. The matter proceeded to an oral hearing on 22 June 2023 before a three-member panel which included a psychologist specialist member. The Applicant was legally represented throughout the hearing. The panel heard oral evidence from the Applicant, his Prison Offender Manager (**POM**), his Community Offender Manager (**COM**) and the HMPPS psychologist author of the psychological risk assessment (**PRA**) and addendum report within the dossier.

10. The panel did not direct the Applicant's release.

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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

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 (the Respondent)

18. The Respondent has submitted no representations in response to this application.

Discussion

19. A number of points are put forward in support of the submission that the panel's decision not to direct the Applicant's release was irrational.

20. In essence, the primary argument seems to be that there was support for release from professional witnesses, provided that the Applicant was given some time to "*tie up loose ends"*. The decision carefully notes that there was support for release subject to further work being undertaken around the Applicant's understanding of consent, his understanding of his licence conditions and how this might impact on his family life, clarification around disclosure of relationships, development of empathy and understanding the feelings and experiences of others, and developing a resettlement plan, to include proposals for employment or other constructive activities. Such activities represent important pieces of risk reduction work and should not be casually dismissed as "*loose ends"* by the Applicant's legal representative.

21. It is also argued that the Applicant's health issues were only "*mentioned in passing, rather than compassionately"*. In the panel's view, the Applicant's medical history was, at best, only of peripheral significance to his risk. It therefore had no need to dwell on it further, compassionately, or otherwise.

22. It is next argued that all allegations concerning the Applicant "*proved negative"*. The decision acknowledges this and explicitly states that the panel "*disregarded the allegations entirely"*.

23. It is next argued that certain of the Applicant's risk assessment scores are low. While this is true, the application fails to note that the predictor score for contact sexual reoffending is very high. It is not unreasonable for the panel to focus on this, given the Applicant's index offence was rape.

24. Peculiarly, the application then offers an account of the general intent of the Criminal Justice Act 2003. No arguments are put forward as to why this supports the view that the panel's decision was irrational.

25. It is next pointed out that the Applicant has undertaken work while in custody. Again, it is not clear what bearing this has on the rationality of the decision.

26. In essence, this application simply points out some matters that would have been raised in evidence at the hearing together with others that are largely, if not wholly, irrelevant. It does not in any way offer any argument as to why the panel's decision

met the legal test for irrationality and there is nothing there that persuades me that it did.

27. The panel's decision is clear, reasoned and based on evidence. The legal test for irrationality sets a very high bar that this case does not meet.

Decision

28. The panel's decision is not irrational and the application for reconsideration is dismissed.

Stefan Fafinski
27 July 2023