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[2024] PBRA 113

Application for Reconsideration by Nance

Application

1. This is an application by Nance (the **Applicant**) for reconsideration of a decision of an oral hearing panel dated 25 April 2024 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 (consisting of 347 pages), and the application for reconsideration (dated 13 May 2024). I have also listened to an audio recording of the oral hearing.

Background

4. The Applicant received four sentences of imprisonment for public protection on 10 February 2012 following conviction on two counts of robbery and two counts of possessing an imitation firearm when committing an offence. He pleaded guilty to all charges. The tariff for the robberies was set at three years and the tariff for the firearms offences was set at 18 months. The longer tariff expired on 10 February 2015.

5. The Applicant was 26 years old at the time of sentencing and is now 39 years old.

6. The Applicant was first released on licence on 26 November 2019 following an oral hearing. His licence was revoked on 29 December 2019, and he was returned to custody after a period unlawfully at large, during which he committed further offences of theft, criminal damage and assault occasioning actual bodily harm. He received (in total) a further 34 month custodial sentence on 3 September 2020 (now served).

7. The Applicant was again released on licence on 2 March 2023 following an oral hearing. His licence was revoked on 4 April 2023, and he was returned to custody on 29 June 2023, again, after a period unlawfully at large.

Request for Reconsideration

8. The application for reconsideration has been submitted by solicitors on behalf of the Applicant.

9. It argues that the decision not to release the Applicant was procedurally unfair and/or irrational.

10. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

11. The Applicant's case was referred to the Parole Board by the Secretary of State (the **Respondent**) in July 2023 to consider whether to direct his release. If the panel did not direct release it was invited to advise the Respondent whether the Applicant should be transferred to open conditions. This is the Applicant's first parole review since his second recall.

12. A two member panel of the Parole Board (including a psychiatrist specialist member) convened to hear the Applicant's case on 12 April 2024. It heard oral evidence from the Applicant, together with his Prison Offender Manager (**POM**) and his Community Offender Manager (**COM**).

13. The Applicant was legally represented throughout the hearing. The Respondent was not legally represented.

14. The professional opinions of the COM and POM differed. The POM considered that the Applicant was suitable for release, whereas the COM considered that he needed to remain in closed conditions to complete further work.

15. Closing written legal submissions on the Applicant's behalf (dated 12 April 2024) indicate there had been some technical difficulties within the hearing. The Applicant raised some further responses to statements made by the COM, before his legal representative set out his case for release.

16. The panel did not direct the Applicant's release (nor recommend open conditions). It is only the decision not to direct release that is subject to reconsideration.

The Relevant Law

17. 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)

18. 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)).

19. 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)).

20. 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.

Procedural unfairness

21. 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.

22. 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.

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

Irrationality

24. 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."*

25. 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.

26. 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 Respondent

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

Discussion

Procedural unfairness - ADHD

28. It is first submitted that the hearing was unfair since the panel did not accommodate the Applicant's unmedicated ADHD when giving evidence nor give it due consideration in its decision.

29. It is submitted that the Applicant struggled to provide evidence in the hearing and that the panel did not allow him to expand upon his answers to questions. The Applicant's legal representative requested a conference with him, and reminded the panel about his ADHD diagnosis and that it was impacting his evidence. The panel said they were aware of this, and the psychiatrist member noted she had experience of working with people with unmedicated ADHD. It is also stated that, after the Applicant has said he found it hard to stop talking, the panel chair said "*well, try"* and "*you are nearly 40 years old"*.

30. I have listened to the recording of the hearing insofar as it is necessary to determine this point.

31. It is clear that the Applicant struggled to maintain focus in answering the panel's questions. He said, more than once, that he felt he was getting *"put off"* when answering and that he did not lose focus "*on purpose*". The panel chair intervened during the psychiatrist member's questioning to explain the difficulty that the panel was facing with his unstructured and lengthy answers. She noted that the Applicant would have time to say everything he wanted but should answer the panel's questions as briefly as he could. He said that he thought he was being brief and could not help his responses. The panel chair said "*well, try, you're nearly 40*".

32. The panel chair then reminded the Applicant that his legal representative would also be asking him questions and she would ensure that he had an opportunity to say everything to the panel that he wanted. The panel chair then asked the Applicant's legal representative if she would like to take a short break with him. The panel chair explained that the panel was just trying to reassure the Applicant that he would have plenty of time when his legal representative was taking evidence. She suggested that, if the Applicant wished, it may be better for the hearing to reconvene so that his legal representative could be present in the room with him. The psychiatrist member reassured the Applicant and his legal representative that she would try to be as supportive as possible, and asked the legal representative to try to encourage the Applicant to give best evidence so the panel did not end up with any questions in its mind.

33. While the panel chair's comment to the Applicant was abrupt; it was not the only part of the dialogue. The panel offered the Applicant's legal representative a break; she did not request a conference as put forward in the submissions. Neither did she have to explain that the Applicant's unmedicated ADHD was impacting his presentation; the psychologist specialist member having already advised the

importance of the Applicant being able to give his best evidence and given a reassurance of support.

34. If the Applicant felt that his ADHD had undermined the quality of his evidence, he had the opportunity to say so in the closing written submissions. No such points were made, other than a comment that he would seek to be prescribed ADHD medication in the community.

35. Having listened carefully to the recording of the hearing, I do not find that the Applicant was prevented from putting his case properly. The panel did not fail to accommodate his unmedicated ADHD. It tried to reassure the Applicant that he would be able to say everything he wished. It offered the option of reconvening when his legal representative could have been present with him. It offered a break and encouraged the legal representative to stress to the Applicant the importance of giving best evidence to the panel. The application does not say how the Applicant's needs could have been better accommodated. It is difficult to see what else the panel could have done. There is no procedural unfairness on this point.

Procedural unfairness and/or irrationality – evidence and reasons

36. The next part of the application contains overlapping submissions which, in essence, argue that the panel did not give sufficient reasons for preferring the evidence of the COM (who did not support release) over that of the POM (who did).

37. Where there is a conflict of opinion, it was plainly a matter for the panel to determine which opinion they preferred, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above. 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.

38. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should clearly explain its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, following *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin). Following *Wells* (at [32]) the panel's ultimate conclusion should be tested against the evidence before it and to ask whether the conclusion can be safely justified on the basis of that evidence (with due deference and with regard to the panel's experience and expertise). Disagreeing with the panel's interpretation and weighing up of evidence does not automatically make a decision based upon that evidence irrational, unless (as per *Wells*) the conclusion is unjustifiable.

39. The panel's conclusion was simply this: the COM had identified further work that needed to be completed in closed conditions and which would provide a steadier foundation for the Applicant's future safe transition into the community. Although this was not accredited risk-reduction work, the COM considered that it would place

the Applicant in a better position to comply with his licence in the community. The panel, having heard the COM's oral evidence, agreed. It was not persuaded by the oral and written challenges raised by the Applicant's legal representative.

40. The panel stated that it took the POM's evidence into account and gave the Applicant credit where it felt it was due particularly in regard to engagement with mental health and substance misuse services. The decision states that the Applicant's behaviour has "*generally been satisfactory*" since recall. The application considers this underplays the last 10 months of "*excellent custodial behaviour*". Amongst the positives, the Release and Risk Management Report (**Part C**) of 8 February 2024, does note a breach of prison rules, a loss of Enhanced status (which the Applicant attributes to anxiety and panic attacks) and a negative intelligence entry. Based on this, it cannot be said that the time since recall has been unblemished.

41. It is also noted that the evidence of the Applicant's mental health worker may not have been taken into account as their letter (read at the hearing by the POM) had not been added to the dossier. The decision records that the reference was provided at the hearing. The Part C also notes the mental health worker's report that the Applicant is doing "*brilliantly*". It cannot be said that the panel did not know of the keyworker's view. Again, it acknowledges the Applicant's progress with mental health services in its decision.

42. Finally, it is argued that the panel is discounting the Applicant's custodial behaviour because he remained unlawfully at large prior to being returned to custody since its decision states "*by choosing to be [unlawfully at large, the Applicant] forfeited any opportunity to evidence positive behaviour".* I do not find this interpretation to be persuasive. A more straightforward interpretation would be to say that, if the Applicant had returned to custody when recalled, he could have started to evidence a period of good custodial behaviour sooner rather than later.

43. In summary, the panel's conclusion was one that it was entitled to make, its reasons are clearly and extensively articulated, and ultimately its decision is not so outrageous that every other panel would have concluded otherwise and released the Applicant.

Decision

44. For the reasons set out above, the application for reconsideration is refused.

Stefan Fafinski
06 June 2024