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[2024] PBRA 150

Application for Reconsideration by Hill

Application

1. This is an application by Hill (the Applicant) for reconsideration of a paper decision dated 13 May 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 paper decision, the dossier (consisting of 277 numbered pages), and the application for reconsideration dated 16 July 2024.

Background

4. The Applicant received an extended sentence comprising a custodial period of eight years and six months with an extended licence period of three years on 31 May 2019 following conviction for attempting to cause grievous bodily harm with intent to do grievous bodily harm to which he pleaded guilty. On the same occasion he was also convicted of possession of a firearm with intent to cause fear of violence and received a concurrent five year determinate sentence (now served). He pleaded guilty to both charges.

5. The Applicant was 24 years old at the time of sentencing and is now 29 years old.

6. Key dates relevant to his sentence are reported to be:

    a) Parole eligibility date: August 2024;
    b) Conditional release date: June 2027; and
    c) Sentence expiry date: June 2030.

Request for Reconsideration

7. The application for reconsideration has been submitted by solicitors on behalf of the Applicant and pleads grounds of both procedural unfairness and irrationality.

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

Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) on 29 November 2023 to consider whether or not it would be appropriate to direct his release. This is the Applicant's first parole review.

10. The case was reviewed by a single member, Member Case Assessment panel (MCA panel) on 13 May 2024. This panel made no direction for release on the papers.

11. This decision was made under rule 19(1)(b) and, by operation of rule 19(6) was a provisional decision. Rule 20(1) permits a prisoner who has received a provisional negative decision on the papers to apply in writing for his case to be determined by a panel at an oral hearing. Rule 20(2) provides that any such application must be served within 28 days of receipt of the provisional decision.

12. On 14 June 2024, an in-time application was made for an oral hearing.

13. In accordance with rule 20(5), the application was passed to a duty member who was not involved in the making of the provisional negative decision.

14. On 1 July 2024, a duty member refused the request for an oral hearing. The provisional decision therefore became final on 1 July 2024. The 21-day reconsideration window opened at that point, with the closing date for any reconsideration application being 22 July 2024. I am therefore satisfied that the application for reconsideration was made in time.

The Relevant Law

15. 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)

16. 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)).

17. 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)).

18. 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

19. 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.

20. 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.

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

Irrationality

22. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined in *Associated Provincial Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) by Lord Greene in these words: "*if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere*". The same test applies to a reconsideration panel when determining an application on the basis of irrationality.

23. In *R(DSD and others) v Parole Board* [2018] EWHC 694 (Admin) the Divisional Court applied this test to Parole Board hearings in these words (at [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*."

24. In *R(Wells) v Parole Board* [2019] EWHC 2710 (Admin) Saini J set out what he described as a more nuanced approach in modern public law which was "*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 regard 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*)". This test was adopted by the Divisional Court in *R(Secretary of State for Justice) v Parole Board* [2022] EWHC 1282(Admin).

25. As was made clear by Saini J in *Wells,* this is not a different test to the *Wednesbury* test. The interpretation of and application of the *Wednesbury* test in parole hearings as explained in *DSD* was binding on Saini J.

26. It follows from those principles that in considering an application for reconsideration the reconsideration panel will not substitute its view of the evidence for that of the panel who heard the witnesses.

27. Further while the views of the professional witnesses must be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. The panel must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.

The reply on behalf of the Respondent

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

Discussion

29. Submissions on behalf of the Applicant on the ground of procedural unfairness argue that the case should have been directed to an oral hearing. The application sets out a number of reasons why the Applicant should have been granted an oral hearing. It is argued that, in refusing the application to grant an oral hearing, the duty member failed to take the fact that the Applicant had not been able to transfer to complete identified accredited offending behaviour work into account. Consequently, it is submitted that the duty member also failed to take the principles of *Osborn, Booth and Reilly* [2013] UKSC 61 into account.

30. The decision not to direct an oral hearing was made under rule 20(6). This decision is not one that can be challenged via the reconsideration mechanism (which only applies to the decision not to direct release). Therefore, the submissions on the ground of procedural unfairness relating to the duty member's refusal to grant an oral hearing must fail. Even if this decision was subject to reconsideration, the duty member correctly acknowledged that, although the identified work could not be completed at the Applicant's current establishment, this did not negate the need for any such work to take place. The duty member concluded that submissions on this point did not materially affect the Applicant's position. I agree with the duty member's conclusion.

31. It is also argued that the oral hearing request was requested on the basis that no evidence was received from the Applicant's Prison Offender Manager (POM). The duty member's decision says no such thing. It makes no reference to the POM.

32. It is also argued that the Applicant was denied an opportunity to consider all the available evidence. It appears that, when the case was first reviewed by the MCA panel, a victim personal statement (VPS) and proposed exclusion zones had not been correctly uploaded to the dossier. The case was reviewed again on 29 May 2024 under the 'slip rule' (rule 30) which permits the Parole Board to correct an accidental slip or omission in a decision at any time. The revised decision notes that (other than a change to the paragraph which included the exclusion zones in the list of proposed additional licence conditions) there were no substantive changes to the decision. It affirms that the VPS had been read and noted the impact that the Applicant's offending has had on the victim.

33. The duty member recognised that the Applicant should have had the opportunity to submit representations on the additional material.

34. The MCA member considered that the additional material made no difference to the decision not to direct the Applicant's release. The duty member noted this and concluded that it would be premature to evaluate the requested exclusion zones.

35. I agree that the Applicant should have had the opportunity to submit representations on the additional material. However, it does not automatically follow that this means the application for reconsideration should be granted. Reconsideration is a discretionary remedy. That means that, even if procedural unfairness is established, I am not obliged to direct reconsideration of the panel's decision. I can decline to make such a direction having considered the particular circumstances of the case, the potential for a different decision to be reached by a new panel, and any delay caused by a grant of reconsideration. That discretion must of course be exercised in a way which is fair to both parties.

36. In this instance, both the MCA panel and the duty member concluded that the availability of the additional material made no difference to the decision. Having carefully reviewed the MCA panel's decision against the evidence in the dossier, it appears to me to be entirely correct in saying that the Applicant needs to evidence that he has addressed his risks and that he has the capacity to engage and comply with the proposed plan. In other words, the Applicant is presently unmanageable under any proposed plan, regardless of whether or not it contains exclusion zones.

37. Therefore, I do not consider there to have been any procedural unfairness on this point.

38. Finally, it is submitted that the MCA panel's decision is irrational. The Applicant's COM was not supporting release, noting that there was "*no evidence to indicate that his risks have been sufficiently reduced or that he is entirely motivated to engage constructively and over a sustained period".* The Applicant was assessed as presenting a high risk of proven reoffending and violent reoffending, and a very high risk of proven non-violent reoffending. He has also been assessed as presenting a high dynamic risk of serious recidivism. There is high risk of serious harm to the public and to children. The MCA member gives very clear reasons for not directing his release; not just relating to the lack of progress in terms of risk reduction but also to his violent behaviour in custody. These reasons clearly discharge the panel's duty to explain its decision. The decision not to direct the Applicant's release is far from meeting the legal test of irrationality.

39. In conclusion, the application submitted that the decisions issued on 20 May 2024, 29 May 2024 and 2 July 2024 should be reconsidered. This statement indicates a fundamental misunderstanding of the operation of the reconsideration mechanism. It is only the reissued decision issued on 29 May 2024 that is open for reconsideration: there is nothing in the application that persuades me that this decision was procedurally unfair or irrational.

Decision

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

Stefan Fafinski
08 August 2024