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[2024] PBRA 173

Application for Reconsideration by Martin

Application

1. This is an application by Martin (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 01 August 2024 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, (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 oral hearing decision, the dossier consisting of 335 pages and the application for reconsideration.

Request for Reconsideration

4. The application for reconsideration is dated 15 August 2024. It has been drafted by representatives on behalf of the Applicant.

5. The grounds for seeking a reconsideration are that the decision is irrational.

Background

6. The Applicant received a sentence of life imprisonment on 3 April 1995 following conviction for murder. He received a concurrent sentence of 7 years for child cruelty. His tariff was set at 20 years, reduced to 18 years, and expired on 1 March 2012.

7. The Applicant was 37 years old at the time of sentencing and is now 66 years old.

Current parole review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) on 31 May 2023 to consider whether or not it would be appropriate to direct his release. If the Board did not consider it appropriate to direct release, it was invited to advise the Respondent whether the Applicant should be transferred to open conditions.

9. The case proceeded to an oral hearing via videoconference on 25 July 2024. The panel consisted of two independent members and a psychologist member. It heard oral evidence from the Applicant together with his Prison Offender Manager (POM), Community Offender Manager (COM) and HMPPS instructed psychologist. The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 1 August 2024 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

11. 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)).

12. 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)).

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. 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 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.

15. In R(DSD and others) -v- the Parole Board 2018 EWHC 694 (Admin) a Divisional Court applied this test to parole board hearings in these words 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. In R(on the application of 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 a Divisional Court in the case of R(on the application of the Secretary of State for Justice) -v- the Parole Board 2022 EWHC 1282(Admin).

17. As was made clear by Saini J 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.

18. 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.

19. 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 Secretary of State

20. The Respondent offered no representations.

Discussion

21. The application repeats for the most part the submissions that were made to the panel at the hearing and which have been set out by the panel in its decision letter. The application disagrees with the panel's conclusion regarding the difficulty of transitioning into the community. The application notes that the Applicant has a cousin in the community and submits that a release into the same area will have a positive impact on the Applicant. The application disagrees with the panel's conclusion regarding the Applicant undertaking RDRs (Resettlement Day Release) and ROTLs (Release on Temporary Licence) as he has completed them previously elsewhere. The application notes that the Applicant has stated and evidenced that he can deal with life in the community, and that he does not recognise any challenges that could confront him and put him in a negative situation. The application submits that loneliness can be seen as a protective factor and an indication that the Applicant only requires a small support network. The application notes the support of the psychologist for release and that there is no immediate risk posed. The application repeats the Applicant's explanation for the positive cannabis test. The application disagrees with the panel's view of unknown aspects of the case

including risk factors. The application notes the length of time the Applicant has been in custody without adjudication.

22. Finally, the application reminds decision makers of the Human Rights Act 1988, particularly s.6, and of Article 5 of the European Convention on Human Rights and of the public protection test that must be applied in the case. The application submits that the decision is "*completely irrational*", that evidence having been given that the Applicant's risk is manageable in the community, it is no longer necessary for the protection of the public that he remains confined.

23. All the matters that are raised in the application were fully considered by the panel and reasons set out in the decision letter. As is noted in the application, the panel conducted an independent risk assessment. Disagreement with the conclusion does not mean that the panel decision is irrational, as the application appears to believe.

24. The panel has given full reasons, supported by evidence, for its conclusions. Whilst the psychologist had recommended release, both the POM and the COM did not do so and noted that the Applicant's transfer to open conditions had taken place only recently and needed to be tested for him to demonstrate he could manage any challenges he would face. The submission that he had been tested before was rejected by the panel as not being adequate. The panel noted that the Applicant had been in open conditions before and completed ROTL but also noted that the period on that occasion had been short lived. That conclusion cannot be described as irrational within the meaning set out above. In my judgement, the Applicant had not been successfully tested before as the previous panel in a decision of September 2022 had noted that:

"*Whilst [the Applicant] has shown periods of motivation to comply with ROTL, questions remain over his ability to sustain engagement without high levels of intervention and support and when faced with stressors or frustrations*."

25. The application disagrees with the panel's conclusion that there are unknown aspects of the case including risk factors. However, the decision letter sets out those aspects such as why the Applicant committed the index offence and how he would deal with life in the community if problems arose. The submission in the application that the Applicant does not recognise any challenges that could confront him which would put him in a negative situation is in my judgement one of the indicators of his institutionalisation and lack of preparedness for release.

26. The panel carefully considered all the evidence presented and submissions made. There are no grounds on which it could be sustainably argued that the decision not to release the Applicant was so illogical that every other panel would have decided otherwise. The legal test for irrationality sets a high bar which this case does not come close to meeting.

Decision

27. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

Barbara Mensah
11 September 2024