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[2024] PBRA 184

Application for Reconsideration by Shaheen

Application

1. This is an application by Shaheen (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 7 August 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 decision, the dossier (consisting of 423 numbered pages), and the application for reconsideration, dated 26 August 2024.

Background

4. On 25 October 2005, the Applicant received a sentence of imprisonment for public protection following conviction for wounding with intent to do grievous bodily harm. On the same occasion he received determinate sentences for committing acts with intent to pervert the course of justice (12 months), possession of a class A drug (heroin, 6 months) and possession of a class C drug (cannabis, 3 months). His tariff expired in October 2008.

5. The Applicant was 27 years old at the time of sentencing and is now 46 years old.

6. He was released (following a Parole Board hearing) in August 2015. His licence was revoked in July 2018 and he was returned to custody.

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) in July 2023 to consider whether or not it would be appropriate to direct his release. This is the Applicant's fourth parole review since his recall.

10. His last parole review was concluded after an oral hearing in August 2022 with no direction for release (and no recommendation for open conditions). The August 2022 panel concluded that the Applicant presented a high risk of reoffending because he had yet to demonstrate full understanding of the areas that placed him at risk of further offending. Moreover, it considered that lack of understanding, or acceptance, of his risk factors, and willingness to subvert controls in place to protect others, raised considerable cause for concern. It concluded that unless the Applicant addressed his thinking skills, further work in the community would be unlikely to succeed and the risk of offending would remain: specifically, there was work for the Applicant to complete with regards to his thought process, understanding of risk, and openness and honesty with professionals.

11. The current review proceeded to an oral hearing on 30 July 2024, before a two-member panel. The panel heard evidence from the Applicant, his Prison Offender Manager (POM) and his Community Offender Manager (COM). The Applicant was legally represented throughout proceedings.

12. In the professional opinion of both the POM and the COM, the Applicant was suitable for release. The panel made no direction for release (but did make a recommendation for open conditions).

The Relevant Law

13. 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)

14. 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)).

15. 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)).

16. 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

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.

Irrationality

20. 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.

21. 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*."

22. 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).

23. 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.

24. 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.

25. 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

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

Discussion

27. The lengthy representations on behalf of the Applicant can be boiled down to a primary submission which argues that the panel's conclusion failed to give adequate reasons for departing from the professional opinions of the POM and COM and could not be rationally justified on the evidence before it. There is a secondary submission regarding procedural unfairness concerning totality of psychological evidence.

28. Dealing first with the primary submission, it is well-trodden ground (and acknowledged by the Applicant) that panels of the Parole Board are not obliged to adopt the opinions of professional witnesses. It is the panel's responsibility to make its own risk assessment and to evaluate the likely effectiveness of any risk management plan proposed. The panel must make up its own mind on the totality of the evidence heard, including any evidence from the Applicant. It would be failing in its duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if it failed to do just that. As was observed by the Divisional Court in *DSD*, the panel has the expertise to do it. 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 explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions (*Wells*).

29. The question for me then becomes relatively simple: can I clearly follow the reasons for the panel refusing release? Unlike the panel, I have not had the benefit of hearing the witnesses and the Applicant first hand, but this does not absolve the panel from its responsibility to ensure that its decision is a coherent standalone document which should enable the informed reader clearly to discern its reasoning (particularly in a case such as this, in which the Applicant is significantly post-tariff and the professional opinions of the POM and COM were supportive of release).

30. In my view, the panel's reasoning is adequate. It formed the reasonable view that, although the Applicant's internal controls were sufficient to manage his behaviour in closed conditions, he had not, in the panel's view, yet shown evidence that he could similarly control his behaviour in less restricted conditions. While the panel accepted that the Applicant had made sufficient progress in addressing his risks to support a recommendation for open conditions it did not need to accept that his risks had been reduced to the extent that he could be safely managed in the community.

31. The panel acknowledges that the Applicant's new attitude towards compliance may or may not be properly embedded. It is self-evident that his new attitude remains untested in less secure conditions and the panel concluded that a move directly to the community presented too great a risk. The Applicant's attitude when fewer

restrictions are placed upon him has not been tested outside of custody, and the panel's caution in this regard is neither unreasonable nor irrational.

32. The Applicant accepts that the panel may have justifiable reasons for its conclusion but contends that they are not present in the decision. I disagree. The panel's conclusion, albeit brief, still enables its reasoning to be safely discerned on the evidence before it.

33. The primary submission therefore fails.

34. The secondary submission concerned the panel's approach to historical psychological risk assessments within the dossier, which had been prepared for the 2022 hearing. It is argued that these assessments were outdated and should not have been relied upon.

35. In its decision (at para. 2.9) the panel notes the 2022 assessments and the conclusion that the previous panel reached as to which one it preferred.

36. There is nothing in the panel's decision which suggests that the panel placed any reliance on the content of these reports. Other than in its descriptive narrative of what happened in 2022 there is no mention of psychology anywhere in the panel's decision. It cannot therefore be sustainably argued that the panel acted in a procedurally unfair manner with regard to these historic assessments.

37. The secondary submission therefore also fails.

38. In closing, the application also refers to the potential for the panel having assessed mistaken oral evidence regarding the timing of the Applicant commencing a new relationship as dishonesty. The panel did not comment on any perceptions of dishonesty in its decision and therefore this argument is speculative at best. It certainly does not meet the threshold for a finding of irrationality or procedural unfairness.

Decision

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

Stefan Fafinski
20 September 2024