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[2024] PBRA 244

Application for Reconsideration by Goldspink

Application

1. This is an application by Goldspink (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 31 October 2024 not to direct release, or progression to open prison.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2024) (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 dossier now consisting of 502 pages, the decision of the OHP, the reconsideration application drafted by the Applicant's legal adviser and counsel on their behalf. The Secretary of State (the Respondent) offered no representations via email on the 27 November 2024.

Request for Reconsideration

4. The application for reconsideration is dated 15 November 2024.

5. The grounds for seeking a reconsideration are set out below.

Background

6. The Applicant was sentenced to imprisonment for the public protection (IPP) following trial on the 7 September 2006 for a series of sexual offences committed between 1990 and 2005. The offences were committed against eleven male victims, all children aged between 11 and 17 years. The offences being sexual assault on a male (x5), sexual assault on a male child under the age of 13 (x2), rape of a male under 16 years old (x2) and indecent assault on a male (x2). The Applicant's tariff expired in June 2011. The Applicant has always maintained his innocence in relation to the index offences. The trial judge described the Applicant as a "*scheming and dangerous paedophile*." Prior to the Applicant's conviction in 2006 the Applicant had no previous convictions recorded against him.

Current parole review

7. This was the Applicant's eighth parole review since sentence. The Applicant was 62 at the time of the oral hearing decision. Due to extraneous circumstances the Applicant's decision was not issued until the 31 October 2024. (Two short technical adjournment notes are included within the papers).

8. The hearing took place on the 9 September 2024 over video link. The panel consisted of two independent Parole Board Members and a judicial member. Evidence was taken from the Community Offender Manager (COM), Prison Offender Manager (POM), and the Applicant.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 31 October 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)

10. 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)).

11. 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)).

12. 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

13. 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.

14. 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."*

15. In **R(on the application of Wells)** -v- Parole Board 2019 EWHC 2710 (Admin) 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).

16. 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.

17. 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.

18. 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.

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;
    (e) the panel did not properly record the reasons for any findings or conclusion; and/or
    (f) the panel was not impartial.

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

Error of law

22. An administrative decision is unlawful under the broad heading of illegality if the panel:
    a) misinterprets a legal instrument relevant to the function being performed;
    b) has no legal authority to make the decision;
    c) fails to fulfil a legal duty;

d) exercises discretionary power for an extraneous purpose;
e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
f) improperly delegates decision-making power.

23. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Other

24. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

25. Reconsideration is a discretionary remedy. That means that, even if an error of law, irrationality, or procedural unfairness is established, the Reconsideration Member considering the case is not obliged to direct reconsideration of the panel's decision. The Reconsideration Member can decline to make such a direction having taken into account 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.

The reply on behalf of the Secretary of State

26. The Respondent offered no representations in response to the Applicant's reconsideration application.

Grounds and Discussion

27. The reconsideration application was drafted in narrative form, both on the application paperwork and in attached legal submissions provided by Counsel dated 14 November 2024. Since Counsel's submissions largely mirror those provided by the Applicant's instructing solicitor, I will deal with the grounds in the order set out in Counsels' submissions.

Ground 1:

28. The decision does not apply the correct legal framework with regards to prisoners who maintain their innocence, thereby rendering the decision procedurally unfair. Counsel submits that the panel did not properly consider how the Applicant's maintenance of innocence effects his risk. They argue that the panel determined

the Applicant's case by *'reference to one factor, that is the denial of guilt following which his inability to undertake work on his sexual interests in children or on his sexual offending was inevitable, as was his inability to take responsibility for his offending.'* Counsel further states *'the decision letter reads as if risk is only capable of being reduced if he begins to develop his personal responsibility and understand and develop insight and internal controls on his sexual interest in children and his sexual offending…'* It is also argued that the panel failed to take into account the context of the Applicant's offending and other progress made.

Discussion:

29. In my estimation, the panel was plainly alive to the fact that the Applicant maintains his innocence and the need to look for evidence of risk reduction beyond accredited programmes, this is acknowledged in terms at paragraph 4.2 of the decision *'...that accredited interventions were not the only means by which risk can be addressed'*. Furthermore, there are multiple references to the Applicant's denial and how this impacts on risk throughout the decision (paragraphs 1.4, 1.7, 2.2, 2.12, 2.21, 4.2, 4.6).

30. It is right that at paragraph 4.6 of the decision the panel states *'no work has been undertaken on [his] sexual interests in children and on his sexual offending due to his continued stance of maintaining his innocence…'.* In my view this is an accurate statement of fact. However, the panel does not limit its assessment of risk to these two risk factors alone, in my opinion. Paragraphs 1.6 & 1.7 of the decision set out multiple other risk factors, beyond the Applicant's insight into his sexual interest and sexual offending. These risk factors are referred to throughout the decision, including commentary on the Applicant's internal controls, self-esteem, thinking, and problem solving skills. All of these risk factors are said to be linked to the Applicant's risk of serious harm in the panel's assessment. This is helpfully summarised at paragraph 1.8 of the decision.

31. Certain of these 'other' risk factors were reviewed during the Horizon Programme and one to one work. However, after hearing the Applicant's evidence the panel concluded that *'while [the Applicant] has undertaken work on risk in custody and has completed the Horizon Programme he did not evidence learning and skills'* (paragraph 4.9.1).

32. In my opinion these findings confirm two things: [1] When considering the Applicant's risk of serious harm, the panel did not solely consider the Applicant's sexual interests or sexual offending, but risk more broadly. [2] In the panel's assessment, the Applicant was unable to evidence insight into these other areas of risk at the hearing. In coming to this opinion, I note the panel's conclusion that *'it found [the Applicant's] evidence to be limited, and [he] was unable to identify clear strategies what would manage his risk in the future'* (paragraph 4.7). A view shared by professional witnesses in their evidence. It is clear to me, when reading the decision as a whole, that the panel did try to find evidence of risk reduction, notwithstanding the Applicant's denial, but was unable to do so. As such, I cannot agree with Counsel that the panel failed to apply the correct legal framework with regards to prisoners who maintain their innocence.

33. Counsel further submits that the panel failed to place adequate weight on the Applicant's progress during the review period, including the Applicant's positive compliance, his previous good character, and the Applicant's engagement with his sentence plan. Again, I am not persuaded by this argument. The Applicant's previous good character is stated in terms in paragraph 1.5 of the decision and his positive compliance and progress is referred to at paragraph 2.3. Protective factors are also set out comprehensively at paragraph 1.9 of the decision.

34. Whilst Counsel submits that '*the Prison Offender Manager (POM) reports that [the Applicant] has progressed sufficiently in terms of work completed, there is nothing further for him to complete and that concerns surrounding his behaviour with other prisoners have not been raised since the previous parole review…*', this submission does not accord with the Panel's findings at paragraph 2.12 of the decision which state '*… whilst she [POM] assessed [the Applicant] as having completed the interventions available to him, she was unsure – given his maintenance of innocence – whether his risk had been fully identified and assessed, and had consider a further psychological risk assessment would be helpful'.* This evidence suggests to me that whilst the Applicant had completed core risk reduction work, its effectiveness remained uncertain.

35. For the reasons set out above, I do not agree that the panel failed to apply the correct legal framework when considering the Applicant's review. Nor do I find that the panel failed to give appropriate weight to the more positive aspects of the Applicant's case, including offending work completed. I do not find any procedural unfairness, in this regard.

Ground 2:

36. Procedural unfairness linked to unproven allegations. Counsel submits that although the panel did not make any findings of fact with regards to certain unproven allegations, the panel unfairly relied on those allegations and placed weight on them when completing its risk assessment and in so doing rendered the decision procedurally unfair.

Discussion

37. I have carefully considered Counsel's submissions with regards to the unproven allegations. These pertain to unproved Security and Intelligence Reports (SIRs). The allegations are set out in detail at paragraphs 2.4 and 2.5 of the decision and also referred to by professionals in their own evidence, including at paragraph 2.16 of the decision: '*The COM was concerned that the on-going security intelligence was linked to sexual preoccupation and interests, leading to poor decision making and [the Applicant] putting himself into risky allegations…*'.

38. Given the nature of the allegations (allegations of sexually preoccupied/inappropriate behaviour), the panel quite properly considered these unproven allegations carefully, however, ultimately the panel concluded that there was insufficient evidence to make any findings (paragraph 2.4).

39. Notwithstanding the panel's decision at paragraph 2.4 to make no findings, Counsel argue, that '*a lot of weight appears to have been placed on the Security intelligence in which the applicant himself has denied.'*

40. I have considered Counsel's submission very carefully because the matter is nuanced, in my view. I accept that the panel does raise concerns about the unproven allegations, but when one reads the decision in its entirety, these concerns are linked to the presence of the SIRs, not the nature of the allegations, in my estimation. Specifically, the panel raises concerns about the Applicant's inability to manage his own risks and his poor thinking and problem solving skills. This is confirmed at paragraph 2.9 where the panel states '*For this panel and for the 2022 panel, the Applicant, had placed himself in the position where a further allegation could be made against him'. This would indicate that he had not been using his thinking skills and problem solving skills to good effect.'* In my opinion, the panel is entitled to raise such matters, especially given the concerns raised by the 2022 panel and ongoing SIR reports, linking the Applicant to alleged offence paralleling behaviour. In my view, the panel makes it clear, that the unproven allegations are significant to risk because they exist, not because of what they allege. Since no one is challenging the existence of the SIRs, the panel cannot be criticised for placing weight on their factual existence, in my view. I find no evidence that the panel placed inappropriate weight on the actual subject matter of the SIRs, having made no findings earlier in its decision, although other witnesses, including the COM may have done so, as is their right (Paragraph 2.14).

41. It is right that at paragraph 4.5 the panel does express concern about the Applicant's minimisation and tendency to blame others. However, this is a general comment, in my view, which refers to multiple parties '*victims, their families, prisoners and staff*.' Significantly, there is no reference to the unproven allegations specifically, or at all, at paragraph 4.5. Again, the panel is entitled to make its own findings based on the evidence before it and the presumption that the Applicant was properly convicted.

42. Accordingly, I do not accept that the panel relied on, or placed inappropriate weight on, the unproven allegations when completing its risk assessment. I find no evidence of procedural unfairness.

Decision

43. Refusal – For the reasons I have given, I do not consider that the decision was procedurally unfair and accordingly the application for reconsideration is refused.

Heidi Leavesley
13 December 2024