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[2025] PBRA 11

Application for Reconsideration by Davey

Application

1. This is an application by Davey (the Applicant) for reconsideration of a decision of an oral hearing panel (OHP) dated the 27 November 2024 not to direct release.

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 308 pages, the application for reconsideration drafted by the Applicant's legal adviser, the panel's decision and the representations by the Secretary of State (the Respondent)

Request for Reconsideration

4. The application for reconsideration is dated 18 December 2024.

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

Background

6. The Applicant was convicted by a jury of offences of rape and sexual assault of a female child under the age of 13. The offences were committed over a period of 10 years and within a familial environment. The Applicant was aged 64 at the time of sentence. The Applicant was sentenced to a period of 14 years imprisonment with an extension of one year as an additional licence period in the light of the nature of the offence.

Current parole review

7. The Applicant was aged 72 at the time of the oral hearing. The panel consisted of a judicial chair a psychologist member of the Parole Board and an independent member of the Parole Board. Evidence was given at the hearing by a former and current Prison Offender Manager (POM), a prison instructed psychologist and a Community Offender Manager (COM). The Applicant was legally represented at the hearing. The Applicant himself gave evidence.

The Relevant Law

8. The panel correctly sets out in its decision letter dated 27 November 2024 the test for release.

Parole Board Rules 2019 (as amended)

9. 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)).

10. 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)).

11. 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

12. 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.

13. 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."*

14. 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).**

15. 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.

16. 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.

17. 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

18. 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.

19. 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.

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

Error of law

21. 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.

22. 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

23. 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.*"

Reconsideration as a discretionary remedy

24. 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

25. The Respondent offered no representations.

Grounds and Discussion

Ground 1

26. It is submitted, on behalf of the Applicant, that the panel's decision in this case not to grant a further adjournment (to continue to seek out suitable accommodation and finalise other arrangements) rendered the decision-making process procedurally unfair as the Applicant had been prevented from putting his case to the panel.

Discussion

Adjourning – general principles

27. The duty of the Parole Board pursuant to article 5 (4) of the European Convention on Human Rights is to provide a speedy review of a prisoner's detention. Adjourning cases delays a decision in the instant case, and also causes delays for other prisoners by taking valuable resources in terms of hearing days. The Parole Board publishes guidance on adjournments [see the publication entitled **Adjournments and Deferrals July 2020 (v 1.0)**]. The principles to be considered necessitate fairness to both the prisoner whose case is being considered, as well as to those (in the queue) waiting for decisions. The guidance makes it clear that there will be occasions when an adjournment will be appropriate. One example cited (as appropriate to adjourn) would be a situation where a risk management plan is

incomplete because of lack of accommodation arrangements, and where a finalised arrangement can be realistically secured in a short time.

Background

28. As noted above the Applicant in this case is serving a period of imprisonment for offences relating to the rape and sexual assault of a child. The Applicant became eligible for parole in December of 2023. The panel were considering a referral from the Secretary of State who had requested the panel to consider whether it would be appropriate to direct the release of the Applicant.

29. The Applicant had been convicted of the offences by a jury, however, he had denied the offences at trial and has maintained his denial. This effectively meant that the Applicant has not, during his prison sentence, undertaken behavioural work or programmes related to his offending, as programmes are dependent upon the candidate accepting all or partial responsibility for offending.

30. The Applicant's general prison conduct was described by the panel as "*exemplary*". Although the Applicant had denied the offences, the denial was not a bar to release. However, as noted by the panel, *"It causes problems deciding if he understands his risks and has adequate strategies to manage them"*. The absence of an understanding of risk and a recognition of risk by the Applicant meant that the panel took the view that the management of risk was highly (and almost solely) dependent upon external oversight and controls.

31. A risk management plan, with external controls suggested, had been drafted by the COM in this case. However, a major difficulty and impediment was identifying suitable short and longer term accommodation. The Applicant was ineligible for a place in probation supported accommodation, because of the low number of places currently available in such accommodation, and therefore the prioritisation of places for more serious offenders.

32. The absence of a place in probation supported accommodation meant that alternatives had to be considered. The panel acknowledged this difficulty, and had adjourned the matter on a number of occasions to allow the professionals and the Applicant to seek out an accommodation option which would ensure that risk could be safely managed in the community. No suitable accommodation option was identified.

33. By the time of the final scheduled oral hearing the matter had been outstanding for a period of 20 months between the referral in March of 2023 and the hearing date in November of 2024. The only options available would have been a possibility of being offered homeless accommodation at some future date after release. The panel indicated that it could not "*direct release with an expectation that [the Applicant] will then be found short or long term accommodation*". The Applicant's legal adviser applied, at the final hearing, for a further adjournment to attempt to secure accommodation.

Discussion

Refusal to adjourn the matter further

34. The Applicant's legal adviser argues that the panel's decision not to grant a further adjournment was procedurally unfair as the Applicant had been prevented from putting his case across properly. As noted above the panel had granted a number of applications to adjourn in order to attempt to secure suitable accommodation in the community. No progress had been made in relation to securing accommodation. It was quite apparent that, in the light of the need for intensive external risk management controls, and the nature of the licence conditions and risk management plan, it was essential that the Applicant was released to short, medium and long-term accommodation which was identifiable and stable. The panel's duty was to apply the test for release for an indefinite period of time. The panel also had a duty to act expeditiously and to conclude the referral on the basis of the evidence presented to it.

35. It was clear in this case that the panel acted fairly in giving reasonable amounts of time, and repeated adjournments to allow the Applicant and the professionals an opportunity to attempt to complete the accommodation aspects of the risk management plan.

36. The decision to finalise the referral, in the light of the fact that no prospect was being offered for accommodation in the immediate future, could not, in my view, amount to unfairness or procedural impropriety. The panel had acted entirely fairly in granting adjournments and time to enable the Applicant and the professionals supporting him an opportunity to finalise the accommodation arrangements. I am not therefore persuaded that the panel's decision could amount to procedural unfairness in the sense set out above.

The panel were not prepared to allow the Applicant to obtain accommodation by funding it himself

37. The Applicant's legal adviser indicates that the panel were irrational in not being prepared to allow the Applicant himself to arrange for privately rented accommodation or purchased property.

38. In the decision letter the panel indicated that they were "*not prepared to leave (the Applicant) to his own devices to find rental accommodation*". The panel also indicated in the decision letter that it acknowledged that the Applicant had expressed a wish to purchase or rent property, and that the Applicant had indicated that he was also in a financial position to buy or rent property.

39. The decision letter therefore does not indicate that the panel were not prepared to allow the Applicant to purchase or rent his own property (as suggested by this ground of the application). The panel were merely indicating that the identification and securing of accommodation was something which had to be done within the auspices of the risk management plan, and would therefore need to be taking place alongside supervision requirements of the probation service. I am not therefore persuaded that the panel acted irrationally in indicating that the securing of accommodation had to be within the auspices of the risk management plan and with the approval of the probation service.

40. The position of a Parole Board panel is that it is a matter for the prisoner and those supporting him (his COM and POM) to propose accommodation (and all other arrangements) within a risk management plan. The panel would then be obliged to assess the risk management plan (which would include accommodation arrangements) and make a decision as to whether or not they are considered suitable, in terms of meeting the statutory test. In this case, no rented or purchased accommodation was being proposed or offered by the Applicant or those who were supporting him. The Applicant was not therefore prevented from securing accommodation privately, but the panel were not minded to consider release without identified accommodation arrangements.

41. In the light of the risk factors in this case, the panel were also entitled to indicate that there may be concerns if the Applicant were to reside immediately, on release, in private accommodation.

42. However as indicated above, this was a case where no accommodation was offered or proposed by the Applicant or those supporting and supervising him.

43. The panel's rationale for refusing a further adjournment was set out clearly in the decision, the panel indicated that any further delays to await arrangements both for suitable accommodation and for an assessment of any social services input would postpone the final decision for "*an inordinate length of time*".

44. I am not persuaded that this was an irrational or procedurally unfair conclusion in the light of the history of this case.

Ground 2

45. It is submitted that the panel failed to give sufficient reasons for rejecting the recommendations of the POM and prison instructed psychologist, that the Applicants risk could be safely managed in the community.

Discussion

46. The panel made clear in its decision letter why it had rejected the recommendations of the POM and the prison instructed psychologist. The panel determined that this was a case where there would be substantial reliance upon external controls and honesty in the light of the Applicant's position relating to denial as noted above.

47. The panel took the view that the POM and the prison instructed psychologist had underestimated the effectiveness of the risk management plan in circumstances where the Applicant would not be in probation approved premises and therefore where intensive oversight and monitoring would be limited.

48. The panel were therefore entitled to reject the recommendations of the POM and the prison instructed psychologist, particularly in circumstances where the initial recommendations were made with a view to the Applicant initially residing in probation supported accommodation.

49. The absence of an offer of probation accommodation together with the absence of any identified and stable accommodation in the community were clearly entirely rational reasons for the panel to reject the recommendations by these two

professionals. Accordingly, I do not find that the reasons for rejecting the professional recommendations were inadequate. The reasons were succinct and predominantly related to the fact that the Applicant's risks could not be suitably managed without clear and identifiable arrangement's for accommodation (to support the need for external control and monitoring) within the risk management plan. I am not persuaded that the panel acted irrationally in the sense set out above.

Decision

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

HH Stephen Dawson
15 January 2025