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[2024] PBRA 112

Application for Reconsideration by McCullough

Application

1. This is an application by McCullough ('the Applicant') for reconsideration of the decision of a panel of the Parole Board ('the Board') who on 25 April 2024, after an oral hearing on 28 March 2024, issued a decision not to direct his release on licence.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) provides that applications for reconsideration may be made, either by the prisoner or by the Secretary of State for Justice, in eligible cases (which are specified in rule 28(2)). The Secretary of State is the Respondent to every application for reconsideration made by a prisoner and will be referred to as such in this decision.

3. An application may be made on the ground (a) that the decision contains an error of law and/or (b) that it is irrational and/or (c) that it is procedurally unfair. This is an eligible case, and the application was made within the prescribed time limit.

4. I am one of the members of the Board who are authorised to make decisions on reconsideration applications, and this case has been allocated to me. I have considered the application on the papers. The documents which have been provided to me and which I have considered are:

   (a) The dossier of papers provided by the Respondent for the Applicant's case, which now runs to 291 numbered pages and includes the panel's decision letter;

   (b) The application for reconsideration, which includes detailed representations by the Applicant himself; and

   (c) An e-mail dated 23 May 2024 from the Public Protection Casework Section ('PPCS') of the Ministry of Justice on behalf of the Respondent, stating that he does not wish to submit any representations in response to the application.

Background and history of the case

5. The Applicant is aged 84. He is serving an extended determinate sentence ('EDS') for serious sexual offences which he committed against a young girl (the 'index offences'). The sentence was imposed on 23 March 2015. It comprises a custodial term of 10 years and an extended licence period of 4 years. The Applicant became eligible for early release on licence on 1 August 2021. Unless early release is directed by the Parole

Board he will be automatically released on licence in November 2024 (his 'conditional release date'). His sentence will not expire until November 2028.

6. It is unnecessary for present purposes to provide details of the index offences save to note that they were committed over a period of a little over a year when the Applicant was in his mid-70s. The victim was aged 12 when the offences began. The Applicant had a number of previous convictions (mostly for offences of dishonesty or motoring offences) but none for sexual offences.

7. This is the second review of the Applicant's case by the Board. The first review was concluded in May 2022 when the then panel, after an oral hearing, decided that he did not meet the test for early release on licence.

8. The present review of his case commenced in November 2022. An oral hearing was directed, and the case was allocated to the present panel. The oral hearing was, as noted above, held on 28 March 2024. The panel comprised two independent members of the Board. The Applicant was legally represented. The dossier at that stage comprised 264 numbered pages. Oral evidence was given by the Prison Offender Manager ('POM'), the Applicant, a prison psychologist and the Community Offender Manager ('COM').

9. The Applicant was applying for a direction for early release on licence. None of the professional witnesses supported that application. The panel decided that the Applicant did not meet the test for early release and accordingly did not direct it.

The Relevant Law

10. The panel correctly set out in their decision letter the test for release on licence: it is that the Board cannot direct a prisoner's release on licence unless it concludes that it is no longer necessary that he should be confined in prison for the protection of the public.

The Parole Board Rules 2019 (as amended)

11. Rule 28(1) specifies 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) specifies the types of sentences 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. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. It is made on the grounds of irrationality and procedural unfairness. No error of law is suggested.

Irrationality

14. In **R (DSD and others) v the Parole Board** [2018] EWHC 694 (Admin) (the "Worboys case"), the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It stated at paragraph 116 of its decision:

> *"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. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.

16. The Administrative Court in **DSD** went on to indicate that, in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Board in making decisions relating to parole.

17. The Parole Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see, for example, **Preston [2019] PBRA 1**.

Procedural unfairness

18. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed, thereby producing a manifestly unfair, flawed, or unjust result. These issues (which focus on how the decision was made) are entirely separate from the issue of irrationality (which focuses on the actual decision).

19. The kind of things which might amount to procedural unfairness include:

(a) A failure to follow established procedures;
(b) A failure to conduct the hearing fairly;
(c) A failure to allow one party to put its case properly;
(d) A failure properly to inform the prisoner of the case against him or her; and/or
(e) Lack of impartiality.

20. Other things may also amount to procedural unfairness, and the overriding objective in any consideration of a prisoner's case is to ensure that his case is dealt with fairly.

The discretionary nature of the jurisdiction to direct reconsideration

21. Reconsideration is a discretionary remedy. That means that, even if some error of law, irrationality, or procedural unfairness is established, the reconsideration member considering the case will not necessarily direct reconsideration of the panel's decision. There are circumstances in which it may be appropriate not to do so. For example it may be clear that the panel's decision would have been the same if the error in question had not occurred, or that it is inevitable that a fresh hearing would have the same

outcome. The reconsideration member's discretion must of course be exercised in a way which is fair to both parties.

The Application for Reconsideration in this case

22. This request for reconsideration was made by the Applicant in person on 18 May 2024. The arguments advanced in support of the application will be explained and discussed below.

The reply on behalf of the Respondent

23. The Respondent is entitled to submit representations in response to the application. As indicated above PPCS have indicated on his behalf that he does not wish to submit any representations in this case.

Discussion

24. As indicated above this application for reconsideration is made on the grounds of irrationality and procedural unfairness. There is sometimes, and is in this case, an overlap between those two grounds, and sometimes the same complaint about the panel's decision may be made under either heading.

25. Before discussing the various arguments advanced by the Applicant in support of his application, I need to examine (a) the evidence about the Applicant's progress since his last review by the Board, and (b) the panel's reasons for finding that he did not meet the test for release on licence.

Progress since the last review

26. Up to the time of the last review the Applicant was detained in closed prisons. In September 2022 he was transferred by direction of the Respondent to an open prison.

27. Unfortunately the Applicant's progress through the open prison regime has, through no fault of his, been seriously delayed. This was partly through his physical health problems and partly through administrative delays. It would have been expected that by this stage he would have progressed from escorted day releases (for medical reasons) to unescorted day releases and then to overnight leaves at a probation hostel ('Approved Premises'). In fact he has not yet had any unescorted day releases or overnight leaves. He has progressed to reside in special housing within the prison gates but not to the next stage of housing outside the prison gates.

28. He had in 2018 completed what was believed to be an appropriate risk reduction programme, and at the open prison he has completed a number of 1:1 sessions with the POM but has not been able to complete all the planned sessions because of problems with the POM's availability.

29. There have been no concerns about his custodial behaviour at the open prison.

The panel's reasons for their decision

30. The Panel set out their reasons in the 'Conclusion' section of their decision as follows:

"The panel carefully considered the written and oral evidence and the representations made [by the Applicant's legal representative]. To direct his release, a panel must be satisfied that it is no longer necessary for the protection of the public that [the Applicant] should be confined.

The index offences were very serious in nature and committed against a young child that [the Applicant] met online ….The victim was vulnerable and despite knowing her age, [the Applicant] continued his contact with her, travelled to meet the victim and booked hotels which is where the offences had taken place.

[The Applicant] has completed [an appropriate risk reduction programme] and progressed to open conditions. He had started consolidation work but through no fault of his own, not able to finish it as yet and he has not had the opportunity to undertake any periods of overnight leave on temporary licence. In the panel's opinion, there is no clear evidence to support a finding of a reduction in the risks that [the Applicant] poses, he has unrealistic plans for the future and in the panel's opinion, he has limited insight into his risks, was not able to tell the panel his risk factors and the [Risk Management Plan] is heavily reliant on the external factors. In the panel's opinion, [the Applicant] has insufficient internal controls at the present time. The panel agreed with the evidence of all the witnesses that he does not meet the Parole Board test at this time. Therefore, in the panel's view, he cannot be managed safely in the community at this time.

The risk he poses is unmanageable at this time in the community and the panel concluded that it was not yet possible to evidence that he met the public protection test. In consequence, the panel concluded that it could not direct his release."

The Applicant's arguments

31. The Applicant set out his arguments lucidly and is to be commended on doing so. I will consider each of his arguments in turn.

Argument 1: The panel unreasonably regarded the Applicant's plans for the future as 'unrealistic'.

32. The Applicant told the panel about his plans in the course of his evidence. The panel recorded his evidence about them as follows:

"In the future, he hoped to work and believed that he had five years left …. He is currently in contact with some family members who will provide support …. In the future, he hoped to have his own accommodation after a period in an approved premises and wanted to set up an industrial cleaning business and a construction agency business. [He] showed the business plan during the hearing and this was uploaded to the dossier for the panel to consider thereafter."

33. In his representations the Applicant states: *"My business plan has been looked at by the prison tutors whose job is to teach exactly the plan I produced, and advised that it was a totally realistic plan for future employment."*

34. The POM and the COM share the panel's view that the Applicant's plans at his age for setting up and successfully running his own business in the above fields are unrealistic, and the psychologist seems to have been of the same view: she wrote in her report that the Applicant would *"require further insight to what employment he will be able to undertake in the community".*

35. I have some sympathy with the Applicant's aspirations but I think he can reasonably be regarded as having under-estimated the difficulties which he is likely to face if he attempts to put those aspirations into effect. I do not, therefore, think that the panel's position is irrational. There is a possibility that, if the Applicant is unable to obtain and keep employment of the kind which he would like to be able to pursue, his risk of future sexual offending might increase.

Argument 2: Criticism of the panel's risk assessments

36. Risk assessment is a difficult task, and probation and psychologists have a number of 'tools' which they use to assess (a) the risk of an offender re-offending and (b) the risk of his causing serious harm if he does re-offend.

37. The tools used by probation to assess an offender's risk of various types of re-offending are statistical. These statistical tools can be very useful in assessing risk but they need to be viewed with some caution when the offender has only one conviction for a particular type of offending but it is a an exceptionally serious one. In this case the type of offending on which the panel was required to focus was the risk of future sexual offending, for which he has had one conviction as described above.

38. The statistical tools in this case indicate that the Applicant poses only a low risk of proven general offending, violent offending, non-violent offending, indecent image offending and recidivism but a medium risk of "*contact sexual offending*".

39. The assessment of the prisoner's risks of causing serious harm if he were to re-offend is not statistical but a 'clinical' assessment by the COM and his or her supervisors using various 'scores' and set out in a lengthy document known as 'OASys' which is updated from time to time. In this case probation assessed the Applicant's risk of serious harm to children and known adults as high, his risk to the public as medium and his risk to staff as low. These assessments were set out in the OASys document as last updated in February 2023. In her evidence the COM told the panel that she believed the OASys assessment of the Applicant's risk to children was an underestimate and should have been higher (according to the appropriate 'scores').

40. The panel in their decision agreed with all the above assessments (statistical and clinical) except the clinical assessment of the risk to children if the Applicant were to re-offend, which they believed to be 'more akin to high' than medium. The Applicant in his representations (perhaps not surprisingly as these things are quite complicated) mistakenly complains that the panel irrationally decided that one of the statistical assessments of the Applicant's risk of re-offending was an underestimate. In fact, as I have explained, it was probation's clinical assessment of the risk of serious harm to children (if the Applicant were to re-offend) which the panel believed was an underestimate. The panel were fully entitled to that belief, which (as I have also

explained) accorded with the COM's view and, apparently, a correct application of the appropriate scores.

41. The Applicant refers to the OASys as having been "*last made in 2017*". In fact, as I have explained, it had been updated in February 2023. It might have been better if it had been updated nearer to the date of the hearing. If it had been, it might well have increased the assessment of the risk of serious harm to children from medium to high (in accordance with the COM's view).

42. As regards the risk of the Applicant committing further sexual offences, the Applicant points out that the psychologist (using a different system from probation's) assessed that risk as "*low to moderate*". This of course differs from probation's statistical calculation that it was "*medium*" but unlike psychologists probation use a simple scale of low/medium/high/very high and they do not use an intermediate assessment such as 'low to moderate'. The panel were fully entitled to accept probation's assessment. The difference between the two assessments was of no real significance the purpose of deciding whether the Applicant met the test for early release on licence.

43. I cannot therefore agree with the Applicant's criticisms of the panel's risk assessments.

Argument 3: Criticisms of the panel attaching weight to irrelevant matters.

44. The first section of the panel's decision deals with the Applicant's offending. After summarising the index offences, the panel refer to allegations of sexual offences in 2011 involving a female child under the age of 16 who was the daughter of a previous partner. The Applicant had always denied those allegations, putting forward reasons to support his contention that they had been fabricated by the alleged victim. He had been tried but acquitted by the jury on all charges.

45. The panel then go on to refer to the previous offences of which the Applicant had been convicted, which they pointed out included burglary, driving whilst disqualified, larceny and on two occasions non-compliance with the orders of the courts, police or probation.

46. They conclude by stating: "*This history raises concerns about [the Applicant's] capacity to cause serious harm to children in particular. He has also demonstrated a pattern of poor compliance albeit many years ago, which raises concerns about the manageability of his risks in the community, should he be released.*"

47. The Applicant submits that that the panel irrationally attached weight to these historical matters in assessing his current risk to the public. There is a good deal of force in this submission.

48. As regards the 2011 allegations it is now, as a result of the decision of the Supreme Court in **R (on the application of Pearce) v the Parole Board (2002) UKSC 4)** permissible in certain circumstances for a panel to attach some weight to unproven allegations, but this is something which always requires some caution. Where a jury has disbelieved the maker of an allegation, a panel of the Board will need a certain amount of evidence before they can justifiably attach weight to that allegation. There does not appear to have been any such evidence in relation to this allegation, and I am

prepared to accept that it could be regarded as irrational and/or procedurally unfair for the panel to indicate that the allegation could be treated as a 'matter of concern' to which weight could be attached in the panel's assessment of the Applicant's current risks.

49. As regards the Applicant's previous convictions, it is of note that they were for offences unrelated to sexual offending, which was the type of offending on which the panel needed to focus. The last of the Applicant's convictions for offences of dishonesty had occurred more than 30 years ago: since then his convictions were for motoring offences. Again I am prepared to accept that it could be regarded as irrational and/or procedurally unfair for the panel to say that the Applicant's previous convictions could treated as a 'matter of concern' to which weight could be attached in the panel's assessment of the Applicant's current risks.

50. As regards the Applicant's convictions for non-compliance of one kind or another, again those occurred a very long time ago and the Applicant's compliance in recent times has been excellent. Again I am prepared to accept that it could be regarded as irrational and/or procedurally unfair for the panel to indicate that those long ago instances of non-compliance could be treated as a 'matters of concern' to which weight could be attached in the panel's assessment of the likelihood of the Applicant failing to comply in the future.

The Applicant's concern about possible misinterpretation of his remarks

51. The Applicant has repeatedly stated, when asked what benefit he thought he had got from the programme which he completed in 2018, that he did not think it had done anything for him. He is anxious that that should not be interpreted as indicating that he had not participated in the course and had shown no remorse, both of which he says would be quite wrong.

52. His remarks do not in fact seem to have had any adverse effect on the panel: they simply recorded, without making any adverse comments, that he had completed the programme. He is, understandably, anxious to point out that that particular programme is now being rolled down and will be replaced by another programme whose focus is different. It seems to be acknowledged by the authorities that the present programme has its limitations, and it is hoped that the new one will be more effective.

53. There is certainly no criticism of the Applicant for adhering to his view of the present programme, and no criticism of the panel for the way in which they referred to the programme.

A final point: should I exercise my discretion for or against directing reconsideration of the panel's decision?

54. It will be seen that I have found that in three respects there were elements of irrationality and/or procedural unfairness in the panel's decision. As I have explained above, that does not necessarily mean that I must direct reconsideration of the panel's decision. I need to exercise my discretion as to whether I should or should not do that.

55. The first point which I should make in that connection is that there is no mention in the concluding section of the panel's decision (see paragraph 30 above) to the past matters which they indicated in the first section (see paragraphs 44-6 above) were of concern. That would seem to indicate that they did not at the end of the day attach much (if any) weight to the past matters.

56. If one examines the concluding section of the decision and the evidence of the professional witnesses the key points in the views both of the panel and of the professionals were that before it would be safe to release the Applicant into the community he would need to complete the 1:1 work with the POM and to be tested by a series of temporary releases (initially day releases and then overnight ones at Approved Premises). These are almost always the stages by which a serious offender needs to progress through the open prison regime. It is regrettable, but a fact, that the Applicant has been unable thus far to complete that process.

57. I cannot find any reason to dissent from the unanimous opinions of the panel and the professional witnesses. I must therefore conclude the panel's decision would have been the same if they had made no mention of the 'matters of concern'.

58. That being so I am bound to exercise my discretion by declining to direct reconsideration of the panel's decision.

Decision

59. For the reasons which I have explained above I must refuse this application. It is unfortunate that through no fault of his own the Applicant has not been able to demonstrate a sufficient reduction in his risk to justify a direction for early release on licence. I hope he will be able to progress in the usual way before he is automatically released on licence in October.

Jeremy Roberts
7 June 2024