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[2024] PBRA 125

Application for Reconsideration by Aslam

Application

1. This is an application by Aslam (the Applicant) for reconsideration of a decision of an oral hearing panel dated 24 May 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 oral hearing decision, the dossier (consisting of 377 pages), and the application for reconsideration (dated 13 June 2024).

Background

4. The Applicant received an extended sentence of ten years imprisonment with a five year extension period on 28 January 2015 following conviction for causing/inciting a boy under 13 to engage in sexual activity (no penetration). He also received concurrent determinate sentences of imprisonment for sexual assault of a male child under 13 (seven years) and five counts of making indecent photographs or pseudo-photographs of children (12 months x 2, nine months, four months, two months).

5. The Applicant was 39 years old at the time of sentencing and is now 49 years old.

6. The Applicant was automatically released on licence on 1 June 2023. His licence was revoked on 19 June 2023, and he was returned to custody the following day. It is reported that he failed to return to his designated accommodation.

Request for Reconsideration

7. The application for reconsideration has been submitted by solicitors on behalf of the Applicant.

8. It argues that the decision not to release the Applicant was procedurally unfair.

9. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

10. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether to direct his release. This is the Applicant's first parole review since his recall.

11. A two-member panel of the Parole Board convened to hear the Applicant's case on 20 May 2024. It heard oral evidence from the Applicant, together with his Prison Offender Manager (POM), his Community Offender Manager (COM), and a Trainee Forensic Psychologist commissioned by HMPPS (Psychologist).

12. The Applicant was legally represented throughout the hearing. The Respondent was not legally represented.

13. The professional opinions of the witnesses differed. The POM and Psychologist considered that the Applicant was suitable for release, whereas the COM considered that he needed to remain in closed conditions to complete further work (which included exploration of the potential for a therapeutic community (TC)).

14. The panel did not direct the Applicant's release.

The Relevant Law

15. 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)

16. 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)).

17. 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)).

18. 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

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; and/or
    (e) the panel was not impartial.

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

Irrationality

22. In *R(DSD and others) v the Parole Board* [2018] EWHC 694 (Admin), the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said 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."*

23. This test was set out by Lord Diplock in *CCSU v Minister for the Civil Service* [1985] AC 374. The Divisional 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 Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.

24. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: *Preston* [2019] PBRA 1 and others.

The reply on behalf of the Respondent

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

Discussion

26. It is submitted that the hearing was procedurally unfair since the panel misinterpreted evidence and made an error of fact with regard to work being undertaken at a TC on an earlier sentence.

27. The application draws attention to the following paragraph in the panel's decision:

> *"[The Applicant] noted that he had been placed on a TC during an earlier sentence and had then be (sic) recommended for alternative work instead. [The Psychologist]*

and the POM knew of this, the COM did not. [The Applicant] may have engaged with courses on an earlier sentence, however, this didn't prevent him from committing further serious offences (the Index Offences)".

28. The Applicant says he told the panel that he had been placed onto the TC while on this sentence in 2014 and was recommended alternative work instead by his probation officer at the time.

29. It is argued that this is an error of fact since the contact index offences were committed on 31 May 2013. I note this is the date reflected in the trial judge's sentencing remarks.

30. If the Applicant had been placed briefly on the TC in 2014, this would have been while he was on remand prior to sentencing on 28 January 2015.

31. An error of fact is not, of itself, a ground for reconsideration. However, in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, the Court of Appeal held that a material mistake of fact giving rise to unfairness was a ground on which to quash a decision on judicial review. Although the reconsideration mechanism under rule 28 is not judicial review *per se,* it nevertheless provides a means by which a decision by a public law body may be scrutinised and potentially sent for a fresh determination. Given that clear analogy, I consider that the case law pertaining to mistake of fact in judicial review is equally applicable to the case before me. This approach has already been taken in cases relating to set aside of parole decisions under rule 28A (*Johnson* [2024] PBSA 11).

32. *E* set out four conditions which must be satisfied for a successful challenge on the basis of mistake of fact:

    a) The mistake is one as to an '*existing fact'* (including a mistake as to the availability of evidence on a particular matter);
    b) The fact or evidence must be '*established'* in the sense that it is '*uncontentious and objectively verifiable'*;
    c) The appellant (or his advisors) must not have been responsible for the mistake;
    d) The mistake must have played a '*material'* but not necessarily decisive part in the decision-maker's reasoning.

33. In my view, the first three conditions are satisfied in the present case:

    a) The fact of the Applicant's engagement (or otherwise) with a TC existed before the decision was made; indeed, the panel referred to it in its decision.
    b) There could be no contention regarding the dates at which the Applicant's was (or was not) at a TC at the point the decision was made since any such dates would be objectively verifiable via prison records.
    c) The Applicant was not responsible for the mistake. There is nothing to suggest the Applicant or his legal representative wilfully or inadvertently misled the panel.

34. This case therefore turns on whether the reasons given for the decision are clear that the link between perceived withdrawal from a TC prior to the commission of the index offences was at least a material part of the panel's reasoning.

35. It is submitted this error of fact had a significant impact on the panel's assessment. I disagree. The relationship between the Applicant's prior curtailed engagement at a TC and the commission of the index offence is not a factor that is referenced at all in the decision's conclusions.

36. Moreover, the panel's statement at paragraph 3.5 is that the Applicant "*may have engaged with courses on an earlier sentence"*. Although the context may suggest otherwise, its view is not objectively solely confined to the Applicant's curtailed engagement at a TC. At the very least, the Applicant had a substantial period of imprisonment from 2005 following conviction for wounding with intent to do grievous bodily harm, and it cannot be said that he applied any learning from that sentence in the commission of the index offence.

37. Moreover, the panel's conclusion is clearly based upon its disagreement that a 2019 intervention was sufficient; it noted his failure on licence after a short time and his history of non-compliance on earlier sentences and the index offences taking place very shortly after release. Although the panel may have been mistaken about the relative timings between a brief engagement in a TC and the index offences, I do not find this to have been a material part of its reasoning.

38. Following the test set out in *E,* I do not find there to have been a material error of fact in this case and consequently find no procedural unfairness either.

Decision

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

Stefan Fafinski
08 July 2024