

[2024] PBRA 139

Application for Reconsideration by Bilton

Application

1. This is an application by Bilton (the Applicant) for reconsideration of a paper decision dated 24 June 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 paper decision, the dossier (consisting of 403 pages), and the application for reconsideration (dated 4 July 2024). I have also seen various items of email correspondence to which I shall refer later.

Background

4. The Applicant received an extended sentence comprising a custodial period of 51 months with an extended licence period of six years on 11 July 2019 following conviction for sexual assault of a male child under 13. He was also made subject to a hospital order and a sex offenders notice for life. On the same occasion he also received a two year concurrent determinate sentence for taking a child without lawful authority. He pleaded guilty to both charges.
5. The Applicant was 26 years old at the time of sentencing and is now 31 years old.
6. He was automatically released on licence on 6 January 2023. His licence was revoked on 24 February 2023, and he was returned to custody on 27 February 2023. This is his first recall on this sentence. His sentence expiry date is reported to be in January 2029.

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

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9. 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 recall.
10. The case was first reviewed by a single member, Member Case Assessment panel (MCA panel) on 17 July 2023. This panel directed the matter to an oral hearing. Further directions were set for various reports, including a psychological risk assessment (PRA) and updates from the Applicant's Community Offender Manager (COM), and the prison mental health and substance misuse services. Hearing logistics were also set out: the hearing was to be listed for five hours, before a three member panel including a psychologist specialist member. In directing a psychologist panel member, the MCA panel noted that the Applicant has "*learning difficulties and challenges, some speech impairment and language problems, and...specialist input should be helpful*". The hearing was also considered to be suitable for video link.
11. The oral hearing was listed for 24 July 2024.
12. On 4 June 2024, the appointed oral hearing panel chair, reviewed the case and issued further Panel Chair Directions (PCDs). This is standard procedure. The PCDs noted that, although the case remained listed for an oral hearing on 24 July 2024, the new evidence contained within the PRA led the panel chair to consider that "*there was merit to concluding this review on the papers*". Legal representations on that matter were invited by 18 June 2024 (as required by rule 21(3) which gives a 14 day window once notice has been given that the panel chair was considering making a direction for the case to be concluded on the papers).
13. These PCDs were sent to the parties (including the Applicant's legal representative) by the Parole Board Case Manager at 16:54 on 4 June 2024.
14. On 5 June 2024 at 13:05, the Applicant's legal representative sent a Stakeholder Response Form (SHRF) to the Public Protection Casework Section (PPCS) on behalf of the Respondent. PPCS added their comments and sent the completed SHRF to the Parole Board Case Manager on 5 June 2024 at 16:32.
15. On 10 June 2024 at 13:53, the Parole Board Case Manager forwarded the completed SHRF to the panel chair.
16. On 24 June 2024 at 13:14, the panel issued its decision to the Case Manager, making no direction for release. It noted that no representations had been received concerning concluding the review on the papers. This was issued to the parties on 25 June 2024 at 12:57.

The Relevant Law

17. 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)

18. 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)).
19. 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)).
20. 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

21. 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.
22. 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.

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

Irrationality

24. 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.
25. 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."

26. 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).
27. 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.
28. 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.
29. 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

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

Discussion

31. Submissions on behalf of the Applicant argue that the decision was procedurally unfair since the panel chair did not consider the SHRF of 5 June 2024.
32. The application states that the PCDs of 4 June 2024 were (for reasons that are unclear) not received by his solicitors' office until 12 June 2024. I have carefully checked the email issuing these PCDs and the email address of the Applicant's legal representative is correct. There is no evidence of any administrative failing on the part of the Parole Board.
33. Unfortunately, the Applicant's legal representative was on leave and thereby missed the deadline for representations against concluding the matter on the papers.
34. It cannot therefore be said that the Applicant made any specific representations in response to the direction inviting views on the proposal to conclude the matter on the papers.
35. However, it is argued that the SHRF of 5 June 2024 did, in fact, articulate the Applicant's position.
36. The relevant part of that SHRF reads as follows:

"I have now received the timetable for [the Applicant's] hearing. The hearing is listed for a remote hearing. I represented [the Applicant] at his last hearing and this hearing was a face to face hearing as [the Applicant] has learning difficulties, a severe speech impediment and is deaf. There was, and still are, concerns that [the Applicant] would be unable to fully engage in the hearing process and he would not be able to understand what was going on if the case was conducted by a remote hearing. I have received an email from the POM voices [sic] her concerns regarding this. I would therefore ask that the hearing be listed as a face to face hearing to ensure that the process is fair to [the Applicant]."

37. This passage does not, in my view, offer any insight into the Applicant's position with regard to potential conclusion on the papers other than asking for any oral hearing to be listed face to face rather than remotely.
38. Therefore, when the panel chair came to decide to conclude the case on the papers, he had no representations about not doing so. The SHRF that he did have did not warrant any response, since it concerned the Applicant's preferences for a hearing that was considered to be unnecessary. The panel's view of the SHRF is implicit in its decision to conclude the review on the papers. While it might have been administratively tidier for the panel chair to have responded to the SHRF with words to the effect of "if the hearing does go ahead, it will be remote/face to face" in the period awaiting representations, the failure to do so does not make the decision to refuse the Applicant's release procedurally unfair.
39. Moreover, the panel chair issued the decision in reply to the Case Manager's email of 10 June 2024, so it cannot be said the panel chair was not aware of the SHRF.
40. It is also argued that the decision to conclude on the papers was irrational. That particular decision is not one that can be challenged via the reconsideration mechanism (which only applies to the decision not to direct release). However, the decision to conclude on the papers in this particular case inexorably led to the decision not to release the applicant. As such, I am prepared to consider them as linked such that an irrational decision to conclude on the papers would indicate an irrational decision not to direct release.
41. The Applicant is assessed as presenting a very high risk of serious harm to children. This means that there is an imminent risk of serious harm, more likely than not to happen imminently and for the impact to be serious. In the professional opinion of the PRA author there was core risk reduction work to be completed in custody prior to risk being managed in the community. Against this backdrop, it cannot be sustainably argued that the decision to conclude on the papers was one that no other panel would have taken.
42. Finally, although the application raises point of fairness under the principles of *Osborn, Booth and Reilly* [2013] UKSC 61, they are essentially belated submissions in response to the PCDs and do not impact the rationality of the panel's decision not to direct the Applicant's release.

Decision

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

Stefan Fafinski
25 July 2024