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[2024] PBRA 15

Application for Reconsideration by Roberts

Application

1. This is an application by Roberts (the Applicant) for reconsideration of a decision of an oral hearing panel dated 14 December 2023 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 846 pages), and the application for reconsideration.

Background

4. The Applicant received a sentence of detention at Her Majesty's pleasure on 5 July 2007 following conviction for murder to which he pleaded guilty. His tariff was set at 11 years less time spent on remand. This was reduced to nine years less time spent on remand by the Court of Appeal (*R v Roberts* [2008] EWCA Crim 59) and expired in March 2016.

5. The Applicant was 17 years old at the time of sentencing and is now 34 years old.

Request for Reconsideration

6. The application for reconsideration is dated 30 December 2023. It has been drafted by solicitors acting on behalf of the Applicant. It submits that the decision was irrational. No submissions were made regarding procedural unfairness or error of law.

7. This submission is supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in December 2019 to consider whether or not it would be appropriate to direct his release. If the Board did not consider it appropriate to direct release, it

was invited to advise the Respondent whether the Applicant should be transferred to open conditions.

9. After a series of adjournments, the case proceeded to an oral hearing on 1 December 2023. The panel consisted of three members including a psychologist specialist member. It heard oral evidence from the Applicant, together with his Prison Offender Manager (**POM**), Community Offender Manager (**COM**), a resettlement caseworker and a HMPPS psychologist. The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate.

10. The panel did not direct the Applicant's release but did make a recommendation for open conditions. It is only the decision not to release the Applicant that is open for reconsideration.

The Relevant Law

11. 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

12. 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)).

13. 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)).

14. 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

15. 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."*

16. 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.

17. 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

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

Discussion

19. It is submitted that the panel's decision was irrational since there was unanimous and strong support for the Applicant's release at the hearing and the panel did not provide sufficient reasons for rejecting the recommendations of the professional witnesses.

20. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in *DSD*, they have the expertise to do it.

21. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should clearly explain its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, following *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin). As Saini J noted (at para. 33), the test for irrationality in the context of a parole decision should be reframed as "*does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion?"*

22. In its decision, the panel sets out a number of factors which supported its conclusion not to direct the Applicant's release:

    a) Its concern that the Applicant had failed a drugs test on 10 August 2023 and initially told his POM that it was a result of medication but later admitted that he had been using a new psychoactive substance (commonly known as 'Spice') over a period of about a week.

    b) The Applicant was a Category B prisoner and had not been recategorised at his last review in 2021. It was concerned that direct release from Category B conditions would be a struggle, particularly as the Applicant had spent the

past seven years on "*the same, small and well controlled wing"* (and therefore had limited exposure to destabilising influences).

c) Its concern that professional witnesses, when making recommendations for release, had given very significant weight to the benefits of release to the Applicant and far less weight to the statutory release test and hence the protection of the public.

d) Since the Applicant's last parole review, he had:

i. been deselected from a Therapeutic Community due to his mood and paranoid thinking;

ii. been involved in an altercation with another prisoner during which he reportedly grabbed a mop handle which could be used as a weapon;

iii. used drugs and not initially disclosed that he had done so (see (a) above).

e) He had also assaulted staff in 2015, receiving a further conviction on two counts of assault occasioning actual bodily harm and a concurrent determinate three year sentence.

f) The Applicant had spent no time in the community as an adult and was still having paranoid thoughts.

23. The panel agreed with the assessments of professional witnesses that the Applicant had completed all risk reduction work that was necessary to be done in closed conditions but did not agree that he met the test for release. It assessed that the Applicant's risk of committing a serious further offence could be imminent in the community, particularly if he lapses into substance misuse.

24. The application argues that the professional witnesses responded in questioning that their recommendations for release were not based on what was best for the Applicant but had applied the public protection test: in considering what would be best for the Applicant, this, in turn provided enhanced public protection.

25. It is further argued that reference to the Applicant's category B status when assessing risk was irrelevant and was unfairly weighted against him.

26. It is also argued that, although the Applicant was not initially open with his POM about his lapse into substance misuse, he was open eventually. Moreover, any lapse would be detected very quickly under the proposed additional licence conditions relating to drug testing and, even if he was to lapse, the risk of violence was not imminent.

27. While the professional witnesses are said to have considered the public protection test in conjunction with the benefits of release to the Applicant, it is not irrational for the panel to assess that they had overweighted the benefits and underweighted the need to protect the public. The panel is, as is acknowledged, entitled to depart from the recommendations of witnesses provided it gives reasons for doing so.

28. It was also not unreasonable for the panel to consider the Applicant's Category B status when considering the significant step of whether he could be released directly from closed conditions. Such a consideration would have been equally valid if the Applicant had, in fact, been downgraded to Category C conditions. It was not irrational for the panel to consider, in whatever terms, the Applicant's position insofar as directed release into the community was concerned.

29. Finally, it was not unreasonable for the panel to have concerns about the Applicant's openness in relation to his drug lapse. It was detected on a test, as it would be in the community, but the Applicant initially lied to his POM about the reasons for failing the test.

30. In any event, and as set out above, these were not the only reasons upon which the panel founded its conclusion.

31. The panel set out very clear reasons why it concluded that the Applicant did not meet the test for release. It cannot be said that it is unclear how the panel arrived at its decision. The panel has discharged its duty to give reasons.

32. The legal test of irrationality is essentially that the panel's decision not to release the Applicant was so illogical that every other panel would have decided otherwise and released him. The panel's analysis is logical, cogent and sufficiently thorough. The legal test sets a high bar which this case does not meet. Accordingly, this application must fail.

Decision

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

Stefan Fafinski
15 January 2024