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[2024] PBRA 163

Application for Reconsideration by Boyle

Application

1. This is an application by Boyle (the Applicant) for reconsideration of a decision of a panel of the Parole Board (the Panel) issued on the 25 June 2024 not directing the Applicant's release but recommending transfer to open conditions.

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. This is an eligible case, and the application was made in time.

3. I have considered the application on the papers. These are the application for reconsideration, the decision and the dossier consisting of 690 pages.

Request for Reconsideration

4. The application for reconsideration was received within the time allowed for submitting applications for reconsideration.

5. The grounds for seeking a reconsideration are that the decision not to direct release was irrational; there was no risk of serious harm and the decision was disproportionate to the potential risk the Applicant poses.

Background

6. The Applicant relies on the background in support of this application so I will deal with it in some detail. The Applicant was sentenced to imprisonment for public protection (IPP) on 15 September 2008 for an offence of wounding with intent to cause grievous bodily harm with a minimum period to serve before he could apply for parole of 2 years 25 days. Following a period in open conditions the Applicant was first released on licence in March 2016. He was recalled in June 2016 having failed to keep in contact with probation. Although it was not the cause of his recall, the Applicant was then investigated by the police for offences relating to coercion of three women including a girl of 15 to engage in sexual conduct with him over the internet. These offences were committed while the Applicant was in open conditions and on licence.

7. These investigations took a considerable amount of time and in November 2018 the Applicant was re-released by direction of the Parole Board who took the view that it was up to the courts to deal with the offences the subject of police investigation.

8. On 16 May 2019 the Applicant was recalled after he was convicted of offences arising out of the police investigations. This was despite the fact that the Court indicated that the Applicant would receive a non-custodial sentence: namely a community payback order. This sentence was later revoked as the Applicant could not complete the sentence in custody and it was replaced with a term of imprisonment of 6 months. The Applicant had denied many aspects of the prosecution case against him but was nevertheless convicted.

9. The first hearing by the Parole Board after this recall was on 2 June 2020. The panel refused release as it felt that the risk factors indicated by the sexual offences were not properly understood and the panel was not satisfied that the risk management plan was sufficient to manage the risk that the Applicant presented.

10. It was not suggested by the panel that the risks apparent from the conviction for which the sentence of IPP was imposed were a factor in the refusal to direct release which arose out of the risks demonstrated by the later conviction.

Current parole review

11. The case was referred to the Parole Board for this review on 24 January 2022. There have been numerous delays in its completion caused by the need for the Applicant to complete an appropriate course relating to the risk factors arising from the conviction for sexual offences. There were considerable delays in securing attendance on a course and when it was completed, the hearing was further adjourned to obtain the report of a psychologist to assess the risk presented by the Applicant in the light of the course completion report and the contents of the course.

12. The oral hearing finally took place on 13 June 2024. The panel heard evidence from a prison social worker, a lifer liaison officer, a community based social worker, a community offender manager and a prison instructed psychologist. All of the professionals considered that the Applicant's risk could be managed in the community. The other professionals all, to some extent, relied on the assessment of the psychologist.

The Relevant Law

13. The panel correctly sets out in its decision letter issued on 25 June 2024 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

14. 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)).

15. 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)).

16. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28.

Irrationality

17. 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.

18. 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."*

19. 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).

20. 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.

21. 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.

22. 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.

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."

The reply on behalf of the Secretary of State (the Respondent)

24. The Respondent has made no submissions in response to this application.

Discussion

25. It is not difficult to understand the frustration of the Applicant and his legal representative at the decision not to direct release. The decision of the panel was not based on any risk arising from the conviction for which the IPP had been imposed. Rather it arose from the sexual offences for which the court originally intended to pass a non-custodial sentence which was then replaced with 6 months imprisonment after the Applicant's recall. The Applicant satisfactorily completed a course intended to deal with sexual violence, after which, the prison psychologist assessed that the Applicant's risk could be safely managed in the community.

26. That does not mean that the decision was irrational. The panel were concerned that there might be difficulties in the effectiveness of the course for someone who was largely denying any criminal activity. He did admit that in the case of one victim he had threatened to put naked images of her on Facebook but otherwise denied using coercion to encourage sexual conduct. The panel accepted that the Applicant was perfectly entitled to maintain his denial but had to reach its conclusions as to risk on the basis that he was guilty in the light of the convictions. In consequence of the Applicant's denials the panel had to consider whether necessary lessons had really been learnt. The panel was concerned that the Applicant by denying his offending was not taking responsibility for his behaviour which was an objective of the training.

27. The panel questioned the psychologist extensively and concluded that they were satisfied that the Applicant's risk factors in relation to general violence could be managed in the community but were not satisfied that the risks apparent from the sexual offending could. They were not satisfied which risk factor had been addressed on the course or how. They were also concerned that much of the psychologist's opinion had to be informed by self report from the Applicant.

28. The panel by rejecting the application for release differed from the views not only of the psychologist but the other professionals as well. The panel considered the evidence of all the witnesses with care and set out why they disagreed with them. In my judgment the panel gave sufficient reasons as to why they disagreed with the recommendations.

29. In the end the panel decided that on all the evidence they were not satisfied that the risk revealed by the sexual offences had been reduced to such an extent that the Applicant could be safely managed in the community. The panel were entitled to disagree with the opinions of the professionals and there was evidence to support their view.

30. The Applicant submits that it was irrational to find that the risk presented by the Applicant of sexual offending was one of serious harm. Alternatively it is submitted that there was not a substantial risk of serious harm and that not to direct release was disproportionate to the level of potential risk.

31. The Applicant relies in support of those submissions on the original non-custodial sentence proposed by the Judge. While there is some merit in that submission, anyone who has been found guilty of coercive behaviour in a sexual context in particular with a young girl may present a risk of causing serious harm, in my judgment, until the level of risk is reduced. The risk the panel is concerned with has to be not insignificant; so a minimal risk would not justify keeping the Applicant in custody. Having said that, in my judgment, the panel were entitled to find on the evidence that they heard that the risk was not insignificant.

32. The test for the Parole Board is based on protecting the public from serious harm and the introduction of the concept of proportionality into that test does not seem to me to be appropriate or helpful. The test is a clear one and the panel applied it.

33. While I have some sympathy for the Applicant and I suspect it was a difficult decision for the panel to take, I do not consider that it was irrational. That is rightly a very high bar as it was for the panel to decide on the evidence that they heard whether the Applicant met the test for release.

Decision

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

J Saunders
3 September 2024