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[2024] PBRA 192

Application for Reconsideration by Hartley

Application

1. This is an application by Hartley (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 21 August 2024. The decision was not to direct 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. This is an eligible case, and the application was made in time.

3. I have considered the application both on the papers and after listening to the recording. The papers considered were the dossier, the oral hearing panel decision, the response by the Secretary of State (the Respondent) and the reconsideration representations by the Applicant's legal adviser.

Request for Reconsideration

4. The application for reconsideration is undated but was received on 5 September 2024.

5. The grounds for seeking a reconsideration are set out below. The application was not made on the published form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints and, reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made.

6. I have attempted to reflect and individualise the grounds, the application for reconsideration was in narrative form. No specific grounds were numbered or identified individually. The application was valid, however legal advisers can assist in ensuring that the issues are addressed if individual grounds are identified and numbered and the arguments supporting those grounds are included.

7. I listened to the recording of the hearing in this case.

Background

8. The Applicant was convicted of attempted murder and possession of a firearm. The Applicant repeatedly shot at the victim while chasing him down the street. The Applicant received a sentence of imprisonment for public protection (IPP). The minimum term of imprisonment imposed by the judge was 12 and a half years and 7 and a half years to run concurrently. The Applicant was aged 24, at the time of sentence.

Current parole review

9. The Applicant was 37 years old when he appeared before the Parole Board panel. This was the first application by the Applicant for release following the end of his tariff period. The panel hearing was conducted by a panel consisting of two independent members and a psychology member of the Parole Board. The panel heard evidence from the Applicant's Prison Offender Manager (POM), Community Offender Manager (COM) and a prison instructed psychologist. The Applicant was legally represented.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 21 August 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)

11. 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)).

12. 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)).

13. 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

14. 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.

15. 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."*

16. 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).**

17. 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.

18. 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.

19. 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.

Procedural unfairness

20. 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.

21. 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;
    (e) the panel did not properly record the reasons for any findings or conclusion; and/or

(f) the panel was not impartial.

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

Error of law

23. An administrative decision is unlawful under the broad heading of illegality if the panel:
    a) misinterprets a legal instrument relevant to the function being performed;
    b) has no legal authority to make the decision;
    c) fails to fulfil a legal duty;
    d) exercises discretionary power for an extraneous purpose;
    e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
    f) improperly delegates decision-making power.

24. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

25. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin), R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:

    (a) the progress of the prisoner in addressing and reducing their risk;
    (b) the likeliness of the prisoner to comply with conditions of temporary release
    (c) the likeliness of the prisoner absconding; and
    (d) the benefit the prisoner is likely to derive from open conditions.

26. 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.*"

Reconsideration as a discretionary remedy

27. Reconsideration is a discretionary remedy. That means that, even if an error of law, irrationality, or procedural unfairness is established, the Reconsideration Member considering the case is not obliged to direct reconsideration of the panel's decision. The Reconsideration Member can decline to make such a direction having taken into account the particular circumstances of the case, the potential for a different

decision to be reached by a new panel, and any delay caused by a grant of reconsideration. That discretion must of course be exercised in a way which is fair to both parties.

28. The panel had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant as well as the witnesses. The Applicant was also legally represented throughout. Where there is a conflict of opinion, it was plainly a matter for the panel to determine which opinion they preferred, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above.

29. Cases in which the party to Parole Board cases have been represented by a lawyer are highly unlikely to generate a successful appeal if there had been no challenge made to the alleged irregularity by the Applicant, save in the event for instance of a failure by the other party (for example, a failure to disclose material relevant to the ultimate decision to the Applicant).

The reply on behalf of the Respondent

30. The Respondent made no representations.

Grounds and Discussion

Ground 1

31. The Applicant's legal adviser submits that the Applicant's POM believed that the Applicant met the test for release. It is therefore submitted that, as the Applicant had spent most of his time with his POM, it would be irrational to dismiss the POM's view.

Discussion

32. At paragraph 3.5 of the oral hearing decision, the panel noted that the POM considered that the Applicant met the test for release. However, this comment was qualified by the fact that the POM deferred to the views of the COM. The COM was not recommending release but recommended a progression to an open prison. It is not uncommon in receiving evidence from witnesses in Parole Board hearings, that there is a difference of opinion. The panel was obliged to consider all opinions and evidence and reach an overall conclusion. This was a case where there were mixed views as to progression. The panel, in fact, rejected the views of all professionals in the sense that they concluded that the Applicant had outstanding core risk factors which had not been addressed by the Applicant. I do not determine that failing to follow a single view of a POM, or indeed of any professional witness, can amount to irrationality in the sense set out above. The panel were obliged to explain, in circumstances of rejecting professional views, why they were rejecting those views. The panel in their decision gave clear and rational explanations. I do not find irrationality, in the sense set out above, under this ground.

Ground 2

33. The Applicant's legal adviser submits that the panel chair suggested to the Applicant that he should not be aggrieved about receiving a sentence of IPP because if that form of sentence had not existed (in the light of the index offence) he would probably have received a discretionary life sentence. It is further submitted that the questioning was unfair to the Applicant and may have created bias in the approach of the other panel members.

Discussion

34. I have listened to the recording of this line of questioning. The chair was submitting to the Applicant that, unlike some prisoners, his tariff period had only recently expired (and therefore the common concern of prisoners being substantially beyond their tariff period did not apply). The chair was enquiring as to why the Applicant was aggrieved by the type of sentence (an IPP) that he had received, and suggested that if an IPP sentence had not been available at the time, the Applicant may have received a similar sentence, namely a discretionary life sentence.

35. The Applicant directed the chair to the judge's sentencing remarks and suggested that the remarks did not indicate that he would necessarily have received an indeterminate sentence. The exact words of the judge were "*This is not a case for a life sentence, nor are you suitable for an extended sentence. It is one for a substantial determinate sentence converted into a minimum term under the IPP regime*." These words needed to be interpreted in the complex sentencing conditions of 2011 when the IPP regime was in force.

36. I determine that this line of questioning by the chair was unhelpful. Whether the Applicant was aggrieved with his sentence type was irrelevant in terms of the panel's role of assessing risk. The chair erred in attempting to make assumptions as to what sentence may have been imposed in the absence of an IPP regime. However, I do not find that this unhelpful line of questioning had any material affect upon the decision or upon any individual panel members. Dissatisfaction with a sentence is almost universally felt by those serving lengthy prison sentences, the panel would, in my determination, be entirely unaffected by any dissatisfaction expressed by the Applicant.

Ground 3

37. The Applicant's legal adviser submits that the panel inappropriately found the Applicant's explanation, of an incident involving the alleged spraying of a prison officer with the room spray, as implausible. Also submitted is that the panel referred to injuries received by the prison officer and there was no evidence of injuries.

Discussion

38. The background to this ground was that in 2021, whilst detained, the Applicant was alleged to have sprayed room spray into the face of a prison officer when she opened the door of his cell to give him an evening meal. It was widely reported in the dossier that following the spraying incident the officer was required to attend an accident and emergency department and had received chemical burns to her eyes, requiring her to remain off work for at least two days.

39. The panel, in its decision letter, acknowledged that the Applicant had been charged with injuring the prison officer. The Applicant was tried in a criminal court and was acquitted of the matter. The panel, however, were not bound by the acquittal and were entitled to consider allegations in the round, pursuant to the Parole Board guidance on allegations and the case of **R (on the application of Pearce and another)**.

40. The panel took the view that the fact that the prison officer had been referred to an accident and emergency department, and was required to take some time off sick, was sufficient to find that the officer had in fact suffered some physical harm which was inconsistent with the outcome of spraying a room generally to address odour, and therefore to find that the Applicant's explanation was implausible.

41. The Applicant's explanation was that he had generally sprayed his cell to improve the smell and that he had not deliberately directed the room spray towards the prison officer. The panel noted that there were two other prisoners with the prison officer, neither of whom suffered any injuries to their eyes or required hospital examination. There was therefore, in the view of the panel, sufficient material for the panel to reach a conclusion that the explanation by the Applicant, applying the test of the balance of probabilities, was implausible. This was a conclusion that the panel were entitled to reach and was reached on the basis of a reasonable analysis of the facts. I do not therefore determine that this comment amounts to irrational decision-making in the sense set out above.

Ground 4

42. The Applicant's legal adviser submits that it was unfair not to question the Applicant in detail about his willingness to become engaged in personality based work.

Discussion

43. A note in the panel's written decision indicates that the Applicant had been referred to an external personality service, however the Applicant indicated to the prison that he did not wish to become involved with this service whilst in custody.

44. The Applicant was represented at the panel hearing. If this matter was to be pursued, his representative was at liberty to address the matter in questioning and in more depth.

45. Paragraph 2.19 of the panel's decision also indicates that there was clearly a discussion during the hearing about personality traits and the personality intervention services that could be available. The Applicant however made it clear that he did not accept that he had personality traits linked to risk.

46. It appears to me that these issues were addressed at the hearing. The panel was at liberty to reach a view as to the need or otherwise for personality intervention and to reach a view about whether the Applicant appeared to be willing to engage. The panel appropriately explained their findings and reasoning.

Ground 5

47. The Applicant's legal adviser submits that the Applicant has been described as a model prisoner with many good character references and was therefore an appropriate candidate for a release direction.

Discussion

48. The panel's view of the Applicant, based on the evidence at the oral hearing and on the dossier, was set out in paragraph 4.1 of the decision. The panel took the view that the Applicant demonstrated a pattern of appearing to be pro social, yet occasionally behaving violently, often with out warning, and in circumstances which escalated quickly. The panel were also concerned about manipulation of female staff, and found that the Applicant demonstrated, at times, a need to control. Accordingly, the panel found that core risk factors remained to be addressed. It is not uncommon that prisoners are well thought of by prison staff, but may well retain issues relating to risk which are unaddressed or unrecognised by prison staff. Having considered the evidence as a whole I am satisfied that the panel reached its conclusion on the basis of the oral and written evidence presented at the hearing. The panel carefully explained those conclusions within the decision letter. The panel were entitled to take a different view to that of some professionals and of the Applicant. I do not find this could amount to irrationality in the sense set out above.

Ground 6

49. The Applicant's legal adviser indicates that the panel mistakenly understood that the Applicant was not willing to stay in probation approved premise when released.

Discussion

50. At paragraph 3.1 of the decision the panel noted that the Applicant did not wish to be released to probation Approved Premises, as he wished to live on release, with his mother. However, the panel also noted that the Applicant had told his COM that he was willing to cooperate with a resettlement plan that included staying initially in probation accommodation. It appears therefore that the Applicant did not wish to reside in probation accommodation on release, but was willing to cooperate with his probation officer and with the resettlement plan. I am not therefore persuaded that this was a misunderstanding by the panel. I found no procedural irregularity in this ground.

Ground 7

51. The Applicant's legal adviser submits that the order of witnesses suggested by the Chair was unfair as in criminal courts a defendant gives evidence after the prosecution case.

Discussion

52. This matter can be taken shortly. Firstly, and importantly, a Parole Board oral hearing is not a criminal trial. A panel hearing is inquisitorial rather than adversarial. The aim of the hearing is to gather evidence and apply the relevant tests. The order of witnesses is discretionary, in this case the Applicant's legal adviser was asked by the chair whether she was happy with the suggested order of witnesses, and the legal adviser indicated that she was. The legal adviser was at liberty to make

submissions as to the order of witnesses and indeed was asked specifically if she agreed that the order was appropriate. I found no procedural irregularity in this ground.

Decision

53. For the reasons I have given, I do not consider that the decision was irrational and/or procedurally unfair and accordingly the application for reconsideration is refused.

HH Stephen Dawson
01 October 2024