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[2024] PBRA 236

Application for Reconsideration by Nolan

Application

1. This is an application by Nolan (the Applicant) for reconsideration of a "paper" decision of a single member of the Parole Board dated 20 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 on the papers. These are the dossier, the decision of the panel member, and the application for reconsideration by the Applicant's legal adviser. The Secretary of State (the Respondent) offered no representations.

Request for Reconsideration

4. The application for reconsideration is undated but was received by the Parole Board on 13 November 2024.

5. The grounds for seeking a reconsideration were in narrative format and are set out below:

Background

6. The Applicant is serving an extended sentence of imprisonment comprising a custodial element of 4 years 6 months and an extended licence period of 4 years. The index offences relate to attempts to arrange and contact a child in connection with a sexual offence. The offences are attempting to arrange the commission of a child sex offence, attempting to engage in sexual communication with a child, making indecent images of children, possessing extreme pornographic images and failing to comply with notification requirements. The Applicant was sentenced in

2022 and was then aged 66. He is eligible for parole in January 2025. He is eligible for release in July 2026.He was 68 years old at the time of the parole decision.

7. The facts of the offending were that the Applicant, through an Internet app, communicated with a male child who he believed was 13 years old. The Applicant engaged in exchanges with the child and eventually suggested that he would meet the child and that he and they could engage in sexual activity. The nature of the sexual activity was set out in the communications with the child. In fact the "child" was an undercover police officer. When the Applicant was arrested and the matter investigated, indecent images of children and extreme pornographic images were found on a device in his possession. The Applicant had previous convictions relating to like offences. In 1988 he was convicted of two counts of indecency relating to a six-year-old child. In September 1996 the Applicant pleaded guilty to nine sexual offences. In 1997 the Applicant was convicted of various offences of indecent assault on males under 16.

8. The sentencing judge (at the time of sentence for the index offences) indicated that he took the view that the Applicant's risk to children remained high and imminent.

Current parole review

9. The Respondent referred the Applicant's case to the Parole Board in April 2024. The referral requested the Parole Board consider whether it would be appropriate to direct the Applicant's release. This was not a case where there was a referral in relation to transfer to an open prison. The request was made in the pre-tariff period of the Applicant's sentence.

10. The decision by the panel member was made on 20 August 2024. The decision was made by a single panel member in the course of the process known by the Parole Board as a member case assessment (MCA). The decision of the single member was made on the basis of the papers. The Parole Board member had concluded that this was a case which could be concluded on the papers rather than directed to an oral hearing (OH). The Applicant had the right to apply for an OH and did so. That application was refused by a Parole Board member, on 16 October 2024. Following the member's decision not to grant an OH, the Applicant had the right to apply for reconsideration. This is therefore the Applicant's application for reconsideration.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 20 August 2024 the test for release.

Parole Board Rules 2019 (as amended)

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)).

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 considered the evidence.

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:
    - express procedures laid down by law were not followed in the making of the relevant decision;
    - they were not given a fair hearing;
    - they were not properly informed of the case against them;
    - they were prevented from putting their case properly;
    - the panel did not properly record the reasons for any findings or conclusion; and/or
    - the panel was not impartial.

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

Error of law

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

22. 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.

Other

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.*"

Reconsideration as a discretionary remedy

24. 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.

The reply on behalf of the Respondent

25. The Respondent offered no representations.

Grounds and Discussion

Ground 1

26. It is argued by the Applicant's legal adviser, on behalf of the Applicant, that relevant evidence was not included in the dossier, namely a letter from a prison-based treatment manager regarding the Applicant's deselection from a treatment programme, and that this letter would have assisted in making a decision as to risk.

Discussion

27. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on a previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an OH where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before it.

28. I note that the Applicant's prison offender manager (POM) had reported (in a report on the dossier) the background to the Applicant's deselection and confirmed that the Applicant would be able to rejoin the programme when his health improved. The Applicant himself had expressed, to his POM, some scepticism about the effectiveness of the programme.

29. I am not persuaded that the absence of the formal letter confirming the Applicant's deselection would have been significant or material evidence required by the panel to undertake its risk assessment or would have materially affected the decision. The panel was aware of the position as it had been summarised by the POM in his report in the dossier. In my determination this ground does not amount to procedural unfairness in the sense set out above.

Ground 2

30. It is submitted on behalf of the Applicant that the panel did not have a psychological risk assessment before making its decision, which would have provided insights into the Applicant's mental health and overall well-being.

Discussion

31. As noted above the Applicant had been assessed by the prison psychology department as requiring and being eligible to undertake a risk reduction programme in prison. He had commenced that risk reduction programme but had been deselected because of ill health.

32. It is clear therefore that a pathway was suggested by the psychology department at the prison. This pathway involved core risk reduction work. Because of the inability of the Applicant to undertake the work in the designated programme available within the prison, (in a later note) the psychology department indicated that alternative options were being considered. The reality therefore is that the view of all the professionals was that further work in terms of core risk reduction was required to be undertaken. The Applicant himself appears to have accepted that work should be undertaken as he volunteered to join the programme and attended some sessions. In the circumstances I am not persuaded that the absence of a psychological risk assessment (in this case) can amount to procedural unfairness or irrationality in the sense set out above. The panel was entitled to take the view that, in the light of the professional advice, the Applicant's future risk in the community could not be realistically assessed until he had undertaken such work as was suggested by the professionals to address that risk. I do not therefore find that the panel's decision to proceed without a psychological risk assessment could be considered to be irrational or procedurally unfair in the sense set out above.

Ground 3

33. The Applicant's legal adviser submits that the panel's decision not to direct release was based "solely" upon the fact that the Applicant had not completed a core risk reduction programme in prison. Additionally, the panel failed to take account of the Applicant's physical ill-health.

Discussion

34. The panel decision in this case sets out, in the conclusion, that an assessment of risk was undertaken and the appropriate test applied. The panel took account of the fact that a recommended core risk reduction intervention had not been undertaken. The panel also took account of the fact that the Applicant may be suitable for further work to address sexual interests. Additionally, the panel took the view that the Applicant, although accepting responsibility for his historical offending, continued to have limited insight into his risks and potential for offending behaviour. The panel therefore approached the decision on the basis of its duty to assess risk. The panel's view was that the Applicant's risk of serious harm could not be safely managed at the time of the decision, however it was posited that the completion of intervention work might lead to a situation where the Applicant's risk could be safely managed in the future in the community.

35. The Parole Board panel's role was to assess risk. The role of the panel is focused upon making an assessment of the Applicant's risk by considering the available evidence, in response to the Secretary of State's referral.

36. The panel, in its decision, addressed the Applicant's risk factors, his history of offending, the facts and circumstances of the index offences and the serious concerns relating to the risk to children. The fact that the Applicant had not undertaken important risk reduction work was clearly a persuasive factor in reaching the conclusion that the Applicant's risk could not be managed in the community. The decision clearly indicated that risk to the public (in particular children), rather than the completion or otherwise of any particular intervention, was the basis of the decision. I am not persuaded that the decision was based "solely" on the fact that a particular intervention had not been completed.

37. Additionally I do not find that the Applicant's physical ill health was likely to be a material factor in reaching a decision about risk. It was clear that the Applicant's physical ill health was a long-term condition which predated the index offences. In my determination this ground does not amount to irrationality in the sense set out above.

Ground 4

38. The Applicant's legal adviser submits that the panel failed to acknowledge that the Applicant could have completed risk reduction work in the community.

Discussion

39. The panel's role in assessing the Applicant was to consider risk at the potential date of release and for an indefinite period thereafter. The panel would have been failing in their duty to protect the public if they were to consider release of a prisoner in circumstances where it was apparent that further core risk reduction work was required in order to address the risk of serious harm to the public. I do not therefore find that the decision of the panel was irrational on this ground.

Ground 5

40. It is submitted on the Applicant's behalf that the panel acted unfairly and failed to consider the principles in the case of **Osborn v Parole Board [2013] UKSC 61** in reaching a conclusion that this review could be completed by way of a paper decision rather than an OH.

Discussion

41. In the case of **Osborn** the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an OH. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an OH, but said there should be, if fairness to the prisoner requires an OH. The Supreme Court indicated that an OH is likely to be necessary where the Board is in any doubt whether to direct an OH, it should be ordered where there is a dispute on the facts, where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put his case. When deciding whether to direct an OH the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It was also noted that

it is not necessary that there should be a realistic prospect of progression for an OH to be directed.

42. The decision-making member in this case considered the principles enunciated in the case of **Osborn.** The panel member took the view that the Applicant's risks were well understood, that there was a proposed treatment and intervention path in relation to those risks, and that those risks remained outstanding at the time of the panel member's decision. The Applicant had been relatively open and honest with his POM and community offender manager and therefore the Applicant's position relating to the offending and his risks were recorded and understood. There were no material disputes of fact. The Applicant's health difficulties were also documented in the dossier and therefore well understood by the decision maker. In the light of the decision in **Osborn** I have considered whether it can be argued that the Applicant was treated unfairly by not being offered an OH. I am not so persuaded; as indicated in Osborn, not every case coming before the Board will require an OH. This is a case where there is a clear and unambiguous pathway and a plan (apparently accepted by the Applicant) for further behavioural work before the Applicant's risk can be realistically re-examined in terms of whether he meets the test for release. For this reason, I do not find that the decision of the Parole Board member in this case was irrational or procedurally unfair in the sense set out above.

Decision

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

HH S Dawson
29 November 2024