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[2024] PBRA 239

Application for Reconsideration by Pewter

Application

1. This is an application by Pewter (the Applicant) for reconsideration of a decision of the Parole Board following an oral hearing on 7 October 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. This is an eligible case, and the application was made in time.

3. I have considered the application on the papers. These are:

   i. The dossier now comprising 532 pages including the Decision Letter (DL) the subject of this application.
   ii. The application dated 8 November 2024.
   iii. An email dated 20 November 2024 from PPCS on behalf of the Secretary of State (the Respondent) indicating that it does not propose to submit representations concerning the application.

4. The Applicant is now 85 years old. In May 2010 he was sentenced to imprisonment for public protection for offences under the Child Abduction Act 1984 and Section 62 of the Sexual Offences Act 2003. His tariff expiry date was in November 2013. The hearing under consideration was his fifth. Since December 2020 he has been in a Category D prison following the Secretary of State's decision to accept a recommendation to that effect by a previous PB panel. The panel at the hearing under consideration did not direct his release.

Request for Reconsideration

5. Although the Applicant was represented at the hearing this application was submitted by the Applicant himself.

6. The grounds for seeking a reconsideration of the case are – in summary - as follows:

   Under the heading of procedural irregularity:

   i. (Paragraphs 1-3 of the Grounds.) The non-existence of – or failure of the Probation Service to identify - a suitable Approved Premises (AP) for the Applicant amounts to

a procedural irregularity. The Applicant's own visit to one of the proposed APs revealed that it was unsuitable for a person of his age and with his physical disabilities**.**

Under the heading of "irrationality":

ii. The panel's decision was "irrationally" influenced by the Applicant's alleged refusal to accept the licence conditions concerning possible APs at which the Applicant would have to reside.

iii. The Applicant has now had more than 90 day releases and one overnight Release on Temporary Leave (ROTL) without incident since his move to Category D conditions. It was irrational in those circumstances not to direct release.

iv. It was irrational of the panel to conclude that the Applicant's concerns about location in an AP which did not serve food and was not close to public transport links was a result of a "wish to be difficult".

v. The panel's assessment of the risk now posed by the Applicant was irrational. It failed to consider the effect on his current level of risk of his age and his current physical condition. The (historic) assessment of his risk of "contact sexual offending" as "high" was not justified by the evidence of the Applicant's current physical state.

vi. The panel irrationally failed to take sufficient notice of two psychology reports both of which suggested that the Applicant was suitable for release. Although neither of the authors of those reports was called to give evidence and another psychologist was called to the hearing and did not recommend release the opinions expressed by the other psychologists deserved more consideration than they received in the DL.

vii. The Applicant's prison behaviour - no adjudications and 'enhanced' IEP status - was not given the weight it deserved as an indicator that he would in fact abide by the conditions of his licence. The fact the only matter of concern in the Applicant's behaviour related to the leaving open of a toilet door while urinating was an indication that his conduct in prison over the past many years was an indication that he would comply with such conditions. In any event that incident had no relevance to the Applicant's suitability for release.

viii. In general, the DL suggests that the panel was actively seeking reasons not to direct release rather than approaching the case objectively.

ix. The Applicant has now served more than ten years in prison over the tariff imposed when he was sentenced. At his age he is unlikely to want – or be able – to commit offences which cause serious physical or psychological harm. It was irrational given those facts not to direct his release.

Current parole review

7. This hearing was the fifth during the currency of the sentence.

The Relevant Law

8. The panel correctly set out in the DL the test for release.

Parole Board Rules 2019 (as amended)

9. 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)).

10. 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)). This is an eligible sentence.

Irrationality

11. 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."*

12. 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.

13. The DSD case is an important case in setting out the limits of a rationality challenge in parole cases. Since then another division of the High Court in **R (on the application of Secretary of State for Justice v Parole Board [2022] EWHC 1282 Admin) (the Johnson case)** adopted a *'more modern'* test set out by Saini J in BR (**Wells) v Parole Board [2019] EWHC 2710 (Admin)**.

14. All of these tests are based on the dictum of Lord Greene in **Associated Provincial Houses Ltd v Wednesbury Corporation (1948) 1KB 233 (CA)** which defines irrationality, in the context of Parole Board cases, as a finding that *"no reasonable panel could have reached the impugned decision".* That definition has been explained and expanded in other cases but it has not been challenged in any parole board case.

15. In the **Wells** case Saini J set out *'a more nuanced approach'* at paragraph 32 of his judgment when he said:

> *"A more nuanced approach in modern public law is 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".

16. It must be emphasised that this is not a different test to the Wednesbury reasonableness test. In the **Wells** case Saini J emphasised at paragraph 33 that *"this approach is simply another way of applying"* the Wednesbury irrationality test.

17. What is clearly established by all the authorities is that it is not for the reconsideration member deciding an irrationality challenge on a reconsideration – or a Judge dealing with a Judicial Review in the High Court – to substitute his or her view for that of the panel who had the opportunity to see the witnesses and evaluate all of the evidence. It is only if a reconsideration member considering the application decides that the decision of the panel did not come within the range of reasonable conclusions that could be reached on all of the evidence, that he or she should allow the application.

18. Panels of the Board are wholly independent and are not obliged to adopt the opinions or recommendations of professional witnesses. The panel's duty is clear and it is to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence and decide what evidence they accept and what evidence they reject.

19. Once that stage is reached, following the guidance provided by such cases as **Wells** a panel should explain its reasons whether or not they are going to follow or depart from the recommendation of professional witnesses.

20. The giving of reasons by a decision maker is *"One of the fundamentals of good administration"* **(Breen v Amalgamated Engineering Union [1971] 2 QB 175)**. When reasons are provided, they may indicate that a decision maker has made an error or failed to take a relevant factor into account. As I understand the principles of public law engaged in deciding this application, an absence of reasons does not automatically give rise to an inference that the decision maker has no good reason for the decision. Neither is it necessary for every factor to be dealt with explicitly for the reasoning to be legally adequate in public law.

21. The way in which a panel fulfils its duty to give reasons will vary depending on the facts and circumstances in any particular case. For example, if a panel is intending to reject the unanimous evidence of professional witnesses then detailed reasons will be required. In **Wells** at paragraph 40 Saini J said:

"The duty to give reasons is heightened when the decision maker is faced with expert evidence which the panel appears, implicitly at least, to be rejecting".

22. When considering whether this decision is irrational, I will keep in mind that it is the decision of the panel who are expert at assessing risk; importantly it was the panel who had the opportunity to question the witnesses and to make up their own minds what evidence to accept. As I have already observed, it is extremely important that I do not substitute my judgment for theirs. My function is to decide whether the panel in this case erred in law or reached a decision that was Wednesbury unreasonable and/or procedurally unfair in some respect.

Procedural unfairness

23. 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.

24. 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.

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

Other

26. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

27. 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

28. The Respondent has offered no representations in respect of this application.

Discussion

29. This case had a number of unusual features. The Applicant is now 85 years old. He has served approximately 11 years in prison since the expiry of his tariff in November 2013. While serving the sentence for the index offences, he was convicted of further sexual offences committed before the index offences and sentenced to 2 years and 6 months imprisonment, having previously, in 1996, served concurrent sentences of 14 years imposed for 5 offences of rape of a female under 16 and one offence of threatening to kill contrary to the Offences Against the Person Act 1861. Since December 2020 – and following a recommendation from the Parole Board – he has been in open conditions. In June 2021 a Parole Board panel declined to order his release. With minor exceptions his behaviour in prison since then has been good and he is an "enhanced" prisoner.

30. Unsurprisingly perhaps in view of the extensive background to the case the hearing lasted more than 4 hours. In view of the grounds put forward I felt it necessary to listen to the recording of the hearing. Unfortunately, for some reason the evidence of the Prison Offender Manager was not recorded and so I was supplied with the handwritten notes of the panel Chair.

31. As to the individual grounds –

i. There was no procedural irregularity. It would have been open to the Applicant through his then legal representative to ask for the hearing to be adjourned so that efforts could be made to place the Applicant in an AP for more overnight stays. No such application was made and the panel had to deal with the state of affairs as at the time of the hearing.

ii. The panel made it clear – at paragraph 4.2 of the DL – that it was the fact that only one ROR had been possible prior to the hearing which meant that its assessment of the risk he still posed was still too high for them to direct release.

iii. This point – that although only one ROR had been possible the Applicant had completed more than 90 Releases on Temporary Leave – was perhaps the strongest point which could be made on the Applicant's behalf. It was clearly made during the hearing and repeated in his Legal Representative's closing submissions and recorded in the DL at paragraph 2.5. While it is possible that those submissions might have swayed another panel, this panel after careful consideration felt that they were not sufficient for them to be persuaded that his risk of serious harm had been shown to have reduced sufficiently to direct release judged against the criteria set out by the courts at paragraphs 11-22 above. As the DL makes clear at para 4.2 the "sticking point" for the panel was the fact that, whatever the reason(s), the Applicant had not in fact carried out RORs "where he will be in the community for up to five nights" to be essential before he can be safety released.

iv. The panel expressed no such conclusion. At paragraph 2.13 of the DL it noted that his previous reluctance to stay at an AP which did not provide meals was now no more than a "preference". This finding accurately summarised the evidence he had given at the hearing.

v. This topic was the subject of much discussion at the hearing. The panel accepted that at 85 years old the Applicant was less mobile than he had been at 70 when he committed the index offences and that his risk was therefore lower than before. At paragraphs 2.14 and 2.16 the DL accurately summarises the evidence on this topic.

An inability to achieve an erection is not a bar to the commission of sexual or other offences which may result in serious harm to their victims.

vi. The panel accurately summarised the reports and evidence of the 3 psychologists who had presented either written or oral evidence to the hearing. It was the case that the two who gave evidence more or less cautiously supported his release. Of course the Community Manager – who either personally or through a fellow Probation Officer would be principally responsible for managing the Applicant's case following his release was not in favour of such a direction. It was for the panel to decide the issue. The DL clearly explains why it reached the decision it did and its reasoning on this topic, as on the others, cannot be characterised as irrational.

vii. The panel noted that his behaviour for some time in prison had been good with a few exceptions. The DL at paragraph 2.4 accurately deals with the evidence that apart from some issues his behaviour had been good and that he remained an "enhanced" prisoner. There is no indication that the eventual decision ignored that fact in such as a way as to make the decision irrational.

viii. This ground – a general allegation as to the panel's unfairness towards the Applicant – is not borne out by the terms of the DL or the conduct of the hearing in which the Applicant gave evidence at some length and was well represented. I detected no sign that the panel was treating the case, or the Applicant unfairly.

ix. This ground - a general reference back to the Applicant's age and decreased mobility since his conviction – has effectively been dealt with above at subparagraph v above. The panel saw and heard the Applicant over a considerable period as well as reading the reports and hearing from the witnesses who had dealt with him and were well able to form a judgment about his ability, if he chose, to reoffend.

32. Additionally, the panel was entitled to conclude as it did that the Applicant's attitude to the questions of the restrictions necessary on the licence of a man with his record, which included the fact that the index offence had been committed against a young girl while he was on licence from a previous sentence for rape of a young person, was something which posed a significant risk that he would choose not to abide by those conditions and thus be at risk of committing offences such as the index offences as a result.

33. The Applicant was well represented at the hearing and his Legal Representative made the best points which could be made in support of the application for release. While a conclusion that release should be directed would clearly on the evidence not have been 'irrational' the case was finely balanced and whether viewed as a whole or by examination of the individual grounds the decision not to direct the Applicant's release falls far short of "irrationality" as set out in the authorities cited above at paragraphs 11-22 above.

Decision

34.For these reasons, I reject this application for reconsideration.

Sir David Calvert-Smith
3 December 2024