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[2024] PBRA 252

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 (OHP). The decision is dated 5 November 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 2024) (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 now consisting of 913 pages, the application for reconsideration drafted by the Applicant's solicitor dated 22 November 2024 and the representations of the Secretary of State (the Respondent)

Request for Reconsideration

4. The application for reconsideration is dated 22 November 2024.

5. The grounds for seeking a reconsideration are set out below.

Background

6. The index offences in this case were threats to kill and the sending of malicious communications. The Applicant contacted family members and a former partner and made threats to kill and sent a letter with a threatening undertone. He was sentenced to an extended prison sentence consisting of an 8 year custodial element and a 4 year extension period. He was serving a prison sentence at the time. The Applicant was aged 51 at the time of sentence. He was 57 at the time of the oral hearing (OH). The Applicant was recalled following breaches of his obligation to be of good behaviour. He breached the exclusion zone of a restraining order and had retained prescribed medication in his room against the rules of the probation accommodation he occupied.

Current parole review

7. The panel hearing was initially scheduled to be heard in March of 2024. That hearing was adjourned as further information potentially relevant to risk came to the notice of the probation service very late in the day. There were further adjournments to await updated information, details of which were noted in the OH decision letter. The matter was eventually concluded in October of 2024 and the decision issued in November of 2024.

8. The panel consisted of an independent chair, a psychologist member of the Parole Board and a further independent member. Evidence was received from a prison offender manager (POM) and a community offender manager (COM). The dossier consisted of 889 pages. The Applicant gave evidence and was legally represented.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 5 November 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)

10. 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)).

11. 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

12. 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.

13. 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."*

14. 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).

15. 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.

16. 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.

17. 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

18. 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.

19. 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.

20. 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:
    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.

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.*"

24. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the 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 them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

Reconsideration as a discretionary remedy

25. 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 Secretary of State (the Respondent)

26. The Respondent offered no representations.

Discussion

Grounds

27. The Applicant's solicitor submits that the panel acted unfairly by relying on hearsay reports of telephone conversations between the Applicant and his family. It is submitted that this arose because the panel did not have access to the full transcript of the telephone calls or the audio of the telephone calls and did not hear evidence from the author of the summarised report of the calls.

Discussion

28. As noted above the Applicant in this case is serving an extended sentence of imprisonment. The index offences, of threats to kill, were committed by the Applicant from prison, while he was serving a prison sentence. The Applicant, in telephone conversations, made threats to kill his brother-in-law. He also sent letters described as "*angry*" to a former partner and to his niece. The letter to the niece contained threats about the outcome if the niece did not do as he asked. This reportedly caused the niece distress and anxiety. The letter resulted in a conviction for malicious communication. The Applicant pleaded guilty to the offences, although he later indicated that he did not think that his family would take the threats seriously.

29. Prior to these index offences, the Applicant had a concerning record of offending. His criminal history began in 1982 and included offences of burglary, theft, dishonesty and drug possession. The panel also noted a primary pattern of violence and aggression, including offences of robbery, criminal damage, public order offences, common assault and battery. Outside the recorded offences, the Applicant had disclosed during assessments, various violent incidents, including one where a partner was strangled until foam came from her mouth. The Applicant also admitted an incident involving stabbing a friend who sustained injuries requiring intensive care.

30. In addition to serving prison sentences, the Applicant had been subject to two hospital orders. The first in 1992 following an offence of section 20 wounding, the second in 2002 when he was admitted to a mental health unit having assaulted a partner.

31. In 2008, the Applicant was convicted of murder in Spain and was sentenced to a period of imprisonment of 16 years. The victim was a person with whom he had a sexual relationship. Reportedly, he and the deceased partner were drinking excessively. The Applicant's report about the murder offence was that on the night of the offence, the Applicant said that he was asleep and woke up to find the victim was abusing him in a way that he (the Applicant) had been abused as a child. He told the panel that he strangled the victim in an extreme response to this perception and memory of abuse.

32. Having been released from the period of imprisonment in Spain, the Applicant returned to the UK. Further offences were recorded. On two occasions in 2018 he received prison sentences for offences of violence. Once for a common assault and on a second occasion for an offence of battery against a partner. The Applicant said that these offences occurred in circumstances of alcohol use.

33. It was whilst serving the sentence for the offence of battery against the partner that the index offences relating to this application for reconsideration occurred.

34. As noted above the Applicant pleaded guilty to offences relating to threats to kill and malicious communication. The Applicant, having served the requisite period of imprisonment in relation to the index offences (of threats to kill) was released automatically subject to licence conditions.

35. He was required to reside in probation supported accommodation. There were various conditions upon release, including exclusion from entering a specific area and a requirement to abide by the rules of the probation accommodation. On the day of release, the Applicant had a prescription to secure prescribed medication. On his way to the probation accommodation from prison, the Applicant entered the exclusion zone (in breach of his restraining order requirements), in order to obtain the prescribed medication from a chemist.

36. He then took up residence at the probation supported accommodation. The rules of the probation supported accommodation required that all residents deposited prescribed medication with the support staff. The medication was then kept locked until required by the individual resident. In breach of that rule, the Applicant retained his prescribed medication in his room. There had therefore been two breaches of his licence conditions within hours of his release. These breaches led to the Applicant being recalled to prison.

37. The matter came before the OHP for review in March 2024. At the outset of the hearing, the OHP were told that on the previous day, the Applicant's COM had received an email from family members of the Applicant. The family members were the victims of the earlier conviction of threats to kill. The email notified the COM that the family members now no longer feared the Applicant, and that they were applying for the restraining order (which was imposed on the Applicant by the sentencing judge upon conviction to be lifted. These messages came as somewhat of a surprise.

38. The panel reflected upon the messages and took the view that there should be further contact and assessment to understand the reasons and background to these messages being sent. The OH was therefore adjourned for further enquiries to be made.

39. In the following month (April of 2024), the prison service reported that the Applicants telephone calls had been monitored. A member of the prison service summarised the content of the monitored calls. The view of the member of prison service who was conducting the monitoring was that the Applicant had been leading discussions around the lifting of restraining orders made by the judge and had been persistent in asking his family members about this topic. The view of the monitoring member of staff was that (overall) there was a level of controlling behaviour by the Applicant in these calls.

40. In June 2024 the panel resumed the adjourned hearing. An application was made by the Applicant's legal adviser to adjourn once again, to secure transcripts or the recordings of these telephone calls. In essence the Applicant took the view that they had been negatively misinterpreted. The panel agreed to adjourn.

41. In August 2024 the panel were informed that, due to technical difficulties, it was not possible for the recordings of the telephone calls to be extracted from a CD disc upon which they had apparently been recorded.

42. The OHP hearing resumed in October 2024. At that hearing it became apparent that the author of the summarised calls (who had listened to the recordings and written the summary) was not present at the hearing. There had apparently been some confusion about who had summarised the material. It appears that, after discussion, the Applicant and his legal adviser agreed that the matter should proceed without the author of the summarised material being present.

43. The panel had before them challenged allegations relating to controlling behaviour demonstrated in the telephone calls. Controlling behaviour was a risk factor in this case. The panel considered this evidence. In their decision they indicated (at paragraph 4.4) that, in the absence of transcripts, "*full weight*" could not be given to the evidence relating to the calls. However, the panel then added, "*neither can they (the content of the calls) be dismissed*."

44. The panel went on to note that the summaries were recorded by a prison staff member and were based upon that staff member's professional opinion. They also took the view that the staff member would be obliged to apply a professional opinion to "*a range of factors both verified and unverified*". However, the outcome of the panel's analysis was that it "*could not find with certainty that they (the content of the calls) demonstrated controlling and coercive behaviours towards*" the family members.

45. However, the panel went on to state the following, "*what is more certain is that the content of the calls form part of a pattern of behaviour dating back over many years and which demonstrates [the Applicant's] limited insight, minimisation and responsibility taking.*"

46. The law relating to allegations, so far as it applies to Parole Board hearings has been comprehensively analysed, in the case of **Pearce [2023] UKSC 13 on appeal from [2022] EWCA Civ 4.** The issue is also addressed in the Parole Board guidance document entitled "**Guidance on Allegations v 2.0"**.

47. Although the panel did not specifically cite the case of **Pearce** or the Parole Board guidance (which would have been helpful), it is apparent that the panel considered the key principles in the case of **Pearce**. The panel confirmed that they were not able to make a finding of fact. However, they did consider that the evidence relating to the allegations was sufficient to allow the panel to attach such weight to it as they thought appropriate.

48. The court in the case of **Pearce** indicated as follows.
"*(vi) In some circumstances, however, the Board may not be able to make findings of fact as to the truth of an allegation either because of an inability to obtain sufficiently reliable evidence or because it would be unfair to expect the prisoner to give an answer to the allegation when he is facing criminal or prison disciplinary proceedings in relation to that allegation.*

(vii) In such circumstances the Board, having regard to public safety, may take into account the allegation or allegations and give it or them such weight as it considers appropriate in a holistic assessment of all the information before it, where it is concerned that there is a serious possibility that those allegations may be true. But the Board must proceed with considerable caution in this exercise because of the consequences of its decision on the prisoner. Procedural fairness requires the Board to give the prisoner the opportunity to make submissions about how the Board ought to proceed. There may be circumstances where, because of the inadequacy of the information available to the Board, it concludes that it should not take account of an allegation at all. There may also be circumstances where the information is less than would be desired but the allegation causes sufficient concern as to risk that the Board treats it as relevant. Its assessment of the weight to be attached to an allegation is subject to the constraints of public law rationality."

49. The panel, in my determination, were entitled to consider the evidence relating to the calls taking a "*holistic assessment*" of the information before them.

50. The panel specifically indicated that their concern was a "*pattern of behaviour dating back over many years, demonstrating limited insight minimisation and responsibility taking*". The panel clearly took a holistic view having regard to the duty to protect the public, but ensuring public law rationality and fairness to the Applicant.

51. As indicated above, the Applicant's solicitor has succinctly focused upon the issue of whether the panel acted fairly by placing weight upon the content of the telephone calls.

52. As the panel fully accepted, it was regrettable that the prison service systems were so poor that they were not able to retain, in some format, the transcripts of these calls to enable all parties to reflect upon them. However, the panel had before them a summary prepared by a member of prison staff. Although the member of prison staff was not present at the hearing, there appeared no reason why the staff member would deliberately misrecord or misinterpret the content of the telephone calls. The panel also took account of the fact that it was (at the least) inappropriate, for the Applicant to be pressing for information about the lifting of a restraining order in circumstances where he was the initial perpetrator.

53. The panel noted in their conclusions that they were "*not totally persuaded that he (the Applicant) has been fully open and honest with himself, let alone others, or gained full insight and capacity to recognise the reasons for the way he behaves and the impact that he has on others.*"

54. I am therefore not persuaded that the panel acted unfairly in the way that they took account of the evidence relating to telephone calls from the prison. The panel were entitled to take account of the evidence, albeit that it was a matter upon which they acknowledged that they had to exercise care and caution given the fact that there was an absence of audio or written transcripts and in fairness to the Applicant.

55. I also note that the decision of the panel was not entirely dependent upon the content of the telephone calls. The panel noted that the Applicant had a complex risk profile and a significant history of violence. The panel noted that there was an absence of support from forensic mental health services (in the community) which

was thought by professionals to be one of the significant areas of support (needed by the Applicant) in the community.

56. The panel also indicated their reservations about the Applicant's openness and engagement with professionals and compliance with his licence. Clearly the matters which led to his recall formed part of that conclusion.

57. The Applicant's COM did not support release as he felt that, even with the risk management plan that had been suggested, the Applicant's risk could not be safely managed in the community. He had been assessed as a very high risk of serious harm and it was felt that there would be no warning of signs of increased risk based upon the historical evidence of the Applicant's behaviour.

58. I am satisfied that the panel explained in a detailed and comprehensive decision letter, their reasons and rationale for this decision.

59. In all the circumstances therefore, I decline the application for reconsideration in this case.

Decision

60. 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 Stephen Dawson
19 December 2024