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[2025] PBRA 1

Application for Reconsideration by Bainbridge

Application

1. This is an application by Bainbridge (the Applicant) for reconsideration of a decision of an oral hearing panel (OHP) dated the 15 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 407 pages, the OHP decision, the application for reconsideration drafted by the Applicant's solicitor and the response by the Secretary of State (the Respondent).

Request for Reconsideration

4. The application for reconsideration is dated 6 December 2024.

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

Background

6. The Applicant was convicted of offences involving a child. He took indecent photographs of the child. The offence was described by the judge as "*persistent and prolonged sexual abuse*". The offences were committed at a time when the Applicant was subject to a community order for earlier offences involving making and retaining indecent images of children. The Applicant was 58 at the time of the sentence for the index offence he was 67 at the time of the OHP decision. He was sentenced to an extended sentence of 6 years and 8 months with an extension period of 5 years. He had been released automatically in April of 2022 and subsequently recalled.

Current parole review

7. The referral from the Respondent requested the panel to consider whether the Applicant could be released.

8. The panel hearing took place in November of 2024. The panel consisted of an independent chair and a psychiatrist member of the Parole Board. Evidence was received from a community offender manager (COM) and a prison offender manager (POM). The Applicant gave evidence.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 15 November 2024 the test for release and the considerations in the case of **Sim** regarding prisoners recalled during the extension period of an extended sentence.

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.*"

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 Secretary of State

25. The Respondent made no representations.

Grounds and Discussion

Ground 1

26. The Applicant's solicitor submits that the panel were wrong to conclude that, on balance, the Applicant had been involved in deleting browsing history, which was a breach of his licence condition.

Discussion

27. The background to this submission relates to the reason why the Applicant was recalled and the initial index offences. So far as offending is concerned, the Applicant had been convicted on two separate occasions of offences relating to children. In 2015, he was convicted of possessing and making indecent photographs of children, he had been found with a substantial number of indecent photographs of children on a device. The sentence imposed for that offence was a community order. The second (index offence) was committed during the currency of the community order. As noted above, the index offence again related to a child and involved both the taking of indecent images of a child and sexual assault and inciting sexual activity relating to a child.

28. The Applicant was therefore obliged, under the terms of court orders and licence conditions, not to delete any browsing history on devices which he used. The

Applicant had been in the community (on licence) for approximately 18 months. A check was made of his mobile phone, the check revealed that the browsing history had been deleted, this breach of licence led to his recall.

29. The allegation, that the Applicant had deleted his browsing history, was addressed at the parole hearing. The assessment of allegations in parole hearings is governed by the decision in the case of **Pearce [2023] UKSC 13 on appeal from [2022] EWCA Civ 4** and is analysed in a Parole Board guidance publication entitled **Guidance on Allegations v2.0**. In brief, Parole Board panels are obliged to assess allegations if they deem the allegations relevant to risk. The process involves assessing such evidence as is available to the panel at the hearing and importantly, taking account of the explanation given by the prisoner. Parole Board panels must then reflect upon the evidence they have received, and reach a conclusion as to whether, on the balance of probabilities, a risk related allegation has been established. If the panel are satisfied that sufficient evidence exists to reach a finding, the panel are then entitled to take account of that matter in reaching a conclusion as to risk and the test for release.

30. The Applicant was asked about the deleted browsing history in this case. He told the panel that he had accepted a software update for his mobile phone, and asserted that the deletion of the browsing history, had occurred as a result of the software update. His case therefore was that the deletion of the browsing history was not suspicious, but caused by an outside agency beyond his control, and, by implication, not relevant to an elevation of risk.

31. The panel considered the position of the Applicant in this case and his explanation. The panel noted that there was no evidence as to whether any software update had occurred, and if it had, whether it would have caused the browsing history of the mobile phone to be deleted. They found however, on the balance of probabilities, that the browsing history alone (of the Applicant's mobile phone) would not have been deleted by a simple software update. They also noted that it was highly likely that the Applicant was aware of the fact that his mobile phone would be inspected, because he was likely to have been given notice the day before of the visit by the police officer to inspect the mobile phone.

32. As indicated above it was argued on behalf of the Applicant that the panel were wrong to conclude that the deletion of the browsing history was likely to be deliberate and therefore implied elevation of risk.

33. The Applicant's argument in this regard involved the contention that a simple software update would specifically delete the browsing history of the mobile phone which, was an important licence condition. The contention also implied the coincidence of the software update occurring a day or so before the visit of the police officer to inspect the phone.

34. The panel were faced with competing arguments about the deletion of browsing history. They were entitled to apply their own knowledge of the world (the unlikelihood of a software update deleting browsing history) as well as the Applicant's background of being involved in offences relating to browsing and use of the internet.

35. I am satisfied that it was not irrational for the panel to conclude that a routine software update, a regular occurrence in the modern world, would be highly unlikely to have resulted in the Applicant's mobile phone losing its browsing history. I am also persuaded that the coincidence of the deletion of the browsing history on the day or so before the arrival of the inspecting police officer was a relevant and reasonable factor to take into account in assessing the credibility of the Applicant's account of what occurred.

36. In the light of the fact that the panel's test was the balance of probabilities. I am not persuaded that the panel acted irrationally in coming to the conclusion that the deletion of the browsing history was not only a breach of the licence conditions but was also an elevation of risk as it implied that the Applicant was attempting to hide his browsing history by deleting it. In the light also of the Applicant's history of convictions the conclusion of the panel in my determination could not be said to be irrational.

Ground 2

37. The Applicant's solicitor submits that the panel failed to take proper account of the evidence that the Applicant had been in the community for 18 months. In particular, there had not been significant concerns raised about compliance. The panel were therefore wrong to rely upon the alleged incident, which led to recall, to infer that the Applicant had limited internal controls.

Discussion

38. The panel addressed the question of the Applicant's internal controls in relation to risk. At paragraph 4.5 of the decision, the panel accepted that the Applicant had been in the community, and had not offended, for 18 months. They also accepted that the risk management plan was robust.

39. However, having concluded that the Applicant had deliberately deleted the browsing history of his mobile phone and taking account of the fact that the Applicant's offending, was, by its nature, as described by the panel "*covert*" the panel took the view that without internal controls and openness and honesty, the Applicant's risk could not be safely managed in the community. Therefore, the conclusion was that it remained necessary in order to protect the public that he be detained.

40. The panel's rationale was that, because of the covert nature of the Applicant's offending, the absence of breaches of licence or convictions for a period of 18 months was not necessarily relevant or persuasive in terms of the Applicant's future risk. The panel took the view that deleting the browsing history was a serious breach of his licence conditions and court orders and directly implied that he had been involved in some form of negative behaviour associated with his risk factors. In the circumstances I am not persuaded that the panel were irrational in reaching this conclusion.

Ground 3

41. It is submitted on behalf of the Applicant that the panel applied an incorrect test for release. It is submitted that the test applied by the panel was whether or not further

offending work should be undertaken or had been undertaken rather than the statutory test relating to necessity and the protection of the public.

Discussion

42. As noted in the panel decision, prison psychologists had, in the past, assessed the Applicant and had concluded that certain behavioural work connected with addressing sexual offending was recommended. That work had not been undertaken either before the Applicant was released from prison, or during any time in the community. The panel in its decision took the view that this was work which was necessary to address the risk. The work was referred to as "*core risk reduction work*" by the panel.

43. At paragraph 3.6 of the decision the panel specifically indicated that there was no evidence of internal controls, demonstrated by the Applicant, which would act as a protective factor. The panel also noted that there was outstanding risk reduction work which had been suggested by psychologists, but had not been undertaken by the Applicant. The inference from the panel's decision was that it may be that, if the Applicant were to undertake risk reduction work, there would be evidence of internal learning and possibly controls which would support managing risk in the future. I am not persuaded that the panel were specifically indicating that they declined to direct release, because the Applicant had not undertaken the risk reduction work, which is suggested in this ground. The panel's decision indicated that they had concluded that it remained necessary in order to protect the public that the Applicant be detained. However, they also noted that further risk reduction work could be undertaken and that that may allow for evidence to be adduced demonstrating a reduction in risk.

44. The panel in this case applied the correct wording of the test for release and also took account of the fact that it was necessary, because of the status of the Applicant, (as a prisoner recalled during the extension period of his sentence), to apply a presumption favouring release.

45. The panel's decision was that, even taking account of the presumption, the Applicant's risk could not be safely managed in the community. The reasons are clearly set out in their decision. I am not therefore persuaded that there is evidence in this decision that the panel failed to apply the appropriate test. I do not find either irrationality or procedural unfairness in relation to this ground.

Decision

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

HH Stephen Dawson
02 January 2025