the Parole Board
working with others to protect the public

[2023] PBRA 20

Application for Reconsideration by the Secretary of State in the case of Barlow

Application

1. This is an application by the Secretary of State (the Applicant) for reconsideration of a decision of a parole board panel dated the 12th December 2022 to direct release following an oral hearing.

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.

3. I have considered the application on the papers. These are the decision letter, the application for reconsideration, the response to the application from the prisoner (the Respondent) and the dossier. I have also read the transcript of the proceedings prepared at the request of the Applicant.

Background

4. Between early 1980 and 1988 the Respondent committed a large number of extremely serious offences of rape. They were mainly committed during the course of burglaries in the victims' own houses. Weapons were used to threaten the victims and in one case to injure. The victims were often young mothers, and they were raped while their children were in the house. On two occasions the victims were teenagers who were attacked in the street. The Respondent was first convicted in late 1988 and sentenced to Life Imprisonment with a minimum term to serve of 20 years. In 2010 and 2017 he was convicted of two further rapes both committed during the 1980s and sentenced to Life Imprisonment in each case with a minimum term to serve of 2 years. The Respondent has served over 34 years in prison and he is now 66 years of age. He has served almost all of his sentence in closed conditions. On 13th January 2021, the Respondent was transferred to open conditions following a recommendation from the Parole Board which was accepted by the Applicant. He was transferred back to the closed estate on 15th June 2022 in circumstances which were the subject of a considerable amount of evidence at the oral hearing.

Request for Reconsideration

5. The application for reconsideration is dated 17th January 2023.

6. The first ground for seeking a reconsideration is that the panel only assessed risk from the time of the last Board hearing and not on the basis of all the information before it. This is said to constitute an error of law and makes the decision of the panel irrational. The second ground is that the panel failed to take proper account of the evidence regarding risk and in particular the expert psychology evidence. This is also said to be an error of law and makes the decision of the panel irrational.

Current parole review

7. This is the 8th occasion that the Respondent's case has been referred to the Parole Board. This referral was originally made on 17th June 2021 and an amended reference was made on 28th November 2022. The case was referred for the Board to consider release and if release was not directed to consider a recommendation that the Respondent be returned to open conditions.

8. The hearing was due to take place on 8th August 2022 but was adjourned to allow the psychiatrist instructed for the Respondent to attend. The hearing took place on 30th November 2022.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 12th December 2022 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. The panel confirmed in para. 4.9 that it had considered and applied the statutory test for release.

10. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is 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).

Illegality

11. 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.

12. 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.

Irrationality

13. 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."*

14. 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.

15. The Applicant relies on the test set out by Saini J in **R(Wells) -v- Parole Board [2019] EWHC 2710**. Saini J describes that test as being a more modern way of expressing the test in Wednesbury. It is not a different test. The Wednesbury test was confirmed in the Worboys judgment (DSD) as being the proper test in judicial reviews. The reconsideration process is similar to a judicial review process. I have considered both tests in reaching my decision but the authorities do not support the view that Wells has made the classic Wednesbury test redundant.

16. It is unnecessary for the panel to include every detail in their decision letter. 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 Respondent

17. The Respondent has filed a detailed response to the application dated 24th January 2023.

Discussion

18. My job, as the reconsideration assessment panel, is to review the decision made by the panel to see whether any mistake of law or irrationality as it is defined in judicial review has been identified. It is not for me to decide the issue of whether the Respondent should have been released nor to have any regard to any public, press or political reaction to the decision. If I decide that there has been an error of law in reaching the decision or that

the decision is irrational I will direct that the matter be re-considered. If not then the decision will stand.

19. **Ground 1 (a) and (b)** The Applicant contends that the panel '*misdirected itself by only assessing risk from the point of the last Board hearing'.* The Applicant argues that to do so amounted to an error of law and/or was irrational. To support his argument the Applicant relies on passages taken from para 1.6 of the decision letter. That paragraph reads as follows:

> *'Whilst the Panel has considered the history of this case the judgment of the Panel is that the essential starting point for a detailed consideration of [the Respondent's] case are the events since the Board last reviewed the case and the Secretary of State agreed that [the Respondent] should spend a period of time in open conditions. Essentially, has [the Respondent's] conduct in the last 23 months demonstrated that his risk cannot be managed in the community?'*

20. The Applicant submits that that demonstrates two errors in law namely that the panel did not consider evidence from before the last Board review and that it applied the wrong test for release rather than the correct one, namely, whether it is no longer necessary for the protection of the public that the Respondent should be confined. In support of his argument that the panel did not consider evidence from before the last review the Applicant points out that the panel chair stopped the Applicant's representative from asking questions about the offences saying that he '*was struggling to find any sense of relevance in what you have been asking'.* Further the Applicant relies on the failure of the panel to mention in its decision letter the finding made in 2010 that the Respondent was still a dangerous man.

21. The Respondent submits that on a proper consideration of the whole of the decision letter the Applicant's argument is misconceived. By relying on simply one paragraph the Applicant has given an inaccurate impression of the exercise that the panel undertook and on a proper consideration of all of the letter it is clear that the panel did not disregard all the evidence preceding the last Board review and it applied the correct test for release.

My conclusion on grounds 1a and 1b:

22. If the panel only considered part of the evidence in reaching its conclusion to direct release, I have no difficulty in deciding that that would amount to an error of law and/or be irrational. It would be an error of law because the panel failed to take into account relevant evidence. The question for me is: did it?

23. I do not consider that the interpretation placed on para 1.6 by the Secretary of State is correct. This was the 8th parole review process which had taken place for the Respondent. It is not unusual and is perfectly permissible for a panel to take account of and, if it agrees with it, adopt the conclusions of previous panels. This panel did that as is clear from para 1.4 and 1.5 of the decision letter. In the letter the panel dealt with a great deal that happened before the last review. It considered the Respondent's background and upbringing (1.7 to 1.10). It dealt with the facts of the very serious offences committed by the

Respondent (1.10 to 1.22). It considered his risk factors and prison experience over the whole of his sentence (1.23 to 1.37). All the members of the panel would have been expected to have read the dossier before the hearing which sets out the history of the Respondent's offending and what had happened during the 34 years the Respondent had been in prison.

24. The move from closed to open conditions is an important stage in any prisoner's progression and it was for the Respondent. By recommending and agreeing a move to open, the Board and the Applicant accepts that the prisoner has reached a stage where he or she should be tested in the community, first accompanied and, if that is satisfactory, and the risks can be managed, unaccompanied. Although it is up to each individual panel to assess the overall risk, if a prisoner does well in open and demonstrates that his risk has reduced and can be controlled in the community, that will be an important factor in a panel deciding whether he or she can be safely released. It is inevitable that for any prisoner who has spent a period in open, consideration of what happened during that period will be a central part of the panel's consideration as it is designed to test whether the prisoner's risk can be managed in the community.

25. What the panel was saying, as properly understood, in the passage complained of, was that it was going to concentrate during the oral evidence on what had happened in open and the circumstances of the Respondent's return to closed. It did not say that it would ignore what had happened before. It said in terms '*the Panel has considered the history of this case'* before saying that *'detailed consideration'* would be given to events after the last review.

26. The authorities make it clear (see Oyston above) that the decision letter does not need to include in detail every consideration that has played a part in the decision. It is required that the letter makes clear why the decision has been made so that it can be understood by the reader and in particular the prisoner. In my judgement this letter meets that requirement. For that reason I do not consider that it was necessary for the panel to mention in its decision letter the finding in 2010. The offence that was sentencing the Respondent for was committed in the same period as the offences for which he was sentenced in 1988. There had been no trial and the material on which the Judge relied was the same as the Board would have received when considering referrals. In that context the finding of the Judge would not have added greatly to what was already known by the Board. There is no reason to believe that the panel had not considered it or that they did not agree with that finding made in 2010. Normally the finding of dangerousness made by a Judge after a trial is of great weight but its significance does depend on the circumstances.

27. For those reasons the argument of the Applicant on this issue is misconceived. It follows that there has been no misdirection of law as the Panel did consider all the evidence in reaching their decision. The complaint about the Applicant's representative being interrupted in her questions doesn't assist the Applicant's case. In an inquisitorial procedure there is a great deal of latitude given to the panel on the areas that they wish to address in oral evidence. Those aspects which were being explored by the Applicant's

representative had been addressed in written reports and in written submissions. The panel was focussing on what had happened after the move to open which they considered to be critical and how that impacted on consideration of release. That does not mean that they ignored everything which related to the offences. They clearly did not.

28. The Secretary of State submits that there is a further error of law contained in para 1.6. in the sentence: '*Essentially has [the Respondent's] conduct in the last 23 months demonstrated that his risk cannot be managed in the community'*. The Secretary of State complains that this means that everything else has been ignored when considering whether the Respondent should be released. For reasons I have already given, that complaint is not supportable on a proper reading of the decision letter. The Secretary of State further complains, as I understand it, that the panel substituted the question set out above for the statutory test. That is an unsustainable interpretation in my view. In deciding the answer to the statutory test, panels will frequently reduce that to questions of fact which it has to decide. Sometimes a proper analytical approach will reduce the issue to a number of questions of fact that the tribunal has to decide, sometimes it can be reduced to one. In this case the panel having considered all the evidence relating to risk, determined that the central issue for them to decide was the one set out in para 1.6. Having considered all the evidence the panel decided that what happened after the Respondent was transferred to open became the critical issue for the panel to decide but that does not mean that it didn't consider all the evidence before reaching that conclusion. Nor does it mean that it substituted that question for the statutory question that it had to answer, and it is clear on a proper reading of the decision letter that it didn't.

29. This whole issue has to be looked at in the context of where the Respondent's prison journey had got to as the panel did. Having been moved to an open prison the Respondent would have been expected to start with accompanied periods of temporary leave and then proceed to unaccompanied periods of overnight leave. An issue arose that unescorted leave was not permitted without a tag and no tags were available. (I paraphrase) Because of the Respondent's reaction to the news that he could not progress to unaccompanied temporary leave he was moved back to closed. All this was controversial and was considered in the evidence in detail as it needed to be. So having reached the stage that the panel had in their considerations, which included the history, it was critical for their decision to know whether what happened in open demonstrated that his risk could be managed in the community or not. They concluded it could which they were entitled to do.

30. It is arguable that in phrasing this subsidiary question in the way the panel did is inconsistent with the statutory test. It may be that it would have been better to have phrased it '*has [the Respondent's] conduct in the last 23 months demonstrated that his risk can (rather than cannot) be managed in the community*'. That is because the statutory test requires that the panel be satisfied that '*it is no longer necessary for the protection of the public that the prisoner should be confined*'. Does this indicate that the panel did not properly apply the statutory test?

31. Considering this in the context of the decision letter as a whole, I am satisfied that the Panel did apply the correct statutory test. A decision on the inferences that can properly be drawn from what happened in the last 23 months in custody is a judgment which is highly unlikely to be different in practice whichever way you phrase the question. Further the correct test is set out at the outset of the decision letter. In addition at para 4.9 the panel says it '*has carefully considered the statutory test for release and the evidence presented to it. In the judgement of the Panel, [the Respondent] meets the test for release and the risk management plan with its extensive list of conditions, will be sufficiently robust to manage [the Respondent] in community'.*

32. There is no ground for suggesting that the panel did not do as it says it did in para 4.9. The whole panel would be aware of the correct test and the panel was chaired by a very experienced retired Judge who also has considerable experience of parole hearings and applying the statutory test.

33. It does not appear that this issue, as to whether the correct question was asked, i.e., **can** should have been used rather than **cannot**, forms part of the Applicant's argument for reconsideration but it seemed to me that, as it was arguable, it was important that I considered it.

34. It follows for the reasons that I have given the application fails on grounds 1(a) and (b). The irrationality submission adds nothing to the illegality submission and also fails.

35. **Ground 2(a) and (b).** Again these submissions are made both as demonstrating an error of law and also irrationality in the decision making. I doubt whether an error of law has been identified but if the conclusions that the panel drew on risk did not follow from the evidence the decision would have been irrational.

36. The Applicant submits that the assessment of risk accepted by the panel was such that the statutory test could not be met. Further, the panel were wrong to conclude that there was little between the psychologists' evidence. The Respondent disputes the Applicant's argument on the basis that the Applicant has again been highly selective in the passages in the decision letter that he has relied on; that the panel clearly understood what the differences between the evidence of the psychologists was; that in so far as it preferred the evidence of Dr B it was entitled to do so and has explained why it did so.

My conclusions on grounds 2 (a) and (b)

37. The Respondent is correct to say that he will always be assessed in a high-risk category under certain measures because of the seriousness and number of his offences. Whatever the assessment, the issue for the panel remains whether it was no longer necessary for the protection of the public that he remained detained. The essential question which the panel had to answer in the Respondent's case was whether his risk could be managed in the community by a combination of the exercise of internal controls by the Respondent and by external controls contained in the risk management plan. The Respondent is

correct that deference has to be given to the views of the panel who have expertise in risk assessment. That is particularly so when there is an independent psychologist on the panel.

38. So, the mere fact that the risk remains high on certain measures does not mean that the statutory test cannot be met. It is a matter for the judgment of the panel taking into account all of the evidence.

39. In reaching that judgment, the panel concluded that there was little between the psychologists. That is said to be an irrational conclusion for the panel to reach. The Chairman had directed that the psychologists should prepare a joint report setting out points of agreement and points of disagreement. This is commonplace in the courts but not necessarily with the Parole Board. It was a very sensible step to take. Whether you label those differences that were identified as large or small they were clear for everyone to see and it is impossible to conclude that the panel were unaware of what they were. The essential difference arising from the reports and the evidence was that Dr. B was of the opinion that the Respondent could be safely released in to the community with a robust case management plan, Ms P considered that the Respondent should be further tested in open with overnight leaves before being considered for release. The panel preferred the opinion of Dr. B and gave reasons for it. It was entitled to reach that conclusion.

40. I do not consider that the decision of the panel was irrational and there was also no error in law.

41. As I said at the outset my function is to consider whether there is any error in law or irrationality that has been identified in the way the decision of the panel was reached. There was not in my view and accordingly the decision stands. If the panel are satisfied that it is no longer necessary for the safety of the public that the prisoner remains confined, it has to direct the release of the prisoner. It was so satisfied on proper grounds and accordingly the decision must stand subject to any contrary ruling from the High Court.

Decision

42. For the reasons I have given, I do not consider that the decision contained any error of law or was irrational and accordingly the application for reconsideration is refused.

Sir John Saunders
02 February 2023