the Parole Board
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[2024] PBRA 157

Application for Reconsideration by Found

Application

1. This is an application by Found (the Applicant) for reconsideration of a decision of a panel of the Parole Board sitting by way of a video conference oral hearing on 3 July 2024. The panel concluded that having heard the evidence they were not satisfied that they were able to direct the re-release of the Applicant.

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. The papers I have considered are the decision of the panel and the written submissions of the legal representatives of the Applicant. The application on behalf of the Applicant is based upon an analysis of the wording of the decision of the panel.

Request for Reconsideration

4. The application for reconsideration is dated the 1 August 2024.

5. The grounds for seeking a reconsideration are twofold and are as follows: -

   a) Firstly, that "*the Parole Board has failed to properly explain itself, with regards to conclusions reached regarding the recall. The conclusion reached being irrational*".

   b) Secondly, that the panel "*failed*": expressed as "*Failure to explain reasons reached re.* [the Applicant's] *contact with a known sex offender, failure to address the issue of a paedophile network, linked to the contact with a known sex offender and in reaching conclusions which are irrational"*.

c) The application makes the broad submission that "*in relation to procedural unfairness this 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"*.

d) The representations in support of the application state that at the hearing on 11 July (the hearing was in fact on 3 July 2024), the Applicant's representative: "*confirmed…that he was seeking release, that he was not challenging the reasonableness of his recall and return to custody, but that he did challenge some of the facts relied upon by Probation within the Part A and Part B reports"*.

e) The application sets out many issues of fact which, it is asserted, were in issue and, it is argued, were not resolved.

6. The matter concerns a factual analysis of the panel's decision and the submissions of the Applicant's representatives. Thus, there was no need to seek further information and/or particulars.

Background

7. The Applicant is now age 38. As the panel recorded, when he was about 19 or 20, following the execution of a search warrant at his home address, police seized a number of computers, CDs, and mobile phones. They also seized items of children's clothing which included underpants, socks and a bib. Ten discs were examined and a total of 12,073 indecent images were found ranging from level one to level five, depicting children as young as 6 months old. The Applicant used a website to distribute the indecent images and discuss sexual offending against children.

8. Images were found of the Applicant abusing a child who was traced and identified as a six year old boy. The Applicant became friends with a man who was the father of the victim and often stayed at his house, sleeping in the same bedroom as the victim. This gave him the access to the child. The Applicant gave a previous panel some details of the abuse he had perpetrated.

9. During a police interview the Applicant admitted to having abused the child over a period of five months between August 2006 and January 2007. He admitted some details of the abuse he had perpetrated on this boy who was particularly vulnerable but claimed that this was done when he was asleep.

10. The Judge's sentencing remarks indicate that he thought of the Applicant as a determined paedophile and he regarded the offences as most grave, describing some of the images as the worst that he had ever seen; some involving a baby.

11. The Applicant was 21 when he was sentenced. On 10 December 2007 he received an indeterminate sentence of imprisonment for public protection ("IPP"). He also received a lifelong SOPO. His tariff expiry date was recorded as 4 May 2011. The minimum term he was expected to serve before he became eligible for parole was set at 3 years, 4 months and 26 days.

12. By August 2018 the Applicant had progressed to open conditions, having undertaken interventions intended to address his core risk factors. He was permitted to leave the prison and spent time in the community on overnight ROTLs. However, he was subsequently recalled (see below).

13. In July 2020 a panel of the Parole Board considered the Applicant's case and concluded that further work was needed, albeit not core risk reduction work. Thus, they recommended that the Applicant transfer to a PIPE unit. This did not happen. Instead the Applicant was transferred to another prison where he completed one to one work with a psychologist.

14. In November 2021 a panel of the Board directed the Applicant's release. On 22 December 2021 he left the prison and two weeks later, on 6 January 2022, following a search of his room at the Approved Premises (AP) he had been assigned to live at, he was recalled to custody. During the room search AP staff discovered a Vodaphone SIM in his room. This was not the SIM or telephone number that had been disclosed to police or probation. Other items were also found, including alcohol, a condom, and a magazine cutting about a young man who is attracted to male children. There was a handwritten note with instructions on how to access the internet without being caught which had the name attached to it of a male, who was a convicted sex offender. Also, in the Applicant's room was an X-Box which he informed AP staff he had told his Offender Manager about, which had not been the case. He admitted, after being informed of the probable use of a digital dog during the search at his parents' house, having the smartphone at their address.

15. The Applicant's recall was authorised: for failing to be of good behaviour and undermining the purpose of the licence period, and for possessing more than one mobile phone or SIM card. He returned to prison on 7 January 2022.

16. It is recorded that following the discovery of these items at the AP, in January 2022, the Applicant was later charged and convicted of offences of breach of his SOPO and making an indecent image, the circumstances of which were that he used an internet enabled smartphone and accessed indecent images. On 5 January 2024, the Applicant was sentenced to 12 months imprisonment.

17. It is also reported that he misled a previous panel of the Parole Board as it was discovered by police that he had acquired a smartphone in November 2019 and had not disclosed the fact.

18. In November 2021 the Applicant's case was considered by a panel of the Parole Board and their findings are summarised in the decision of the panel which is the subject of this application for Reconsideration.

19. I should add that the submissions from the Applicant's representatives report that the Applicant has been transferred to the open estate on two previous occasions. In November 2016 he was returned because of "*items found in his cell*" and in August 2018 (referred to above: para 12) he was returned "*following concerns raised by the author of an autism assessment".*

Current parole review

20. The Applicant was referred to the Parole Board for a review of his case. At the time of his review, it is recorded that he was 38 years old. It was the 8th time his case had been reviewed.

21. The Applicant's case was considered at an oral hearing on 3 July 2024. The panel was comprised of three independent members and a psychologist member. A dossier containing 966 pages was reviewed and written closing submissions were lodged by the Applicant's representative, which the panel records they carefully considered.

22. Evidence was received from the COM, the POM and a psychologist instructed by the prison. The 15 page decision records, having summarised the evidence of each witness, that no witness supported the Applicant's application for re-release. The decision also records that no witness was prepared to support a recommendation for a transfer to the open estate. In summary, the panel found, based upon the evidence they had received, that there was still core risk reduction work which the Applicant would have to undertake. His risk towards children was still regarded as a "very high" risk of serious harm. The panel agreed with the assessments of the level(s) of risk and the conclusions of the report writers who gave evidence.

The Relevant Law

23. In its decision letter dated 11 July 2024 the panel correctly sets out 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)

24. 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)).

Irrationality

25. 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.

26. 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."*

27. Those acting for the Applicant rely on the case of Wells (see paragraph 10). In **R (on the application of Wells) -v- Parole Board 2019 EWHC 2710 (Admin)**, the court set out what was 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)".*

28. This test was adopted by a Divisional Court more recently in the case of **R (on the application of the Secretary of State for Justice) -v- the Parole Board 2022 EWHC 1282(Admin).** 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 held to be binding on Saini J.

29. It follows from these 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.

30. 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.

31. In this case the panel agreed with the witnesses and it is clear that they gave cogent reasons for their conclusions.

Procedural unfairness

32. 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.

33. 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.

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

35. The submissions of the Applicant's representatives seek to suggest that the panel did not properly record the reasons for any findings or conclusion.

Error of law

36. 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.

37. 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.

Factual Errors

38. 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.

39. 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

40. Finally, I should add that 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)

41. The Respondent has lodged no written submissions in answer to the application for Reconsideration made by the Applicant's representatives.

Discussion

42. As noted above the grounds for this application before me is that the panel's decision is irrational and/or unfair. The application analyses the decision of the panel and seeks to suggest that matters of fact which were said to have been in dispute were not addressed in detail by the panel in its decision. It is not in dispute that the panel referred to these issues in its decision.

43. At the core of the application is the assertion that the panel failed to address (and therefore arrive at a conclusion upon) a number of factual matters which were or may have been in issue at the hearing. However, it is quite apparent that the decision letter reviewed the circumstances of the recall of the Applicant and summarised the evidence but did not resolve, nor indeed seek to resolve, all the issues of fact. The application suggests this is unfair and irrational.

44. The application for Reconsideration of the panel's decision concedes that the decision to recall was not challenged. However, it goes on to assert that the Applicant "*did challenge some of the assertions made by the Probation Service which were relevant to his compliance and possible breaches of licence in the community. The conclusion reached by the Board in relation to the position of* [the Applicant] *is that his explanations lacked plausibility, minimised his actions and*

failed to take account of the conditions and expectations placed upon him. We seek to set out each individual issue, including the stance of [the Applicant]*".*

45. The decision letter reviews the history of the case. It refers to previous non-compliance when under supervision. At paragraph 2.2 it sets out the background to the Applicant's release: the search of the room in the AP and the articles which were found. The decision does not cite the case of **R-v-Calder** but that is not an essential requirement. The decision records that "[the Applicant's] *recall was authorised for failing to be of good behaviour and undermining the purpose of the licence period, and for possessing more than one mobile phone or SIM card.* [The Applicant] *does not challenge the appropriateness of his recall; there is nothing within the dossier that suggests that the recall was inappropriate and in consequence the panel is satisfied that the recall was appropriate".* The decision to recall was not challenged.

46. The panel asked the Applicant about a number of matters: a "cutting", the note to enable him to circumvent detection, the acquisition of the SIM card, and it is recorded that they found his answers *"lacked plausibility, minimised his actions, and failed to take account of the conditions and expectations placed upon him"*.

47. A complaint is made that insufficient detail is provided in the decision letter about the Applicant's contact with a known sex offender and it therefore provides an inadequate guide to the decision of a future panel. The panel dealt with the contact in a number of places, in particular at paras 2.10 and 2.11, where the Applicant's explanations are summarised. Moreover the Applicant's explanations for the possession of the articles found in his room and elsewhere, which led to his recall, are all summarised in the letter which found as a fact that, whether or not the Applicant had accepted that the circumstances of his recall were accepted by him the panel "*considered* [the Applicant's] *behaviour to be undermining the purpose of his licence"* adding, fairly, that they *"placed no weight"* on an incident for which he had received criticism, namely a trip away and the discovery of an illicit mobile phone.

48. On behalf of the Applicant it is submitted that: "*The conclusion reached by the Panel regarding his challenge of information presented by Probation is limited, it is not fact specific, it is a general, sweeping assertion made without explanation and is contrary to the evidence presented to it".*

49. In my judgement the panel's decision can be properly described as a fair summary of the evidence provided by all the witnesses, including the Applicant. Moreover it sets out its findings about the evidence it has received and the conclusions it might draw from a witness's evidence to the panel, with findings as to its own conclusions. The fact that detailed matters not germane to the decision to recall and extraneous issues were not fully resolved does not undermine the considered decision of the panel.

50. The Applicant's representatives have sought to rely upon the case of **R-v-Pearce**.

51. In that regard the decision to recall the Applicant was not challenged. This has been conceded in the submissions of his representative. Whilst it might be thought to be helpful to receive the panel's view on every issue which emerges in the course of a review of the factual matrix leading up to and after the recall of a prisoner to the closed estate, the essence of a decision letter is to provide the prisoner and his representative the reasons for the panel's judgement. There is in my judgement no requirement to resolve every disputed fact. It is, of course, otherwise if the recall had been the subject of challenge and the specific reason for the recall in dispute. In those circumstances I would have expected a finding upon all the matters which were the subject of dispute. That is not the case here.

52. A decision is designed to review the evidence it hears and provide an assessment of the risk of the prisoner. This decision does so. It moves appropriately to analyse the manageability of the Applicant's risk, what needs to be achieved before he is re-released, and what might be necessary within the risk management plan, looking carefully at the risk management plan with a view to how the Applicant might be best managed in the future. It properly concludes with assistance to a future panel.

53. In this case the recall was not disputed and the panel's decision was devoted, properly, to the consideration of the importance of that finding and how the future risk could be managed to prevent a recurrence. This letter is a more than adequate review of the evidence presented to it and the consequences of the findings regarding the Applicant's conduct and therefore on the risk presented by the Applicant.

54. Accordingly, whilst it might be of interest to find out the panel's view on every single incident alluded to in the course of a hearing that is not an essential pre-requisite for a decision of the Board. The issues can be summarised and the source for the information can be set out without the need for a judgement and/or opinion on every fact within a dossier, or the information received in evidence at an oral hearing.

55. The purpose of a decision of a panel of the Board is to provide a review of the salient features of the evidence, identify the important, core evidence, and make findings as to the future risk. If a finding of fact is necessary then the principles adumbrated in the case of Pearce apply. If there is no challenge then there is no requirement to undertake a fact finding exercise.

56. In my judgement the decision of the panel does not lack logic. It properly summarised the relevant evidence and it does not fail the tests laid out in the cases cited above.

Decision

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

His Honour Nick Coleman
21 August 2024