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[2024] PBRA 170

Application for Reconsideration by Tootle

Application

1. This is an application by Tootle (the Applicant) for reconsideration of a decision of an oral hearing panel dated 30 July 2024 not to direct her 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 the oral hearing decision, the dossier consisting of 421 pages and the applications for reconsideration. Two applications have been submitted dated 8 August 2024 and 9 August 2024 in almost identical terms.

Request for Reconsideration

4. The application for reconsideration is dated 8 August 2024 and then for the most part in all important respects repeated in a further application on 9 August 2024.

5. The grounds for seeking a reconsideration are as follows:
   (1) Error of law in applying the test for release for extended sentence prisoners serving the extension period of their sentence;
   (2) Procedural unfairness in considering a security report which was submitted on the day of the hearing without adjourning to allow for it to be fully considered and contested;
   (3) Irrational in failing to provide full and adequate reasons for not directing release and reaching a decision contrary to the recommendations of the professional witnesses.

Background

6. The Applicant received a sentence of 14 years imprisonment comprising 9 years detention and 5 years extended licence on 20 February 2015 following conviction for manslaughter. She was aged 20 years old at the time of sentencing and is now 30 years old.

7. She was released on licence on 6 March 2023. Her licence was revoked on 2 April 2023 and she was returned to custody on 3 April 2023.

Current parole review

8. The Applicant's case was referred (in an undated document) to the Parole Board by the Secretary of State (the Respondent) to consider whether or not it would be appropriate to direct her release.

9. The case proceeded to an oral hearing via videoconference on 29 July 2024. The two member panel consisted of an independent member and a psychiatrist member. It heard oral evidence from the Applicant, her Prison Offender Manager (POM) and her Community Offender Manager (COM). The applicant was legally represented throughout the hearing. The Respondent was not represented by an advocated.

10. The panel did not direct the Applicant's release.

The Relevant Law

11. The panel set out in its decision letter dated 30 July 2024, the test for release that release will be directed if it is no longer necessary for the protection of the public that the prisoner should be confined.

Parole Board Rules 2019 (as amended)

12. 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)).

13. 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

14. 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.

15. 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."*

16. 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).

17. 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.

18. 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.

19. 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

20. 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.

21. 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.

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

Error of law

23. 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.

24. 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.

The reply on behalf of the Respondent

25. The Respondent has submitted no representations in response to this application.

Discussion

Ground 1 – Error of law

26. The Applicant submits that the test for release to be applied in her case was incorrectly interpreted and the reasons given for the departure were insufficient. A careful reading of the decision letter shows that is not the case. The panel was clearly aware that in reviewing the Applicant's case, as a recalled extended sentence prisoner, it was required to apply a presumption in favour of release. That was clearly set out in paragraph 4.16 of the decision letter. In such cases the panel should direct release unless positively satisfied that continued detention is necessary for the protection of the public (R (Sim) v Parole Board [2004] QB 1288).

27. There is no evidence that the correct test, as recorded in the decision, was incorrectly interpreted and therefore no reasons for departure were necessary to be given. The panel gave reasons why it reached the decision it did on the application of the test. In particular the panel considered the speed of recall (barely a month after release) and the Applicant's behaviour since recall (security entries and adjudications). The panel considered that the Applicant's risk of non-compliance and further offending was too high to be managed in the community. There was no error of law in the decision which correctly identified the test, objectively analysed the evidence and fairly reached the conclusions set out. This ground therefore fails.

Ground 2 – Procedural unfairness

28. The decision letter records that the panel was provided with an updated security report on the day of hearing. No further details are given in the decision letter as to the approach taken by the panel, whether an adjournment was requested by the

representative or offered by the panel. The application states that the updated report was disclosed as the Applicant and her representative were entering the hearing room, and there was insufficient time to take instructions before the hearing. The application also states that the panel were provided with the report when questioning of the POM had already commenced and there was then a short adjournment in the hearing to consider the report.

29. The application submits that the Applicant and her representative did not have sufficient time to consider the report or to provide further evidence to refute the allegations. It is said that the updated report contained a significant number of entries which have subsequently been confirmed by a Governor can be discounted as they related to health concerns. The application further submits that the Applicant and her representative *"were in an exceptionally compromised position"* as an objection to proceeding would have resulted in an adjournment for many months. It is also submitted that the panel had a wider duty to consider independently whether it was fair to proceed.

30. It would appear from the application that no request was made for an adjournment of the hearing or request for further time for consideration during the hearing, or application for further written submissions after the hearing. The Applicant gave evidence and addressed the question of the security entries. She was legally represented throughout the proceedings. In cases where a prisoner has the benefit of legal representation, it would ordinarily be expected that any perceived deficiencies with the conduct of the hearing would be raised at the time of the hearing. There was nothing before the panel to show that further evidence was available or necessary or further time required. In those circumstances there was no unfairness in the panel's decision to continue the hearing.

31. The Applicant was able to put forward her explanation for the entries which are recorded in the decision letter (paragraph 2.48). The professionals were also able to comment on the entries and despite the entries, the POM nevertheless continued to recommend release. The decision is not based solely or even mainly on the updated report. The panel noted that even if the disputed security entries were put to the side, there remained five adjudications and uncontested and negative entries which indicated the Applicant's difficulty in complying with the custodial regime, four of the adjudications occurring between the listing of the Applicant's case in January 2024 and the hearing in July.

32. The Governor's subsequent report that many of the entries could be discounted did not undermine the fairness of the proceedings or affect the final conclusion reached. The Governor's report supported a position adopted by the POM and put forward by the Applicant and reflected a position taken by the panel to consider the case without taking into account the disputed entries.

Ground 3 – Irrationality

33. The grounds submit that the panel did not give sufficient weight to the evidence of the POM, did not take into account the work completed by the Applicant, the medication she is now receiving and the lack of adjudications since receiving her medication 3 weeks previously. In addition the grounds submit that the panel failed

to provide adequate reasons in the light of the recommendations of the professional witnesses.

34. The Applicant's POM and COM were both supporting release, albeit as the panel noted, the recommendations were equivocal. The COM had noted in her report that there were ongoing issues with the Applicant's behaviour. The panel gave reasons for disagreeing with the recommendations. Those reasons (paragraphs 4.8-4.17) are soundly based on the evidence before the panel as well as being rational and reasonable. The panel noted the positives in favour of the Applicant and that the Applicant had recently been re-started on her ADHD medication. The panel was not obliged to adopt the opinions and recommendations of professional witnesses. It was the panel's responsibility to make its own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. The panel has done so carefully and thoroughly and there is no irrationality in the assessment or conclusion.

Decision

35. For the reasons I have given, I do not consider that the decision contained any error of law, procedural unfairness or irrationality and accordingly the application for reconsideration is refused.

Barbara Mensah
05 September 2024