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[2024] PBRA 50

Application for Reconsideration by Pemberton

Application

1. This is an application by Pemberton (the Applicant) for reconsideration of the decision of an oral hearing panel (OHP) dated 1 December 2023. The decision was released on 2 February 2024. The OHP determined not to direct the release of the Applicant on licence.

2. I have considered the application on the papers. These comprise of the dossier, the provisional decision letter of the panel dated 1 December 2023, the application for reconsideration dated 27 February 2024 and the response by the Respondent.

Background

3. The Applicant is serving an indeterminate sentence for public protection. The minimum term specified by the judge was 4 years, 2 months and 6 days. The sentence was imposed for the offence of rape. The Applicant's minimum term expired on 18 August 2010.

4. The victim of the index offence in this case was aged 15. The offence of rape occurred in circumstances where the Applicant had been taking illicit drugs. The Applicant initially denied the offence but latterly has accepted responsibility and expressed remorse.

5. The Applicant was 32 at the time of the index offences. He is now aged 49. The Applicant was released on licence in October of 2018 and recalled in August of 2019. This recall was based upon allegations of burglary and poor behaviour associated with a partner. The burglary allegations did not result in any conviction.

6. The Applicant's case was referred by the Secretary of State (the Respondent) to the Parole Board in November of 2021. The Parole Board were asked to consider whether to direct immediate release. If immediate release was not directed the Parole Board were asked to consider a recommendation relating to a move to open conditions.

Request for Reconsideration

7. The application for reconsideration is dated the 27 February 2024

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

Current Parole Review

9. The Applicant had been released by the Parole Board in October 2018. He was recalled in August 2019. The application was therefore for the Applicant to be released following recall.

Oral Hearing

10. The review was conducted by an independent Chair of the Parole Board, a psychology member of the Parole Board and an independent third member of the Parole Board. Oral evidence was given by a Prison Offender Manager (POM), and a deputising POM a prison instructed psychologist and a Community Offender Manager (COM). The Applicant was represented by a solicitor.

11. A dossier consisting of 564 pages was considered.

The Relevant Law

12. The panel correctly sets out in its decision letter 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.

13. Rule 25 (decision by a panel at an oral hearing) and Rule 28 (reconsideration of decisions) of the Parole Board Rules 2019 apply to this case.

14. 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.

Irrationality

15. In **R (on the application of 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."*

16. This test was set out by Lord Diplock in **CCSU -v- Minister for the Civil Service [1985] AC 374**.

17. 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.

18. 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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

Procedural unfairness

19. 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.

20. 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; and/or
    e) the panel was not impartial.

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

Failure to give sufficient reasons

22. It is well established now, by decisions of the courts, that a failure by a panel to give adequate reasons for its decision is a basis on which its decision may be quashed, and reconsideration directed. Complaints of inadequate reasons have sometimes been made under the heading of irrationality and sometimes under the heading of procedural unfairness: whatever the label, the principle is the same.

23. The reason for requiring adequate reasons had been explained in a number of decisions including:
    - **R v Secretary of State for the Home Department ex parte Doody (1994) 1 WLR 242;**
    - **R (Wells) v Parole Board (2009) EWHC 2710 (Admin);**
    - **R (PL) v Parole Board and Secretary of State for Justice (2019) EWHC 306; and**
    - **R (Stokes) v Parole Board and Secretary of State for Justice (2020) EWHC 1885 (Admin).**

24. The principal reason for the duty to give reasons is said to be the need to reveal any error which would entitle the court to intervene without knowing the panel's reasons the court would be unable to identify any such error and the prisoner's right to challenge the decision by judicial review would not be an effective one. In **Wells** Mr Justice Saini pointed out that the duty to give reasons is heightened when a panel of the Board is rejecting expert evidence.

25. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of

the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD,** they have the expertise to do it.

26. However, as noted above, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, **per R (Wells) v Parole Board [2019] EWHC 2710**.

27. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.

28. The Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

29. 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

30. The Respondent offered no submissions.

Ground for Reconsideration

31. As there are two prison offenders managers involved in this case I have identified them as POM1 and POM2.

32. The Applicant's solicitor submits that the panel failed to take into account the evidence and recommendation of POM1, a prison offender manager who had responsibility for the Applicant in this case. It is also submitted that the panel failed to fully summarise and reference the evidence of POM1, that evidence having been given at a hearing in September 2023. Finally, that the panel omitted to note the fact that POM1 recommended release and gave reasons for that recommendation. Additionally, it is submitted that the panel's letter does not provide sufficient evaluation of POM1's evidence, or of the evidence of the COM. It was noted that the COM had known the Applicant for very many years. It was submitted that the panel

had not explained why they had come to a different conclusion to those professionals (namely POM1 and the COM).

Discussion

33. A short chronology of this case is as follows:
    - The case was initially referred to the Parole Board for review in November 2021.
    - In June of 2022, an MCA (Member Case Assessment) member adjourned the case for further reports.
    - In October of 2022 the case came back before an MCA member and was sent for hearing.
    - The case was listed for hearing in September of 2023. On that day the case was adjourned part heard. The panel ordered several matters to be clarified and updated reports to be prepared. The Applicant's POM at that time was POM1. POM1 told the parties that she would not be available for the next hearing and that any further evidence would be covered by a deputising POM (POM2).
    - The matter was then relisted for an adjourned hearing in December of 2023. Updating evidence from the prison, at this hearing, was provided by the deputising POM (POM2).
    - The case was not completed in December of 2023, it was again adjourned part heard as the panel were awaiting further information.
    - The matter was concluded by way of a decision in February of 2024.

34. This was a case where there were conflicting recommendations as to release. The Applicant's COM supported release to specialist designated probation premises with strict licence conditions.

35. A prison instructed psychologist, who reported upon the Applicant, did not support release. The psychologist took the view that there were outstanding areas of risk to address relating to substance misuse and alcohol misuse. There were also issues relating to emotional management and coping strategies associated with personality. The psychologist suggested interventions and work to develop openness with professionals. There were also notes on the dossier indicating that at an earlier stage, there had been suggestions by a prison psychologist that the Applicant should transfer to a specialist unit in prison. An assessment for that specialist unit took place, however the outcome was that the Applicant had demonstrated limited motivation to engage with the programme and was therefore not offered a place.

36. So far as the position with the POM was concerned, the panel noted that POM 1 had indicated in in September of 2023 that staying in prison "*would not help him to progress*" and that an open prison would '*demotivate*' him. The inference to be drawn therefore was that POM1 was indicating that the Applicant should be released as there was no further value in him remaining in custody.

37. At the adjourned hearing the deputising POM (POM2) gave evidence, but no recommendation from POM 2 is noted.

38. As indicated above, the panel received mixed recommendations as far as the Applicant's progression was concerned.

39. The panel noted, in the decision letter, that the Applicant's COM had drafted appropriate licence conditions. There would be a place in probation supported designated accommodation. There were suggested plans for the Applicant to complete an intervention in the community and to engage with support services in the community. He would also be monitored by a police support organisation. The panel also noted that the Applicant's COM was aware of the fact that the manageability of his risk would depend upon his openness. Openness and honesty was an issue which caused some concern to the panel.

40. In light of the above, I am satisfied that the panel took account of the arguments adduced by the COM in support of release. I have considered, therefore, whether there would be any further arguments adduced by the POM in this case, which would have added to the material to be considered by the panel. I note that although the application for reconsideration asserts that the evidence of POM1 had not been fully rehearsed in the decision, no specific additional points or issues, which may have been raised by POM1, are suggested within the application by the Applicant.

41. The panel acknowledged, in the decision letter, that POM 1 took the view that there was no further value in the Applicant remaining in prison. With respect to prison-based offender managers, this is often the view adopted by them. However, the test to be applied by the parole board is not whether remaining in custody is of any further value to the prisoner. The test is entirely focused upon the risk to the public. The panel therefore would have acted inappropriately if it had adopted the view that the Applicant should be directed to be released because there was no further value in him being in custody. It also appears to me that there is unlikely to have been any further supporting evidence relating to release adduced by POM 1 beyond that which was suggested by the COM. It was clear that POM 1 and the Applicant's COM had undertaken joint meetings and discussed progression (as is the norm). The risk management plan, proposed by the COM, had clearly been compiled as a result of joint meetings between the COM and POM1 (again as would be the norm).

42. I have also considered whether the panel explained the reasons for their decision and for not supporting the view of the COM in this case.

43. In its concluding remarks, the panel determined that the Applicant had been evasive at times. That he minimised reports of negative behaviour in prison. That he had a history of the use of fermented liquid. He also showed little insight into his risk factors. The panel determined that the Applicant had a distorted perception of himself and others and that he had not sufficiently addressed those difficulties, even though he may have expressed an understanding of the difficulties. The panel made clear that they took the view that behavioural work had to be completed before the Applicant's risk could be managed in the community. The panel indicated that they had considered whether the necessary behavioural work could be completed in the community (as suggested by the COM). However, they took the view that there was a serious risk of disengagement by the Applicant were he to be in the community.

44. The panel noted that the Applicant had given inconsistent reports about prescribed medication. He had apparently told the panel that he was taking the medication and that it helped him. However, further enquiries revealed that he had not received his prescription for some time. The panel also noted the fact that there had been a

recent adjudication for possessing fermented liquid. One of the adjudications related to a large quantity of the liquid.

45. In essence the panel rejected the view of the COM, (and by inference POM1 who had provided input into the preparation of the risk management plan), because the Applicant had demonstrated evidence of poor compliance, evasive behaviour, and a limited understanding of his risks. The panel clearly concluded that the COM's (and POM1's) confidence that risk could be managed in accordance with the statutory test, was misplaced.

46. Having considered the decision in detail. I am satisfied that the panel fully explained its reasons for declining to direct release and applied the statutory test in the appropriate manner. I am also satisfied that the panel explained why they did not support the view that the Applicant's risk could be safely managed in the community, (as suggested by the COM and POM1).

Decision

47. In all the circumstances therefore I conclude that the decision in this case was not irrational in the legal sense set out above and that the decision was not procedurally unfair. I refuse the application for reconsideration.

HH S Dawson
05 March 2024