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[2024] PBRA 59

Application for Reconsideration by Carson

Application

1. This is an application by Carson (the Applicant) for reconsideration of a decision of an Oral hearing panel not to direct release. The hearing took place on the 28 September 2023.

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 dossier of 845 pages, the application by the Applicant's solicitor dated 8 March 2024 and the Secretary of State's (the Respondent) response.

Background

4. In November of 2006 the Applicant was sentenced to an indeterminate prison sentence for public protection. The minimum term set by the judge was 1 year. The index offence was the possession of a firearm (a BB gun) with intent to cause fear of violence. The Applicant waved the gun in a shopping centre. The Applicant was released on licence in May of 2020. She was recalled to prison in March of 2022. The Applicant is now aged 45. She was 27 years old at the time of sentence.

Request for Reconsideration

5. The application for reconsideration is dated 8 March 2024.

6. The grounds for seeking reconsideration are set out below.

Current parole review

7. The panel convened to hear this matter as an oral hearing (OH) in September of 2023. The panel then adjourned the case for a period of 5 months to await information relating to accommodation. The matter was concluded in February of 2024.

8. The panel members consisted of an independent Chair, a psychiatrist member and a third independent member. The Applicant was legally represented. Evidence was given at the hearing by a prison offender manager, two community offender managers and prison instructed psychologist.

The Relevant Law

9. 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.

10. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

11. Pursuant to 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)).

12. 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)).

13. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

14. 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."

15. 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.

16. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

Procedural unfairness

17. 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.

18. 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.

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

The reply on behalf of the Secretary of State (the Respondent)

19. The Respondent offered no representations.

Ground of Application

20. The Applicant's legal adviser submits that the decision not to further explore alternative accommodation options, was irrational, when considering the weight of the evidence in support of the Applicant's risk being manageable in the community.

Discussion

21. The background to this application is that the Applicant had been recalled to prison having been initially released on licence. At the time of the recall the Applicant was living in supported accommodation. The Applicant had initially settled well in the accommodation and had demonstrated stability and engagement and had used appropriate coping skills. However, in the months preceding the Applicant's recall her behaviour became challenging. At one point she left the supported accommodation, without permission from her probation officer and travelled some distance to see a family member. She returned to the supported accommodation. However, her presentation and behaviour deteriorated to a point where the supported accommodation managers withdrew their offer of accommodation. There was apparently no alternative accommodation available, and the Applicant was recalled to prison.

22. The oral hearing panel (OHP) noted that the Applicant had been diagnosed with a personality disorder. It was recorded that the Applicant's aggressive and violent behaviour was likely to be linked with personality and mental health issues. The Applicant was recorded as having suffered a dysfunctional and traumatic early life. The Applicant had had contact with psychiatric services for many years and had spent some years as an in patient in a psychiatric hospital. The OHP, in its decision, identified a number of risk factors. There was general agreement that the Applicant would be unable to cope and that her risk would elevate, unless she were accommodated in specialist supported accommodation.

23. Leading up to the oral hearing there had been some possibility of specialist supported accommodation being available. The panel had adjourned the hearing in order to await the outcome of assessments in relation to the specialist accommodation. It appears that as a result of a miscommunication or mistake, the prison accommodating the Applicant, declined to permit staff from the specialist accommodation, entry to the prison and the assessment did not therefore take place.

24. However, following this difficulty, the specialist accommodation providers reassessed the Applicant's background and concluded that they would not, in any event, be in a position to offer the Applicant accommodation.

25. The Applicants legal adviser submits that the accommodation providers had declined to offer accommodation because of the difficulties with accessing the prison and undertaking an assessment. It is clear, however, from the evidence on the dossier, that this was not the case. The records indicate that the accommodation was declined after an assessment of the Applicant's background and challenges. The accommodation providers had reassessed the position and had concluded that they could not offer the Applicant accommodation in their specialist unit as she would not meet the criteria and requirements of the unit.

26. The position of the professionals at the oral hearing was that there was support for the Applicant's release from prison, subject to the availability of specialist supported accommodation. Without the specialist supported accommodation it was clear that the professional view was that the Applicant's risk could not be managed. The nature of the accommodation in the community was therefore a key factor underpinning the risk management plan.

27. There appeared to be no alternative accommodation options available. There may have been the possibility of the Applicant being accommodated in a probation hostel for a limited term. The panel, however, were obliged to consider the Applicants future risk beyond short term accommodation offers.

28. The role of an OHP of the Parole Board is to assess risk at the time of the hearing. The duty to seek out and secure accommodation is a matter for the probation Service and the prison service, liaising with the Applicant and possibly legal advisers. The position at the oral hearing was that no suitable accommodation was available or being offered. It was also clear that as a result of the Applicant's serious behavioural challenges, securing suitable accommodation was likely to be difficult

and protracted. The duty of all Parole Board panels pursuant to *article 5 (4) of the European Convention on Human Rights*, is to provide a speedy review of the prisoner's detention. In this case, the panel gave sufficient time to ascertain whether the supported accommodation, which was potentially on offer, was in fact available.

29. The Applicant's solicitor argues that the panel acted irrationally in not further adjourning the matter and attempting to secure appropriate accommodation for the Applicant in the future. As indicated above securing accommodation is not the role of the Parole Board. In this case no suitable accommodation was available or being offered. The panel therefore considered all the evidence before them at the hearing date and declined to direct release.

30. The Applicant's legal adviser refers to a legal authority, namely ***Goldsworthy v Sec. of state and R. on app of Rawnsley v Parole Board***. In this case (which was considered before the introduction of the current reconsideration process) the High Court were considering a different situation.

31. The facts of the *Goldsworthy* case were that the released prisoner was elderly and unwell. He had been released on licence and was living in a care home. The care home were unable to cope with the behaviour of the released prisoner and had withdrawn his accommodation place. The probation service had the possibility of offering alternative accommodation (namely a self contained flat) but had recalled the prisoner. The probation service had not fully investigated the viability of the alternative accommodation. The High Court in this case took the view that the Probation Service, in recalling the prisoner, had acted irrationally by not investigating the possibility of the alternative accommodation which was potentially available. The general principle illustrated in that case and quoted from an earlier decision ***R (Jorgensen) v Secretary of State for Justice [2011] EWHC 977***, namely. *"As Silber J observed, detention is a last resort. It was incumbent on the Defendant to consider reasonable alternatives to prison before recalling him, and particularly to consider the viability of managing him in alternative accommodation which had already been identified as available."* is clearly rational and appropriate, however, ***Goldsworthy*** was far from the facts relating to this Applicant. Firstly, the role of seeking out accommodation is one for the probation service, rather than the Parole Board, additionally ***(Goldsworthy***) was a situation where a decision was being made in relation to recall by the Probation service, rather than the test for release which has to be applied by the Parole Board. Finally and importantly, in the ***Goldsworthy*** case accommodation had been identified as available. I am not persuaded that this case greatly assists in this matter.

32. I therefore do not determine that the Parole Board panel in this case had any duty to further adjourn in the hope that suitable appropriate accommodation might be available in the future. I fully accept that if there had been the potential for accommodation which might have been available within a reasonable amount of time the Applicant may well have applied for an adjournment and it may well have been unreasonable for a panel not to allow for a reasonable time to ascertain whether accommodation was available. However, even in these circumstances an adjournment may only be for a reasonable amount of time and should be in

circumstances where there is a realistic possibility that the accommodation will be available.

33. In all the circumstances, therefore, I am not persuaded that the panel's decision in this case to decline to direct release was irrational, in the sense set out above, or indeed procedurally irregular.

Decision

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

HH S Dawson
25 March 2024