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[2024] PBRA 56

Application for Reconsideration by Somerville

The Application

1. This is an application by Somerville (the Applicant) for reconsideration of a decision made by a panel of the Parole Board (the panel) following an oral hearing decision refusing his application for 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 decision of the panel, written submissions in support of the application prepared by the Applicant's representatives and a letter written by the Applicant himself.

Background

4. The Applicant is now 82 years of age. At the time he was sentenced he had 14 previous convictions for some 20 offences, one of which was a conviction in 1983 (when aged around 40) for indecent assault on a female under the age of 14. He was sentenced in April 2018 as an offender of particular concern to an extended determinate sentence comprising of a custodial term of 11 years with an extension period of 1 year. The offences were all of a sexual nature committed between 1993 (when aged around 51) and 2000, against five young female children, the most serious being an allegation of attempted rape of a girl under the age of 13.

5. The distressing circumstances of these serious offences were briefly as follows. The Applicant had a male friend who was a carer for his two female children aged 8 and 6 respectively. The friend entrusted the Applicant with the role of baby-sitter. This arrangement progressed to the girls going to the Applicant's home on the pretext that he would be baby-sitting for his own child. When the two girls would go to his house the Applicant allowed them to take alcohol and drugs. He would then sexually abuse the children in a variety of ways. As time passed the girls would come to the house with female friends of theirs who the Applicant would abuse in similar ways. The Judge found that the Applicant's offending had a devastating life-long effect on all five of the children who suffered in the words of one of them *"huge damage".*

Current parole review

6. The case was referred to the Parole Board in January 2023. It was the Applicant's first review. The oral hearing before a two person panel comprising of two independent members was heard on 25 January 2024.The panel heard evidence

from the Prison Offender Manager (POM), the Community Offender Manager (COM) and the Applicant himself who was legally represented.

The Request for Reconsideration

7. There are, as I understand it, essentially two grounds put forward in support of the application for a reconsideration, there being no submission that the hearing was procedurally unfair; it is submitted that the decision was however irrational because:

   Ground (i) The Applicant's explanation for watching a particular TV programme for the purpose of demonstrating that his sexual libido had reduced significantly was misinterpreted.

   Ground (ii) The panel failed to take sufficiently into account the evidence given by the COM that she was supportive of release demonstrated by her accepting that an intervention could be undertaken in the community which intervention the Applicant said he was willing to undertake.

The Relevant Law

Parole Board Rules 2019 (as amended)

8. 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)).

9. 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)).

10. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28.

Irrationality

11. 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."*

12. 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.

13. The **DSD** case is an important case in setting out the limits of a rationality challenge in parole cases. Since then another division of the High Court in **R (on the application of Secretary of State for Justice v Parole Board [2022] EWHC 1282 Admin) (the Johnson case)** adopted a *'more modern'* test set out by Saini J in **Wells [2019] EWHC 2710 (Admin)**.

14. All of these tests are based on the dictum of Lord Greene in **Associated Provincial Houses Ltd v Wednesbury Corporation (1948) 1KB 233 (CA)** which defines irrationality, in the context of Parole Board cases, as a finding that *"no reasonable panel could have reached the impugned decision".* That definition has been explained and expanded in other cases but it has not been challenged in any parole board case.

15. In the **Wells** case Saini J set out *'a more nuanced approach'* at paragraph 32 of his judgment when he said:

    "A more nuanced approach in modern public law is 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".

16. It must be emphasised that this is not a different test to the Wednesbury reasonableness test. In the **Wells** case Saini J emphasised at paragraph 33 that *"this approach is simply another way of applying"* the Wednesbury irrationality test.

17. What is clearly established by all the authorities is that it is not for the reconsideration member deciding an irrationality challenge on a reconsideration – or a Judge dealing with a Judicial Review in the High Court – to substitute his or her view for that of the panel who had the opportunity to see the witnesses and evaluate all of the evidence. It is only if a reconsideration member considering the application decides that the decision of the panel did not come within the range of reasonable conclusions that could be reached on all of the evidence, that he or she should allow the application.

18. Panels of the Board are wholly independent and are not obliged to adopt the opinions or recommendations of professional witnesses. A panel's duty is clear and it is to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence and decide what evidence they accept and what evidence they reject.

19. Once that stage is reached, following the guidance provided by cases such as **Wells** a panel should explain its reasons whether or not they are going to follow or depart from the recommendation of professional witnesses.

20. The giving of reasons by a decision maker is *"One of the fundamentals of good administration"* **(Breen v Amalgamated Engineering Union [1971] 2 QB 175)**. When reasons are provided, they may indicate that a decision maker has made an error or failed to take a relevant factor into account. As I understand the principles of public law engaged in deciding this application, an absence of reasons does not automatically give rise to an inference that the decision maker has no good reason for the decision. Neither is it necessary for every factor to be dealt with explicitly for the reasoning to be legally adequate in public law.

21. The way in which a panel fulfils its duty to give reasons will vary, depending on the facts and circumstances in any particular case. For example, if a panel is intending to reject the unanimous evidence of professional witnesses then detailed reasons will be required. In **Wells** at paragraph 40 Saini J said:

   "The duty to give reasons is heightened when the decision maker is faced with expert evidence which the panel appears, implicitly at least, to be rejecting".

22. When considering whether this decision is irrational, I will keep in mind that it is the decision of the panel who are expert at assessing risk. Importantly it was the panel who had the opportunity to question the witnesses and to make up their own minds what evidence to accept. As I have already observed, it is extremely important that I do not substitute my judgment for theirs. My function is to decide whether the panel in this case erred in law or reached a decision that was Wednesbury unreasonable and/or procedurally unfair in some respect.

Procedural unfairness

23. In conducting its proceedings the Board must comply with the requirements of procedural fairness which is the modern term for the rules of natural justice. 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.

24. 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.

25. 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)

26. The Respondent has indicated that he does not wish to make any submissions in response to this application.

The evidence before the panel

27. Given the way in which this application is expressed it is necessary to refer in a little detail to some of the evidence heard by the panel.

28. The panel noted that the current risk assessments provided suggested that the Applicant presented a high risk of harm to children. It accepted the assessments taking into account his background and previous offending, the contents of the dossier and his evidence to the panel. It observed that without any external controls the Applicant presented a high risk of sexual offending.

29. The panel identified the following risk factors which included accommodation; lifestyle and associates; relationships; drug misuse; the Applicant's thinking and behaviour; his attitudes, his distorted views and his sexual attraction to children. The panel recorded that he had said he is a paedophile and had demonstrated distorted thinking about boundaries in respect of sexual consent and about children's maturity. The panel recorded that the Applicant contended that he would be safe to be alone with children. I note that while acknowledging that the Applicant's risk was not imminent, the panel said that for the Applicant to reoffend *"this would likely be preceded by a period of grooming behaviour".* While it does not alter my decision in this application, it is right that I should draw attention to two decisions of the High Court, in the cases of **Johnson [2022] EWHC 1282 (Admin)** and **Dich [2023] EWHC 945 (Admin)** in which the High Court held that the process of grooming itself is a criminal offence liable to cause serious harm.

30. The POM told the panel that the Applicant presented a moderate risk of sexual recidivism and in his opinion offence focused work was necessary before release could be safely considered. In addition, the POM is reported as saying that the Applicant needed to show some awareness of the degree of harm he presented to his victims. The POM also stated in his evidence that the Applicant had engaged well with him. He confirmed there were no offence focused programmes at the establishment where the Applicant was held and consequently a transfer would be required to enable him to be assessed for the most suitable programmes.

31. As for the POM's recommendation to the panel, he said that the Applicant did not understand his triggers to offending. He observed that the Applicant had sought to excuse his culpability by relying on past attitudes, that there was no psychological risk assessment and no core risk reduction work had been done. Taken these matters together the POM described support for release as being "*indefensible*" until there had been an assessment of the Applicant's risks and needs.

32. The COM who had known the Applicant for several years gave evidence of changes in his engagement and in particular that he has acknowledged that what he had done was wrong because his victims were children. Importantly, she also told the panel that currently he could acknowledge that he had a sexual interest in children, representing a shift in his position since the beginning of his sentence. Despite not

writing the most recent COM report in the dossier she told the panel that she agreed with the risk assessment and recommendation that is contained within it. This report is dated 29 November 2023 and was written by a replacement COM who had been allocated to the Applicant's case in May 2023. In the replacement COM's view the Applicant had expressed an intention to comply. He had considered the Applicant's overall level of compliance and his behaviour in custody, and concluded that he had demonstrated a likelihood of being compliant if released. The COM went on to observe that he remained concerned that the Applicant had not completed a particularly important programme which if completed would provide evidence of a reduction in risk. He said that in his opinion it would be "*desirable*" for that work to be completed prior to release.

33. The Applicant in his evidence told the panel that he felt his eldest victim was *"promiscuous"* or *"sexually curious".* When asked by the panel whether a child of 8 years could be sexually curious, the Applicant indicated that this could indeed be the case. He told the panel he committed the abuse because he enjoyed the sexual element of it. He also accepted in his evidence that he gained sexual satisfaction from his offending. He told the panel that he had a weakness for young girls and that he had recently acknowledged this.

34. The panel confirmed that the Applicant had completed some vocational work but had not completed any work on his offending behaviour. The panel noted that he qualified for a particular programme but had refused to travel to another prison to complete it, having consistently told prison staff that he would not be able to manage the journey in a prison vehicle because he suffered from claustrophobia. He was asked if he felt the need to complete any risk reduction work and is reported as being ambivalent in his response but said that he would work with a psychologist in the community.

35. The panel referred to a report that revealed that the Applicant had watched a tv programme involving adult nudity. He told the panel it did not sexually arouse him - something he specifically relies upon in this application to demonstrate that his sexual libido had reduced significantly. The panel heard from the COM in this regard and noted that she described the programme as an "*unusual choice*". The panel (while recognising that the programme's participants were adults) expressed the view that they found it difficult to understand why the Applicant would have chosen such a programme other than out of a sexual interest – thereby suggesting that his libido had not completely diminished as he had suggested.

36. The panel considered the proposed risk management plan together with other proposed measures.

37. The panel noted that the closing submissions made on behalf of the Applicant placed emphasis on the following points:

(i) His positive conduct in custody,
(ii) His willingness to reflect on his past behaviour,
(iii) His willingness to complete any programme in the community and,
(iv) His age and reducing libido.

The panel's findings and conclusions

38. The panel acknowledged that the Applicant had made some positive progress during his sentence. He was they found able to engage with staff and keep to the prison regime. He had not been disciplined for any breaches of prison rules.

39. Also, in the Applicant's favour, the panel recognised that since committing the offences several years ago he had remained free of any other police investigation. The panel accepted that this pointed towards some level of self control. Against that, the panel remained concerned that the Applicant had not addressed his sexual offending or even begun any exploration of his sexual interest in children. The panel noted that during his evidence the Applicant appeared to them to describe the eldest victim as being sexually curious while at the same time maintaining that he understood the legal position regarding the age of consent. He said that his conviction for attempted rape was not seen by him as being rape because what he did not involve any element of violence or coercion.

40. The panel found the nature of his offending, its duration and the number of victims involved demonstrated an entrenched pattern of behaviour which could not be separated from his previous conviction for the indecent assault of another young girl albeit years before. It went on to find that when those matters were combined with the absence of any offence focused work, taken together with his apparent reluctance to complete an appropriate programme the panel were led to the conclusion that he had not in fact made any progress during his sentence and that the risk factors underpinning his offending had not been addressed nor reduced; the panel specifically noted that *"both professional witnesses appeared wary of progressing (*the Applicant) *in the absence of such work".*

41. The panel raised serious concerns regarding the risk management plan when the time came for the Applicant to move on from supervised and monitored accommodation when restrictions and monitoring would inevitably lessen.

42. For these reasons the panel concluded that the statutory test for release had not been met.

The Applicant's submissions

43. The Applicant's submissions provided by his legal representative were extremely brief and frankly somewhat difficult to follow. I have earlier summarised what I understand to be their effect.

44. In fairness to the Applicant, I should briefly paraphrase his own observations dated 14 February 2024 given that his representatives ask that I take them into account. They are as follows:

    (i) Between what he describes as *"ending his relationships"* with the victims in the year 2000 - he consciously avoided all contact with young girls up to and after his arrest.
    (ii) He values that he was able therefore to exercise *"self-control"* for several years.
    (iii) He has changed character and seeks the opportunity to demonstrate that in open conditions where he says would be happy to undertake offender programmes.

(iv) He accepts his behaviour was *"inappropriate"* and that it caused harm.
(v) He has expressed his *"deep regret for my shameful behaviour."*
(vi) His faith has helped him accept that he cannot behave the way he did ever again.

Analysis and conclusions

45. **Ground (i)** asserts that the explanation provided by the Applicant as to why he was watching a particular programme on television featuring naked adults was misinterpreted. Both the COM and the Applicant gave evidence regarding this incident. It was the Applicant's case that because he did not get sexually aroused by watching a film involving naked adults this indicated that his sexual libido was significantly reduced. The Applicant was legally represented and had it been thought appropriate the possibility of a misunderstanding could have been explored. From the material before me it does not seem to have been suggested that there was any misunderstanding or misinterpretation. The panel's task was to reach a conclusion if it could upon that evidence and decide what weight to place upon it, if any. They did so, and reached a view of this evidence which is somewhat adverse to the Applicant and provided, insofar as they could, their reason. In **R (DSD and others v the Parole Board)** the court considered the approach of a panel to the assessment of risk in the following way:

"117.The evaluation of risk, central to the Parole Board's judicial function is in part inquisitorial. It is fully entitled, indeed obliged, to undertake a proactive role in examining all of the evidence….The individual members of a panel, through their training and experience, possess or have acquired skills and expertise in the complex realm of risk assessment…

118. The courts have emphasised on numerous occasions the importance and complexity of this role, and how slow they should be to interfere with the exercise of judgment in a specialist domain….

133. A risk assessment in a complex case is multi-factorial, multi-dimensional and at the end of the day quintessentially a matter of judgment for the panel itself".

46. It is clear that the assessment of evidence is a matter for the panel and only for the panel. The assertion by the Applicant after the event that there must have been a misinterpretation takes the matter no further. There is in my judgment no merit in this ground and therefore it fails.

47. **Ground (ii)** asserts in effect that because the COM was supportive of release it was irrational for the panel to find otherwise**.** This ground ignores the fundamental principle that a panel is perfectly entitled to accept or reject any piece of evidence including any recommendation provided that if it rejects the evidence, in this case a professional witness being apparently supportive of release, it must explain why. As I read the decision, the panel did just that.

48. It is further submitted that the Applicant does not accept that professionals were "*wary"* of his progression and that his evidence on the issue of his willingness to engage in offending behaviour programmes in the community should have been accepted. I have set out in **paragraphs 30 to 32** above a summary of the evidence

given by the professionals in this case. The panel in its decision noted that the professional witnesses appeared to the panel to be *"wary"* of progressing the Applicant. I remind myself that the Oxford dictionary defines *"wary"* as being *"on one's guard, cautious or circumspect"* The POM's evidence was that support for the Applicant's release would be *"indefensible"* prior to there being an expert's assessment. The COM, who did not give evidence, but whose report was before the panel said that it would be *"desirable"* that a particular programme should be completed by the Applicant before release. I understand that the Applicant does not accept at least one of the professional's opinions but in my judgment that does not begin to establish that to deal with this issue as the panel did was in any way irrational.

49. In my judgment there is no merit in this ground and it too must fail.

50. In **paragraphs 44 (i) to (vi)** above, I set out in summary form observations prepared by the Applicant himself. It is usual for any submissions on behalf of an applicant to be made orally at the conclusion of the oral evidence or with the panel's leave (and sometimes at the panel's request) in writing following the hearing. The point being that fairness requires a panel to have before it everything that the parties wish to rely upon before a panel concludes its deliberations and issues its decision.

51. That said, I have considered the matters the Applicant put forward and shall of course take them into account. I simply add that the majority of the points the Applicant has made on his own behalf were in fact already before the panel.

52. Having had the advantage of hearing and assessing all of the evidence, which included evidence from the Applicant, a man of 82 years of age in this sensitive and serious case, an experienced panel provided a comprehensive and fair-minded decision which clearly considered all of the evidence before it with care before reaching reasonable conclusions that it was perfectly entitled to reach. The panel applied the established principles of law and satisfied their public law duty to provide evidence based reasons that in my judgment adequately and sufficiently explained the conclusion it reached to refuse release.

53. In my judgment, it cannot be sensibly argued that this was a decision that no reasonable panel could have come to and accordingly I find the decision is not irrational.

Decision

54. For all the reasons I have given, I do not consider the decision to be irrational or procedurally unfair and accordingly the application for reconsideration is refused.

HH Michael Topolski KC
13 March 2024