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[2020] PBRA 95

Application for Reconsideration by Troughton

Application

1. This is an application by Troughton (the Applicant) for reconsideration of a decision of a panel dated 2 June 2020 not to direct his release.

2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.

3. I have considered the application on the papers. These are the dossier, containing 300 pages including the decision letter now under review, and submissions on behalf of the Applicant containing seven pages. The Secretary of State has not made a submission. Within the dossier there are, *inter alia:*

   (a) Some 28 pages dealing with the index offence and the Applicant's criminal record;
   (b) Some 20 pages of previous Parole reviews;
   (c) Some 29 pages of reports from Offender Supervisors;
   (d) Some 115 pages of reports from Offender Managers;
   (e) 138 pages of probation service assessment report;
   (f) Some 116 Pages of psychiatric and psychological reports from 2007 until 2020;
   (g) Some 16 pages devoted to accredited courses attended by the Applicant during his sentence; and
   (h) In view of the grounds submitted, I asked for, and have read, the Chair's notes of the hearing, and also that the Applicant's legal representative be requested to inform me whether at the hearing there was an application for the case to be adjourned or deferred.

Background

4. On 9 February 2012, the Applicant was convicted of murder. He was sentenced to life imprisonment with a minimum term of 12 years. This term was reduced by the Court of Appeal Criminal Division to nine years and was due to expire on 13 May 2020. In August 2018 he was transferred to open conditions. On 22 May 2020 his case was considered by a three-member panel of the Parole Board. The Decision Letter (DL) declined to order his release.

Request for Reconsideration

5. The application for reconsideration was received at the Parole Board on 23 June 2020.

6. The grounds for seeking a reconsideration are in summary as follows:

   (a) The DL fell into error in asserting that the Applicant had declined the opportunity of a deferment or adjournment of his hearing in order for his release management plan to be developed further;

   (b) The hearing was conducted by video link. This was procedurally unfair since the Applicant, an 83-year-old man, was unable to play a full part in the proceedings and his lack of understanding of the way in which the proceedings were conducted resulted in the panel coming to unjustified conclusions about him and his suitability for release; and

   (c) The DL irrationally failed to put proper weight on the contents of a psychological report which had been prepared for the purposes of a previous Parole Board hearing.

Current parole review

7. As set out above, the hearing took place on 22 May 2020. Oral evidence was taken from the Offender Supervisor (OS), the Offender Manager (OM) and the Applicant.

The Relevant Law

8. The panel correctly set out in the DL the test for release.

Parole Board Rules 2019

9. Under Rule 28(1) of the Parole Board Rules 2019 the only type of decision which is eligible for reconsideration is one that the prisoner is or is not suitable for release on licence. This is therefore an eligible decision.

Irrationality

10. 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."

11. 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.

12. 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

13. Procedural unfairness means some procedural impropriety or unfairness which has resulted 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 focuses on the decision itself.

14. In summary an Applicant, who complains of procedural unfairness under Rule 28, must satisfy me that:

(a) express procedures laid down by law were not followed in the making of the relevant decision; or
(b) he was not given a fair hearing; or
(c) he was not properly informed of the case against them; or
(d) he was prevented from putting their case properly; and/or
(e) the panel was not impartial.

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

16. It is possible to argue that mistakes in findings of fact made by a decision maker resulted 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.

17. 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

18. The Secretary of State has indicated that he does not wish to make representations in response to this application for reconsideration.

Discussion

19. Ground (a). I have examined the material submitted on behalf of the Applicant in support of this ground.

(a) The expectation in the minds of the Applicant and his OM had been that the Applicant would be able to live, on his release, at the address of a family member. Unfortunately, before the hearing, the current COVID-19 'lockdown' was imposed. The family member works in the social care field and was thus understandably unable to offer the anticipated accommodation to the Applicant; and a house to be built on land belonging to the family and eventually to be occupied after release by the Applicant is not yet habitable.

(b) The OM, faced with this difficulty, was unable to recommend immediate release because the Applicant had not yet had the opportunity to take temporary release and she was concerned that if the Applicant did not have that opportunity the risk of the sort of problem which had led to the commission of the index offence might arise and that members of the public might thereby be exposed to an unacceptable risk of serious harm.

(c) A series of documents are now considered.

(i) In December 2019, the Panel Chair directed an oral hearing expressing the hope that, were a hearing to be fixed at about the time the tariff expired on the Applicant's sentence, and there had been a successful completion of temporary releases, a panel would be in good position to hear the case and possibly to direct release. The full and helpful passage in the Direction explaining the decision to direct a hearing, rather than to adjourn/defer consideration of the case until the temporary releases had been successfully or unsuccessfully completed, makes it clear that the hope is that they will have been completed and that if there were no other problems which had arisen in the meantime, a direction for release would be a likely though not a certain outcome.

(ii) On 15 May 2020 the casework manager in charge of the case at the Parole Board sent an email to the Applicant's legal representative. It read, *"in the light of the recent report do you wish to proceed to the oral hearing or conclude on paper?"* The email in reply has not been sent with the papers requesting reconsideration but it is clear that if there was an answer it must have been to the effect that the Applicant wished the oral hearing to proceed, since that is what happened.

(iii) The DL contains the following passage in paragraph 2:

"Given the above, the panel chair contacted [the Applicant's legal representative] prior to the hearing, to enquire as to whether [the Applicant] wished to take the opportunity to defer [the] hearing in

order to develop your release plan, including taking [temporary release]. On [the Applicant's] behalf, [the Applicant's legal representative] firmly declined".

(d) It seems, both from the way in which the DL is phrased and the subsequent application for reconsideration, that the topic was not raised during the hearing. I asked for the recording, if any, of the hearing to check this and the matters connected with Grounds (b) and (c). Unfortunately, although the intention was to record the hearing, all that has been recorded is the Chair's voice. Thus, the vast majority of the hearing has been lost. Efforts to photograph such notes as were taken have apparently been unsuccessful.

(e) In those circumstances I must make the decision based on what has been presented. It is clear from this therefore that for whatever reason – perhaps a misunderstanding - the DL was in error when it stated that the opportunity for the case to be deferred or adjourned had been refused by or on behalf of the Applicant. The ground, correctly in my judgment claims that the alternatives being presented to the Applicant were to have an oral hearing or to accept a negative decision on the papers. The choice set out in the email quoted above made no reference to the possibility of deferring or adjourning the hearing. In my judgment therefore, the passage quoted above at 18(c)(iii) was both 'irrational' and 'procedurally unfair' and must result in an order for reconsideration.

20. Ground (b). In view of my finding on Ground (a), I need not go deeply into the merits of this ground. However, since the result of this decision will be that another hearing should be convened to consider the Applicant's case, I need only indicate that if this ground had stood alone, I would not have granted reconsideration on it. The current COVID-19 restrictions mean that all oral hearings are being conducted remotely and with all parties and the panel members separate. If a legal representative believes that her/his client is not receiving a fair hearing, the time to voice an objection or make a suggestion is during the hearing. The Board, offenders, and those representing them, assisted where necessary by professionals, many of whom will know the Applicant well, are faced with problems of this kind all the time; the more so now when COVID-19 has made it impracticable for hearings to be conducted in prisons however desirable that might be in ordinary circumstances. The Applicant was represented throughout the hearing and had opportunities to ask for changes to the arrangements or for allowances to made for the difficulties an 83-year old prisoner would be, or was actually, having in playing his proper part in the hearing. The ground makes no reference to any complaint or submission made on behalf of the Applicant before or during the hearing.

21. Ground (c). As with Ground (b), I need not go in detail into the merits of this ground. Although it is perhaps right to say that it is surprising that there is no reference to the report in the DL, in particular bearing in mind the presence on the panel of a psychologist member, it is most unlikely that the absence of a reference to a report now two years old would amount to a procedural irregularity or result in an irrational decision.

22. Accordingly, I do consider, applying the test as defined in the case law, the decision to have been procedurally unfair. I do so solely for the reasons set out above at paragraph 18. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

Sir David Calvert-Smith
22 July 2020