[2021] PBRA 184

the Parole Board

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Application for Reconsideration by the Secretary of State for Justice in the case of Ogbogu

Application

1. This is an application by the Secretary of State for Justice (the Applicant) for reconsideration of a decision of a panel dated 17 November 2021 to direct the release of Ogbugu (the Respondent).

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 a dossier containing 135 pages including the decision letter the subject of this application, together with the application for reconsideration.

Background

4. On 22 September 2017 the Respondent, who is now 66, was sentenced to an extended sentence of 9 years with one year extension. The case was referred to the Parole Board by the Applicant on 24 May 2021. The decision to release was made on paper by a single Parole Board member. His Conditional Release date is November 2022.

Request for Reconsideration

5. The application for reconsideration is dated 8 December 2021.

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

    a. Irrationality.

        i. The panel should not have accepted at face value the claim within the Community Offender Manager's report that the risk factors which might mean that his risk was not manageable in the community were so well known that there was no need for a formal risk assessment to be made. There is no indication in the DL that the risk factors identified within the risk assessment report prepared by the Community Offender Manager (COM) were considered individually and, if so, why the panel concluded

that they were manageable under the protection of stringent licence conditions.

ii. The report prepared for the panel contained references to two instances of alleged bad behaviour in prison by the Respondent earlier this year. The DL fails to explain what weight if any was placed on those two matters, when within the probation risk assessment report form they are highlighted as an indication that the Respondent is sometimes unable to deal properly with conflict situations.

iii. The same report indicates that when committing the index offences, he never considered the impact they would have upon his victims. The DL fails to explain how, if at all, the panel had considered this aspect of his offending and his apparent lack of "thinking skills".

iv. The Respondent, who was unrepresented, submitted his own written submissions to the panel. In them he expressed the hope that he would be able to stick to his licence conditions. The DL did not refer to this statement and did not express its own opinion on whether he would indeed comply and, if he did not, what the consequences might be to the public.

v. The panel failed to explain how the Risk Management Plan would reduce the risk of serious harm posed by the Respondent sufficiently to justify a direction for release. In particular,

   1. The DL fails to set out what if any assistance it derived from the Her Majesty's Prison and Probation Service (HMPPS) psychology team report and its suggestion that – as a "low risk" person – it could assist the COM in the drawing up of a Risk Management Plan.
   2. The DL fails to consider whether, and if so how, the fact that the Respondent's wife continues to believe in his innocence should affect the Risk Management Plan.
   3. The DL fails to consider the impact of the refusal by the Respondent's wife to disclose the details of the grandchildren directly related to the Respondent. The Respondent himself expressed his concern to the COM that some of the victims of the index offences still "show up" for family functions and what his recourse should be.
   4. This failure of the DL should be seen alongside the Respondent's written response summarised at iv above.

b. Procedural unfairness.

   i. The panel failed to *"give full reasons…for any recommendation it makes."* The failures set out in the grounds alleging irrationality amount to procedural unfairness. The cases of **R (Wyles) v Parole Board and Secretary of State for the Home Department [2006] EWHC 493 (Admin)** and **R (Oyston) v Parole Board [2000] All ER (D) 274*,*** set out the principles that Parole Board reasons must be proper, sufficient and intelligible and explain why the decision has been reached.

Current parole review

7. The panel considered that the case did not require an oral hearing. No submissions were made to the contrary by the Respondent or the Applicant.

The Relevant Law

Parole Board Rules 2019

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

Irrationality

9. 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."

10. 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.

11. 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

12. Procedural unfairness means some procedural impropriety or unfairness which resulted in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result.

13. 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) s/he was not given a fair hearing;
    (c) s/he was not properly informed of the case against them;
    (d) s/he was prevented from putting their case properly; and/or
    (e) the panel was not impartial.

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

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

16. 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

17. On 14th December I received handwritten submissions from the Respondent dated 10th December 2021. In summary he submits:
    a. That the problems he has had in identifying and reacting properly to problems have been traced and are now being satisfactorily controlled by medication.
    b. That the two negative entries referred to in the Applicant's grounds were the result of bullying by other prisoners. When this behaviour was reported to prison staff it only exacerbated the situation which usually arose when he refused to breach prison rules on behalf of other prisoners who thought he would be able to perform acts or services for them without detection because of his trusted status with the prison.
    c. That his expressed hope in his written submission to the panel that he "*hoped*" to abide by such conditions as may be attached to his licence he meant that he will comply with all such conditions.
    d. That so far as his step-son and step-grandchildren are concerned he has not seen them and does not know their names. They are Muslims and he is a Christian. So far as the victims of the offences are concerned there has been no contact with his family.
    e. That both the professionals assigned to his case – the POM and COM in reports countersigned by their superiors – recommended release.
    f. That on 2nd November 2021 he was "*re-categorised to progress to Category D establishment*".

Discussion

18. It is surprising that the Applicant, if he had doubts about the reasoning process applied to the case by the COM, countersigned by her superior, did not take steps to make submissions in opposition in advance of the hearing.

19. It is more surprising that the Applicant, faced with a decision which exactly mirrored the recommendations of his own witness supported by the witness' superior, seeks to characterise that decision as irrational or procedurally unfair.

20. The dossier contains the following recommendations or statements of opinion:
    a. An HMPPS Forensic Psychologist in April 2021: '*It is recommended that a psychology risk assessment is not needed at this time. While a treatment pathway has not been identified, his risk of offending is known to be low.*'
    b. His COM in July 2021. '*It is my assessment that (the Respondent) poses a low risk of re-offending at this time. [The probation risk assessment report] assesses (the Respondent's) risk of re-offending as low. The static Offender Scale version 3 (OGRS3) assesses his probability of proven reoffending at 2% within 1 year and 4% over 2 years. This places him in the low percentile category for further offending for someone of his age, gender and previous criminal behaviour. As (the Respondent) has been in custody for some years and away from offending this is considered when assessing the current risk of re-offending. It should be noted that at age 66, this should not be a determining factor of low re-offending rate, but his myriad of health issues contributes to further lowering the risk of reoffending.*' And a little later: '*Following discussions with Senior Probation Officer, release is supported by probation at this time. This recommendation follows a careful analysis of his risk.*'
    c. At the conclusion of that report the COM suggests that in view of the fact that the Respondent is unlikely to be represented at a hearing and unlikely too to be able to represent himself because of his health problems it may be preferable for the case to be dealt with on the papers. The COM has been responsible for his case since he came into prison in 2017.
    d. His Prison Offender Manager (POM) focused on the Respondent's current vulnerability because of his age and serious health issues including the need for a carer on some occasions. However her report did not contain a recommendation one way or the other concerning release.

21. As to the grounds submitted:
    a. It is almost inconceivable that a decision for release based upon the clear recommendation of the professional responsible for the implementation of that decision who has been responsible for the case from the outset of the sentence could be characterised as "irrational" when no other professional opinion had been put forward.
    b. The Respondent – now 66 - has no previous convictions apart from those for the index offences. His risk of general offending - apart from the type of behaviour which resulted in his sentence - is said to be low or very low.
    c. The Case Advice note from the Psychology Service contains a significant error, claiming that the COM informed the writer that the Respondent had only recently been allocated to her. In fact, the note itself contains the

information that the COM had been responsible for his case at least since October 2018 and – as her report made clear, that she had been his COM from the start of his sentence. There is a recommendation that no psychological risk assessment is needed. In those circumstances the failure of the HMPPS psychology team to provide consultancy to (the Respondent's) COM regarding his release plan and the absence of a reference to it in the DL cannot make the ultimate decision "irrational".

d. The instances of possible "bad behaviour" had nothing whatsoever to do with the possibility that he might reoffend in the way he did when committing the index offences. He has never been convicted of a physically violent offence. The professionals were unanimous that they did not affect their assessments of the risk of serious harm.
e. The question of his understanding of the impact of his offending on his victims. Clearly those who deny their offences will find it hard if not impossible to express such an understanding. Both the DL and the COM's report focused on the need for the possibility of similar offences being committed to be reduced by the imposition of conditions. The DL makes this quite clear at paragraph 3.1-3, and at paragraph 4.2 and 4.3 explains why it is that in the result his release is directed.
f. The suggestion that each DL should, if it considers the arguments put forward in the reports indicate that it has considered each of them and agrees with the conclusion of the report writer, is itself irrational.
g. The complaint concerning the "hope" expressed by the Respondent that he would be able to comply with the proposed licence conditions is without foundation. No offender can in reality do otherwise. Expressions of certainty by offenders that they will certainly do so are more likely to require examination. For the forty or more years that the Respondent has been an adult the only persons at risk of serious harm have been young girls. The focus of the Risk Management Plan and the resulting licence conditions has rightly been focused on that risk.
h. As to the concern that the DL makes no specific reference to the relatives who are not related by blood, and his own grandchildren, every condition is aimed at the same target. There must be no contact with such people without prior approval from the COM. It is impossible to characterise a decision which imposes such conditions as having ignored the risk suggested in the grounds.
i. As for the suggestion that the comparatively brief nature of the decision renders it procedurally irregular, having considered the cases cited I am satisfied that the decision and the reasons for it are entirely clear. Sentences passed at first instance are frequently far briefer than the DL in this case in explaining the reasons why one sentence is chosen rather than another.
j. I looked again at the two decisions cited by the Applicant. In **Oyston**, it will be recalled, the Board's decision occupied 7 lines of text. In **Wyles** the issue concerned the degree to which the Board should attach any weight to allegations which have resulted in acquittals. Neither in my judgment offer any support to the Applicant's contentions.

Decision

22. It will be clear from the above that I do not consider that the decision was either irrational or procedurally unfair.

Sir David Calvert-Smith
23 December 2021

3rd Floor, 10 South Colonnade, London E14 4PU
www.gov.uk/government/organisations/parole-board
info@paroleboard.gov.uk
@Parole_Board
0203 880 0885

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