[2022] PBRA 167

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Application for Reconsideration by Powell

Application

1. This is an application by Powell (the Applicant) for reconsideration of a decision of a Parole Board Panel dated the 3 October 2022 not to direct release but to advise the Secretary of State that the Applicant was still suitable to remain in open conditions.

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 and/or (c) the decision contains an error of law.

3. I have considered the application on the papers. These are the application for reconsideration, the Panel's decision letter and the contents of the dossier.

Background

4. The Applicant was sentenced on 13 July 2012 for sexual offences against children. For one of those offences, assault by penetration of a child under the age of 13, he was sentenced to Life Imprisonment with a minimum period to serve of 5 years less time spent in custody on remand before he was eligible for parole. For other offences he was sentenced to concurrent sentences of imprisonment. The minimum period elapsed on 4 June 2016. He was transferred to an open prison on 23 March 2021 following a recommendation made by the Parole Board after an earlier oral hearing.

Request for Reconsideration

5. The application for reconsideration is dated 17 October 2022.

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

    - The panel failed to attach sufficient weight to the progress that the Applicant had made while in an open prison and that he had met the recommendations made by the panel which preceded his move to open prison. He had made constructive use of his time in open prison; had complied with all necessary conditions when released on temporary licence and had developed a robust release plan. The Applicant sets out in greater details the progress that he has made in his application, and I have considered everything that he has set out.
    - The Applicant sets out in his application what he says are mistakes of fact made by the panel which may have affected their decision

- The Applicant argues that as the reasons for the refusal of release included an inadequate risk management plan and insufficient contact with the Community Offender Manager who had not long been n post; neither of which was his fault, the decision was unfair

Current parole review

7. This case was referred to the Parole Board by the Secretary of State on 19 July 2021. The reference was to consider release and if release was not directed to advise if the Applicant was still suitable for open conditions. This was the second time that the Applicant's case had been referred to the Board to consider directing release.

8. The hearing was on 27 September 2022. The panel was made up of two judicial members and an independent. They heard from the Prison Offender Manager, the Community Offender Manager and a prison psychologist. They also considered the contents of the dossier.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 3 October 2022 the test for release.

Parole Board Rules 2019

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

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.

Procedural unfairness

13. 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.

14. 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.

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 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.

The reply on behalf of the Secretary of State.

17. The Secretary of State has not responded to this application.

Discussion

18. The panel set out in its decision letter the progress that the Applicant had made while in open conditions. It was well aware of it. The concerns that the Panel had related to the risk management plan and the short period that the Applicant had had to form a relationship with the Community Offender Manager.

19. In so far as the Applicant suggests that the Panel relied on mistakes of fact, I do not consider that, even if they did make those mistakes, they were material to the final decision. The first suggested mistake is based on a statement made by a panel member to the Applicant that he had admitted that he masturbated to images of children. The Applicant says that he never made such an admission. Assuming that mistake was made it is likely to have been corrected as it appears nowhere in the decision letter. It was not relevant to the decision. The Applicant was represented at the hearing and I would have expected the representative to have corrected the mistake, even if the

Applicant had not. The other suggested mistake was that the panel were under the misapprehension that the Applicant had only had one face to face contact with his new Community Offender Manager when he had in fact had three. Assuming that mistake was made which is not entirely clear to me from the decision letter at para 3.6, it was not material to the decision. The panel were aware that there had been 3 meetings and it is not of any great importance whether those meetings were virtual or face to face. The point being made by the Panel was that there had been a limited amount of contact which was correct.

20. The Applicant further complains that it was unfair that the principle reasons for refusing release was that the Panel considered that the risk management plan on release was not sufficiently robust to manage the Applicant's risk and one of the factors in that was his limited contact with his Community Offender Manager. The Applicant complains that that was unfair as neither of those shortcomings was his fault and he could not have done anything further about them.

21. I do have some sympathy with the Applicant over this last complaint as it was certainly nothing to do with him that his Community Offender Manager was changed so close to the hearing. However, that does not in my view provide a basis for a reconsideration. The unfairness which is referred to in the Parole Board Rules as a ground for reconsideration is unfairness in the hearing such as not knowing the case which is put against the prisoner. This hearing was fair. It was the circumstances in which the Applicant found himself at the time of the hearing is what he complains was unfair.

22. The Applicant had committed very serious offences against children. Not only by committing the instant offences but on other occasions. He has shown his attraction to them sexually over a number of years. The offences he has committed are extremely serious. The Panel were right to insist that there should be a robust risk management in place before the Applicant was released. They could not be satisfied in those circumstances that it was no longer necessary for the protection of the public to keep the Applicant in custody.

Decision

23. 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.

John Saunders
21 November 2022