[2022] PBRA 21

Application for Reconsideration by Harrington

Application

1. This is an application by Harrington (the Applicant) for reconsideration of a decision of a Parole Board panel which heard his case at a telephone oral hearing on 16th December 2021, and, in its Decision Letter issued on 29th December 2021, declined to order 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:

   (a) The dossier of 449 pages including the decision letter (DL) under review; and
   (b) Undated Representations submitted on behalf of the Applicant.

Background

4. The Applicant was born in 1985 and is now 36. In 2007 he was sentenced to an Indeterminate Sentence for Public Protection with a "tariff period" of 3 years 120 days. He was released on licence in December 2015 and recalled to prison on 3rd October 2017. On 7th September 2019 a Parole Board panel declined to order his release but recommended that he be transferred to open conditions.

Request for Reconsideration

5. The application for reconsideration was received on 25th January 2022.

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

   A. The panel's decision was irrational in that

   i. The previous panel which had issued its decision in August 2019 had recommended the Applicant's transfer to open conditions but not on the basis that any 'core risk reduction work' was necessary. Unfortunately, a transfer had not been made by the time of the restrictions necessary as the result of the Coronavirus pandemic and he remained in closed conditions. It was irrational of the latest panel to find that core risk reduction work was now necessary

before release could be directed and to fail to explain why it had reached that conclusion.

ii. The instant panel heard from 4 professional witnesses and the Applicant at the hearing.

(a) The Prison Offender Manager (POM), both in writing and in oral evidence at the hearing, recommended release under the umbrella of a robust risk management plan.
(b) The psychologist instructed by the Prison Service concluded that 'core risk management work' was necessary before the Applicant could safely be released.
(c) The psychologist instructed by the Applicant's legal representatives concluded that there was no core risk management work necessary and that the Applicant could be safely released under the umbrella of a robust risk management plan.
(d) The Community Offender Manager both in writing and in oral evidence at the hearing concluded that 'core risk management work' was necessary before the Applicant could safely be released.

Having done so the panel failed to explain clearly why it had rejected the evidence of the witnesses who recommended release and accepted that of those who recommended that the Applicant should remain in prison.

iii. The panel misrepresented the position so far as the necessity or not for the Applicant to complete further work and for a consequent transfer to another prison was concerned.

iv. The panel misrepresented the position concerning the Applicant's willingness or otherwise to engage with professionals.

v. The panel commented adversely on the Applicant's lack of openness with professionals. The evidence was to the contrary.

vi. The panel's decision not to make a recommendation concerning a possible transfer to open conditions because of the absence of firm evidence to support such a recommendation was irrational.

B. The panel's decision not to make the decision summarised at a.vi above amounted to procedural unfairness.

Current parole review

7. Following referral by the Secretary of State for Justice (SOSJ) to the Parole Board in December 2020 a hearing was fixed for 20th July 2021. The case was adjourned on that day for further information to be obtained.

8. The case was heard on 16th December 2021. The panel heard oral evidence from the Applicant's Prison Offender Manager and Community Offender Manager as well as from 2 psychologists and the Applicant. The Applicant's legal representative submitted that the panel should direct release.

The Relevant Law

Parole Board Rules 2019

9. 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. 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 its decision on the papers (Rule 21(7)).

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. I note the reference in the Applicant's helpful grounds to the judgment of Saini J in **Wells [2019] EWHC 1885 which did not purport to cast doubt on let alone overrule the decisions of the House of Lords and Divisional Court referred to above.**

Other

13. 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.

14. 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

15. No representations were received from the SoSJ.

Discussion

16. The DL correctly set out the tests to be applied.

Irrationality

17. Ground 6 A i. Previous Parole Board decisions are not "precedents" to be applied by, or in any way binding upon, subsequent panels. A subsequent panel is required to deal with the offender as s/he is at the time of the hearing and to assess her/his risk according to the information before it at the time. There is no duty upon a panel to explain why, if it so decides, it does not choose to follow the indications suggested by a previous panel whose suggestions or recommendations go beyond the simple one to direct or not direct release. Each panel starts an oral hearing fresh and relies exclusively on the evidence given by professionals as to the conduct of the offender while in prison and, where they are competent and willing to express them, their opinions on whether or not the test for release is met and their reasons for those opinions as well as on the evidence given – if s/he chooses to give it – of the offender. The instant panel was faced with conflicting evidence on the question of release and rightly focused on that evidence. The Applicant may well be entitled to a sense of grievance that – perhaps as the result of the Coronavirus pandemic – the recommendation that he be transferred to

open conditions has not been carried out. If it had been of course the evidence before the panel would have started from a different basis. The instant panel however had to deal with the Applicant as it found him. At paragraph 8 it explained clearly why it had come to a different conclusion than the previous panel – in particular its reliance on the evidence of the Prison Psychologist.

18. Ground 6 A. ii-v. It is a commonplace occurrence for panels to be presented with conflicting opinions as to whether an offender should be released. A "split" in opinion between Prison Offender Manager (POM) and independent psychologist or psychiatrist on the one hand and Community Offender Manager (COM) and prison psychologist or psychiatrist on the other is probably the most common encountered by Parole Board panels.

    a. At the conclusion of paragraph 5 of the DL the panel explained why, having heard from the POM, it found that although the Applicant, in his evidence to the panel, showed "good victim empathy" he displayed a lack of "real insight" into the effect of his offending against the victims of the index offences and of the offence committed while he was on licence.
    b. In Paragraph 6 the panel explained why, having considered the static and dynamic risk assessments within the relevant reports produced by the COM and heard their oral evidence it concluded that it preferred the conclusions of the COM to those of the Independent Psychologist and found that the Independent Psychologist had underestimated the risk the Applicant poses to future intimate partners.
    c. The panel explained in great detail at paragraph 7 why it came to the conclusion that the Applicant had not been open and honest or willing to engage with the prison psychologist and in particular referred to its assessment of the oral evidence given by the Applicant at the hearing and to his admitted lack of engagement with the prison psychologist. The panel was entitled to conclude that the nature of his past offending and his regular failures to be open and honest with professionals up to the present time led to the conclusion that without further work the risk of serious harm, in particular within intimate relationships, was still too great for him to be released without further work being done to reduce that risk. It pointed out that when the relevant risk is one which arises "within the four walls of a household" the warning signs are far harder to detect than they are in other commonplace situations in which the risk may grow.
    d. So far from misrepresenting the position concerning the perceived need for the Applicant to do further work the panel dealt with it thoroughly in paragraphs 8 and 9 of the DL. In short, the POM and Independent Psychologist were of the opinion that *"there was outstanding core risk work in the area of inter partnership violence".* This was an opinion which

the panel was entitled to accept. The panel made it clear that its acceptance of that opinion was based in part on the evidence which it had heard from the Applicant at the hearing.

e. Ground 6 B. As to the panel's decision not to make a recommendation for transfer to open conditions, bearing in mind the problems which had arisen in implementing the Secretary of State's previous decision in principle to effect such a transfer: the panel made it clear that since it had no evidence before it from any source as to whether the necessary work it had identified could be done in open conditions it was right for it to leave that decision where it ultimately lies in any event, namely with the Secretary of State. That finding cannot be characterised as either irrational or procedurally unfair.

Decision

19. It will be clear from the above that I do not find the grounds put forward, together or singly, justify an order for reconsideration.

Sir David Calvert-Smith

11th February 2022