the Parole Board
working with others to protect the public

[2023] PBRA 46

Application for Reconsideration by Blood

Application

1. This is an application by Blood (the Applicant) for reconsideration of a decision of an oral hearing dated the 18 January 2023 not to direct his 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.

3. I have considered the application on the papers. These are:

    (a) dossier of 592 pages;
    (b) The application dated 7 February 2023;
    (c) The Decision Letter (DL) the subject of this application, including the written representations submitted on the applicant's behalf following the hearing; and
    (d) The Grounds of Appeal.

Background

4. The Applicant's index offence and the subsequent sentence and parole history are accurately set out in the DL. In summary -

    (a) He was 35 years old in 2001 when he committed the index offences – 5 robberies. In 2003 he was sentenced to life imprisonment with a minimum term of 7.5 years reduced to 5 years 8 months to reflect the time he had spent in custody before trial.
    (b) He was released on licence on 27th June 2016 and was recalled to prison on 23 January 2017, following which he received a 12-month suspended prison sentence for an offence of harassment and later an 8-month sentence for an offence under the Proceeds of Crime Act 2002. On 5 March 2021, after an oral hearing, a Parole Board panel declined to order his release. A second Parole Board panel, by its decision of 18 January 2023, again declined to order his release.

Request for Reconsideration

5. The application for reconsideration is dated 7 February 2023.

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

   a. The panel acted irrationally in concluding that the evidence of the psychologist concerning her assessment of the progress made by the Applicant was not sufficiently powerful to justify a direction for release and in failing to explain in the DL why it had come to that conclusion. ***R (Wells) v Parole Board [2019] EWHC 2710 (Admin)***, ***R. (on the application of Osborne) v Parole Board for England and Wales [2022] EWHC 3306 (Admin)***.

   b. The panel�ََ‘s conduct was procedurally unfair and the unfairness contributed to/resulted in an irrational decision because it failed, during (or before) the hearing to indicate its opinion that the proposed Release Management Plan (RMP) was inadequate.

   c. The panel acted irrationally when coming to conclusions about the events in late 2016 and early 2017 which preceded his recall in that it failed properly to apply – with suitable allowance for the differences between Parole hearings and criminal trials – the principles set down in ***Lucas [1981] QB 720*** and the guidance given to Parole Board panels concerning allegations which have not been the subject of a judicial decision. More recently, guidance set out in ***R (on the application of Pearce) v Parole Board of England and Wales [2022] 1 W.L.R. 2216*** (decided in November 2020 and first reported as **[2020] EWHC 3437)** and followed by Parole Board Guidance dated July 2021 on the same topic was not followed. A proper assessment of the circumstances of those allegations may have resulted in a decision for release. In particular the fact that a particular allegation of robbery resulted in a judicial direction that a Not Guilty verdict be entered in respect of it following the Applicant plea of guilty to handling stolen goods should have led to the panel disregarding any possibility that the Applicant may nevertheless have been a party to the robbery rather than adding that possibility to its assessment of the risk posed by the Applicant to the public if released.

Current parole review

7. The case was referred by the Secretary of State for Justice (SoSJ) on 8 October 2021. A hearing fixed for 14 September 2022 was adjourned on the day of the hearing with a direction that the panel should contain a psychologist member. It took place on 20 December 2022. It was heard by a 3-member panel which included a psychologist member. The panel heard evidence from the Prison Offender Manager (POM), Community Offender Manager (COM) (a second COM attended but did not give evidence at the hearing), Prison Forensic Psychologist in training, and the Applicant. Written submissions were submitted following the hearing by the Applicant’s legal representative. The SoSJ was not represented.

The Relevant Law

8. The panel correctly sets out in its decision letter the test for release.

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. This is thus 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.

13. In the grounds submitted by the Applicant's legal representative passages from the cases of **R(Wells) v Parole Board [2019]** and **R (on the application of Osborne) v Parole Board for England and Wales [2022] EWHC 3306** are cited in support of the application both under this head and that of procedural unfairness. In order to get a fuller impression of the Courts' attitude to the key issue of how the Board should approach decisions of fact I have considered also the Guidance published by the PB in 2019 following the decision of the Divisional Court in **R(DSD) and NVB) v Parole Board and Secretary of State for Justice [2019] QB 285,** and the decisions in **R(Delaney) v Parole Board [2019] EWHC 779 (Admin)** and **R(Broadbent) v Parole Board [2005] EWHC 1207.**

Procedural unfairness

14. 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.

15. In summary an Applicant seeking to complain 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; and/or
    (b) they were not given a fair hearing; and/or
    (c) they were not properly informed of the case against them; and/or
    (d) they were prevented from putting their case properly; and/or

(e) the panel was not impartial.

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

17. In support of this ground the Applicant relies on passages cited from ***R (Bousfield) v the Parole Board [2021] EWHC 3160.***

Other

18. 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.

19. 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 Secretary of State

20. The Secretary of State has made no representations.

Discussion

21. The dossier prepared for the hearing ran to well over 500 pages. Within it, following the standard pages outlining the history of the sentence and parole hearings and the previous criminal record of the applicant, as well as the standard reports from Prison and Community Offender Managers, Security, and the relevant papers from the index offences, were a number of psychological reports, some 50 plus pages of behavioural logs compiled by the Applicant since May 2021 and more than 150 pages of documentation from the police concerning the offences which gave rise to the Applicant's recall in early 2017.

22. The hearing itself started late so that all concerned could have a chance to read through the latest material and finished at 7.30 pm. The Applicant's legal representations sent through final representations on the Applicant's behalf following the hearing. In view of the grounds submitted I asked for the recording of the hearing to be made available

and I have listened to it. Leaving aside parts of the tapes not directly concerned with the substantive hearing it lasted some 4 hours 30 minutes.

23. Having studied the dossier and listened to the hearing:

a. I reject Ground A. It is clear from the way in which the panel tested the evidence of the psychologist G, and from the way in which the DL is framed, that the panel found that the psychologist's reliance on the Applicant's behavioural logs – which in criminal legal parlance were almost exclusively "*self-serving*" – together with a general acceptance of what she was told by him at face value was to some extent misplaced. In addition, there was – albeit not tested by cross-examination – a report from another psychologist A of December 2021 which came to very different conclusions to those of Ms G as to the level of risk posed by the Applicant were he to be released. It is impossible to characterise the panel's finding as irrational.

b. I also reject Ground B.

    i. The suggestion that in advance of a hearing the 'panel' should indicate its dissatisfaction with an RMP is fanciful. The panel only convenes a few minutes before the oral hearing. The Chair of the panel may well have, and indicate if appropriate, matters which require evidence or some clarification in advance but it would be unrealistic and lead to accusations of prejudgment for the panel to be required to indicate its dissatisfaction with an RMP in advance.
    ii. The recording makes it clear that the degree to which licence conditions, whether those set out in the RMP or others, could reduce the risk that the Applicant might cause serious harm if released was fully and fairly discussed between the panel and the witnesses, in particular the Community Offender Manager who would have the duty, at least at first, of overseeing compliance with them.
    iii. It is only – as it is with a three-member court in the Court of Appeal Criminal Division – at the end of a hearing that the panel can reach a conclusion, whether unanimously or by a majority, on the findings to be reached on a relevant topic to the decision.

c. After anxious consideration I also reject Ground C.

    i. I have studied the passages of the DL – in particular those which deal with the circumstances surrounding the robbery of the Post Office and the Applicant's connexion to it through his car, the possession of a substantial amount of cash following it and the admitted lies he told about how he had suffered burns to his face which culminated in his plea of guilty to an offence under the Proceeds of Crime Act 2002. I have also listened to the evidence given to the hearing on these topics. The panel was entitled – as it did – to come to the conclusion that the Applicant was prepared to lie or be less than frank about matters, including the circumstances – and his differing accounts of - of the convictions which had led to his recall to prison. At paragraph 4.6 of the DL -

'(The Applicant) maintains his innocence of the index offences, which does not preclude his eligibility for release on licence but it does mean that the Parole Board has to look carefully for evidence of insight and risk reduction. With regard to the Proceeds of Crime Act conviction, the panel found (the Applicant's) account at the hearing to be riddled with inconsistencies and untruths and to lack credibility. In particular, he gave a completely different account to the one in his 'Prepared Statement' and one which was not reflected in any of the reports to the professionals involved in his case. This gave the panel little confidence that (The Applicant) would be honest and open with the professionals and this was reinforced by his tendency to be evasive at times when answering the panel's questions.'

ii. It is clear therefore that the panel did not '*cross the line'* alleged in this ground and the recording of the hearing provides ample grounds for those conclusions. In short, the panel was dealing with the circumstances of the conviction in connexion with the Applicant's likely truthfulness with professionals following release rather than with his risk of causing serious harm on release.

d. It may be that a superior court in the future may wish to consider whether the general rule as to '*judicial findings'* arising from previous unproved allegations can sensibly include occasions in which a not guilty verdict to a serious violent offence has been entered upon a plea to a lesser and non-violent alternative without any consideration of the strength or weakness of the evidence – in particular when the offender is already subject to recall to prison on a life sentence. However, that is not a topic of any relevance to this decision bearing in mind my finding at sub-paragraph c above.

Decision

24. For the reasons I have given I do not consider the decision to be either irrational or procedurally unfair. I therefore reject the application for reconsideration.

Sir David Calvert-Smith
20 March 2023