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[2023] PBRA 93

Application for Reconsideration by Rabey

Application

1. This is an application by Rabey (the Applicant) for reconsideration of a decision of a Member Case Assessment decision dated 30 January 2023 not to direct release or to recommend transfer to open conditions. The MCA was concluded on the papers. Following this decision, the Applicant's legal representatives submitted representations against recall. These were considered by a Duty Member on 10 March 2023, who did not grant the request for an oral hearing.

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 the application, further representations from the Applicant following my request, the dossier, the MCA decision and the Duty Member decision. I have also considered a response to the application from the Secretary of State.

Background

4. The Applicant is serving a sentence of imprisonment for public protection (IPP) for the offence of wounding with intent to cause grievous bodily harm (GBH). He is post tariff and has been released and recalled on 4 occasions. This review is in relation to the most recent recall.

Request for Reconsideration

5. The application for reconsideration is dated 29 March 2023.

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

   (a) Irrationality:

   Essentially, the application indicates that the MCA, in deciding not to release or progress the Applicant and not to direct release, ignored relevant information in the dossier or was incorrect in interpreting information in the dossier.

The application also submits that the circumstances of the recall included allegations of domestic violence for which the Applicant has been given conditional bail. The application specifies that no findings should have been made (if they were) in relation to the allegation without further evidence, and in the face of the Applicant's denial, his own account.

(b) Procedural Unfairness:

The application states that there are areas of dispute in relation to some of the circumstances of the recall that should have been considered. The reason they were not able to be considered was because the MCA member was not provided with legal representations that had been sent to the Parole Board, albeit late. The application states that the representations were sent some 4 days before the MCA decision date, by implication suggesting that the representations should have been placed before the MCA member in any event.

Reasons for the late provision of the representations have been provided. These are that the legal representative was unable, despite trying, to meet with (remotely or face to face) their client to take instructions on the recall. This submission is disputed by the Secretary of State, and I give further details of this below.

7. I looked further into the issue about the MCA member not having been given the legal representations. The application indicated that the representations were late because the legal representative had had consultations with the Applicant cancelled, and as a result could not speak to him in good enough time to provide timely representations. I further noted that the Secretary of State's (the Respondent) response to the application indicated otherwise, stating that they had not cancelled any meetings between the legal representatives and their client and also that the legal representative had not turned up for a booked meeting. I asked for further particulars from the Applicant's legal representative about their submissions that they had been unable to see their client in a timely fashion. I received these as well as a copy of an email confirming a booked meeting on 10 November 2022, via video link.

8. Lastly, I noted that the Duty Member had these original legal representations as well as new legal representations when they considered the application for an oral hearing.

Current parole review

9. The Secretary of State referred the Applicant's case to the Parole Board in October 2022. On 30 January 2023 it was considered by a single member for an MCA, who decided on the papers not to release or recommend transfer to open conditions. The legal representatives made representations against recall which were considered by a Duty Member on 10 March 2023. That Duty Member rejected the application for an oral hearing.

The Relevant Law

10. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

11. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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 the decision on the papers (Rule 21(7)).

12. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

13. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

14. 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."

15. 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.

16. 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

17. 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.

18. 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.

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

Other

20. In the cases of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner’s legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

21. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin), R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:

(a) the progress of the prisoner in addressing and reducing their risk;
(b) the likeliness of the prisoner to comply with conditions of temporary release;
(c) the likeliness of the prisoner absconding; and
(d) the benefit the prisoner is likely to derive from open conditions.

22. 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.

23. 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.*"

24. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

The reply on behalf of the Respondent

25. The Respondent responded to the application in relation to the issue of provision of time for the legal representative to take instructions from the Applicant. In that response they indicate that the prison did not cancel any '*visits*' and that the legal representative did not appear during a booked virtual meeting on 28 December 2022. The response also states that the Applicant did speak to his legal representatives over the telephone in November 2022.

Discussion

26. In order to assist the reader, I will reiterate here again the process since the referral from paragraph 9 above:

27. Following referral, on 30 January 2023 the case was considered by a single member for an MCA, and the decision not to release or recommend transfer to open conditions was made. At this point the MCA member did not have before them any legal representations which were, it is submitted in the application, provided late but in advance of the MCA panel itself. Following this negative decision, the legal representatives made representations against recall requesting an oral hearing. These representations attached the previously unconsidered representations. A Duty Member considered the case and representations on 10 March 2023. That Duty Member rejected the application for an oral hearing.

28. The application repeats the issues raised before the Duty Member. On the face of it, the application clearly identifies that they are applying for reconsideration of the MCA decision and not the Duty Member decision, and that is the way in which I have

reconsidered this case. Challenging a Duty Member decision is not eligible for reconsideration.

29. Taking each ground separately, I considered procedural unfairness first.

30. There is a dispute between parties as to whether or not the legal representative was given sufficient time to take instructions from the Applicant or if appointments were not adhered to by either party. The Applicant provided further submissions at my request on this matter and attached a confirmed booking for a remote (video) conference with the Applicant on 10 November 2022. This confirmation is from the prison. The further submissions then state that the prison did not appear on the link on that day and no explanation was given, although attempts were made to reach the prison. Without what might become lengthy further investigations I am unable to make a firm finding on this issue. I am aware however, that it is extremely challenging for legal representatives to get timely appointments to take instructions from their clients. I do therefore accept that there is sufficient evidence to accept that the legal representatives made reasonable attempts to take instructions from the Applicant without success.

31. The second point I need to consider is whether it was in fact unfair that the MCA member did not have the representations before them when they were considering their decision. It is not known why they were not sent to the MCA member if they had been received before the MCA decision was made. Deadlines and internal processes are important for the smooth running of the Parole Board's work. No criticism can therefore be levelled at the fact that the MCA member did not have the representations.

32. Taking into account the legal framework I must consider; I do have a different position to that of the Duty Member. In particular I am mindful that a prisoner may have a very different account to the accounts provided by professionals, and that it may be appropriate for the prisoner to be able to put their account before a panel.

33. This is not always the case. There are times when the circumstances are so clear that directing an oral hearing would make no different to the result. However, where there are material disputes that can be aired at an oral hearing and where a prisoner consistently wishes to put them before a panel, there is sufficient caselaw, led by the case of *Osborn* as indicated above, that an oral hearing should be directed.

34. I also considered carefully the case of *Williams* (above). This states clearly that a decision is not automatically procedurally unfair because the decision maker did not have all the material before them. However, the case also states that *"There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness."* This is not the case here as I explain below.

35. I noted that as well as not having the legal representations before them, the MCA member also did not have two key documents which, in my view, it would have been appropriate for the MCA member to direct prior to making their decision. These are described below.

36. The dossier contained the previous Parole Board panel decision dated 10 February 2021. On reading that decision, it is clear that a psychological risk assessment was

considered at that hearing. I have no further information about when this assessment was made. It is not in the dossier that I have been provided with, which I understand, is the as the one considered by MCA panel. The MCA panel did not therefore have the advantage of either considering this assessment or directing an updated one but should have been alerted to one being in existence on reading the earlier decision letter.

37. The dossier does not contain a Part C, which is the final report in the recall process from the Community Offender Manager. The Part B in the dossier, taken into account by the MCA member, is dated 27 October 2022. It is good practice to ensure that a Part C is available to consider any further developments before a decision is made. There were several months between the Part B and the MCA panel, and it would have been possible to ensure that a Part C was available prior to the decision being made so that the MCA member had before them updated information from the Community Offender Manager.

38. Having considered the matters of dispute within the legal representations and the lack of evidence placed before the MCA member, I have come to the conclusion that it would be appropriate in this case for the case to be directed to an oral hearing.

39. Irrationality: Having decided that the Applicant has a right to put his case before a panel under the ground of procedural unfairness, I have decided it would be wrong to make any decision about the content of the matters in dispute. Therefore, I make no findings on this ground.

Decision

40. Granted – Accordingly, I find that the decision of the MCA panel on 30 January 2023 to be procedurally unfair. I grant the reconsideration solely for the reasons set out above. The application for reconsideration is therefore granted.

Chitra Karve
19 May 2023