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[2024] PBRA 78

Application for Reconsideration by Masters

Application

1. This is an application by Masters (the Applicant) for reconsideration of the decision of a Parole Board panel (undated but received by the Applicant on 19th February 2024), following an oral hearing on 6th February 2024, 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 either on the basis (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that the decision is irrational and/or (c) that it is procedurally unfair.

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

    i. The dossier of 372 pages including the Decision Letter (DL) the subject of this application.

    ii. The application for reconsideration submitted on the Applicant's behalf by his legal representative.

    iii. An email dated 18 March 2024 sent on behalf of the Secretary of State of Justice (the Respondent) indicating that he did not wish to submit representations for the purpose of the appeal.

4. In addition, I have listened to the recording of the hearing.

Background

5. The Applicant's index offence and the subsequent sentence and parole history are accurately set out in the DL. In summary, on 26th March 2007, then aged 24, he was sentenced, having pleaded not guilty, to imprisonment for public protection for an offence of 6 counts of rape and 1 count of false imprisonment. The offences were committed against two separate victims. His minimum term was set at 5 years and 8 days. He was released on licence on 24th August 2020 and returned to prison following recall on 12th December 2022. This was the 1st review of his case by the Parole Board since his recall. The panel declined to order his release but recommended to the Respondent that he be transferred to open conditions.

Request for Reconsideration

6. The application for reconsideration is dated 10th March 2024.

7. It alleges that the panel's decision was flawed as the result of "procedural irregularities":

   a. Within paragraph 2.6 and 2.8 of the DL there are important mistakes of fact.

      i. As to the topic which had given rise to the argument which led in due course to the Applicant's recall.

      ii. As to the question of when the argument began which led in due course to the Applicant's recall. In particular, the suggestion in the DL at paragraph 2.6 that the argument began when the Applicant and the complainant were having sex.

      iii. The panel's conclusion that the Applicant had previously described the relationship as "*toxic*" was unjustified. The Applicant specifically rejected that suggestion in his evidence.

   b. The panel found that there was a lack of clarity around a possible referral of the Applicant to an Approved Premises and, more generally, that there was '*little information about any practical preparation for a future release'* (paragraph 4.3 of the DL). It is submitted that if the panel was concerned at the hearing about this issue it should have been '*pressed upon*' by the panel and, if such information was not forthcoming the hearing should have been adjourned for the position to be clarified. A decision based on a '*lack of clarity*' which may have been remedied either at the hearing itself or following an adjournment to clarify the issue is '*irrational*'. And the failure to adjourn the hearing to clarify the issue rendered the decision '*procedurally irregular'*. In support of this ground the Applicant cites a passage from the judgment of the House of Lords in **E v Secretary of State for the Home Department [2004] QB 1044.**

      "66. In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of CICB. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

Current parole review

8. The case was referred to the Parole Board by the Respondent on 4 January 2023.

The Relevant Law

9. The panel correctly set out in the DL the tests for release.

Parole Board Rules 2019 (as amended)

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. 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)).

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.

13. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

14. In addition the Applicant has cited a relevant passage from **E v Secretary of State for the Home Department [2004] QB 1044**: "*….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.*"

15. 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.*"

Procedural unfairness

16. 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.

17. 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) s/he was not given a fair hearing; and/or

    (c) s/he was not properly informed of the case against them; and/or

    (d) s/he was prevented from putting their case properly; and/or

    (e) the panel was not impartial.

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

19. While considering the submissions on behalf of the Applicant I asked for and was supplied with the recording of the hearing. It became clear that from the start to the finish of the hearing the voice of the Chair of the panel was not audible. It seemed to be the case that on the few occasions when the Chair was speaking the recording stopped picking up any voices (although there are a few audible but muffled noises which indicate that persons were speaking). Thus, until the next person, co-panellist, Prison Offender Manager (POM), Applicant, Community Offender Manager (COM) or the legal representative "*took the floor*", everything said during the period when the Chair was speaking was lost.

    (a) The first few minutes are clearly taken up with trying to ensure that the witnesses and others were linked to the hearing and are very indistinct. The fact that the application was for release is clear.

    (b) The evidence of the first witness, the POM, is fully recorded from the outset. She gave evidence for a little more than half an hour.

    (c) Following her evidence there is effectively silence – save a reference to the "*Chair*" from 57.11 minutes until 1 hour 4 minutes into the recording of the hearing.

    (d) The evidence of the Applicant is fully audible. It finished at 2 hours 35 minutes into the recording. There is then a short pause during which it is reasonable to assume that the Chair was speaking before the evidence of the COM was heard.

    (e) There is less than a minute's "*silence*" then until the COM's evidence is taken until 3 hours 18 minutes into the recording. This is clear throughout.

(f) At the conclusion of the evidence the Applicant makes some additional comments criticising the evidence of the COM, at the conclusion of which there is a short "*silence*" following which the Chair is mentioned by name. The rest of the hearing is audible and includes the closing submissions from the legal representative.

20. In these circumstances I have considered whether the deficiencies in the recording – whether on their own or put together with the grounds submitted might either -

(a) Afford the Applicant a valid ground of appeal on the basis of procedural irregularity – or

(b) Support the existing grounds summarised above.

21. I have come to the conclusion that they do not. The recorded parts of the hearing amount to well over 3 hours of evidence and submission and there was a dossier containing some 360 pages of evidence. The passages relevant to the two issues raised in the grounds namely the circumstances of the incident leading to the recall and the perceived lack of a viable release plan with appropriate licence conditions are covered in detail during the audible parts of the evidence of the three witnesses and the submissions at the close of the hearing.

The reply on behalf of the Respondent

22. The Respondent has offered no representations, although as I understand it he has not been informed of the defective recording of the hearing.

Discussion

23. Irrationality.

a. As to paragraph 7a above.

i. There was no dispute that there was a quarrel between the Applicant and the woman with whom he was then living which resulted in the woman calling the police. It was common ground that there had been such an incident. The panel was not bound to accept in terms the account given by the Applicant and was entitled to consider the incident in the light of all the evidence and in particular that of the Applicant and the way in which he gave it.

ii. The question of whether the argument began while they were having sexual intercourse or afterwards was hardly relevant to the issue before the panel.

iii. I have not found any reference in the dossier to the word "*toxic*". Nor did I hear it on listening to the recording, to that extent the ground put forward has merit. However, the important matters before the panel were the incident which led to the recall, the opinions and the reasons for them of the professionals, and the panel's assessment of the

Applicant's current risk rather than the question of the "*toxicity*" or otherwise of the relationship generally.

iv. While of course panels have to make up their minds about incidents such as these about which there is no conviction of crime or even a charge and trial, the panel was entitled to conclude that even on the limited basis of the evidence before it that it represented a significant increase in the risk posed by the Applicant of serious harm. The fact that another panel may have come to a different conclusion does not lead to the conclusion that the conclusion drawn by the panel was "*irrational*".

b. As to paragraph 7b above. Panels are frequently faced with the fact that for reasons beyond their control and that of the relevant professionals there is no viable release plan which could reduce the risk posed by an offender of causing serious harm to members of the public. In this case, the panel adopted the wholly rational solution of recommending that the Applicant be transferred to open conditions in the hope that a gradual reintroduction to the community, combined, no doubt, with the creation of a viable release plan and appropriate licence conditions, would lead to a direction for the Applicant's release in due course.

c. In addition, it is clear that both in her report for the purposes of the hearing and in her evidence at it, the COM was firm in her view that the risk of serious harm currently posed by the Applicant was such that she could not recommend his release. For a panel decision which is supported by the person who would be most directly concerned with the supervision of an offender if released to be deemed irrational a very serious procedural failing or a clear and relevant factual error would be necessary. This is not such a case.

Decision

24. Accordingly, this application is refused.

Sir David Calvert-Smith
26th April 2024