[2020] PBRA 13

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Application for Reconsideration by Kumar

Application

1. This is an application by Kumar (the Applicant) for reconsideration of a decision of the Parole Board dated 5 December 2019 not to direct release following an oral hearing.

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 the application for reconsideration, the decision letter and the contents of the dossier.

Background

4. The Applicant was sentenced to Imprisonment for Public Protection on 9 September 2008 for robbery, burglary and other offences. The minimum period was 3 years less time spent on remand. The Applicant has been transferred to open conditions on two occasions during this sentence but was recalled to closed conditions on both occasions. In November 2017 following an oral hearing the Parole Board recommended that the Applicant be transferred to open conditions, but the Secretary of State did not accept the recommendation.

Request for Reconsideration

5. The application for reconsideration is dated 25 December 2019.

6. The grounds for seeking a reconsideration are as follows:
   (a) The panel failed to provide sufficient reasons for their decision;
   (b) The refusal to transfer to open conditions was not given separate consideration by the panel;
   (c) The conduct of the Panel Chair resulted in an unfair hearing;
   (d) The finding that the Applicant's level of risk was such as to give rise to a risk of at least psychological harm was irrational. Further there was no evidence that any psychological harm could amount to serious harm; and

(e) The panel failed to reference the positive features of the Applicant's case.

While it is not specifically said to be a ground for reconsideration, the Applicant has pointed out that there is a mistake of fact in the decision letter in that it is said that the Applicant was sent to open conditions and recalled three times while that only happened twice.

Current parole review

7. The Applicant's case was referred to the Parole Board in July 2018. An oral hearing took place on 3 December 2019 where the Applicant gave evidence. The panel also heard evidence from a Prison Psychologist, a Prison Offender Manager and a Community Offender Manager. The opinion of all three was that the Applicant should remain in closed conditions.

The Relevant Law

Parole Board Rules 2019

8. 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)).

9. 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**. In so far as the grounds for reconsideration in this case are concerned with a failure to recommend open conditions, they do not come within the Parole Board Rules 2019.

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."

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.

11. 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

12. 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.

13. 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;
    (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.

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

14. It is possible to argue that mistakes in findings of fact made by a decision maker may make the decision 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.*"

The reply on behalf of the Secretary of State

15. In representations dated 7 January 2020 the Secretary of State has confirmed that the decision letter did contain a mistake of fact. The Applicant had only been transferred to open conditions on two occasions and not three as set out in the decision letter.

Discussion

16. I shall deal first with the suggestion that there is a material mistake of fact in the decision letter. In para. 5 of the decision letter, the panel says this: "*On three occasions you have been transferred to open conditions but returned to the secure*

estate following adverse developments. On two of those occasions you incurred debts and were putting pressure on your mother to repay them. You were considered an abscond risk. The last such period was terminated on the 15 November, 2016, after just one month, as the result of your involvement with Spice." Although it is not entirely clear from a consideration of the dossier, as a whole, it is apparent from a consideration of the Offender Manager's report and the assessment of risks and their origin report that there were not two occasions on which the Applicant was recalled because of debts he had incurred but only once. There were, therefore, a total of two transfers and recalls rather than three. The origin of this mistake would appear to be the previous decision letter dated 16 November 2017 which is then repeated in the MCA directions dated 14 December 2018. It is of course important and only fair to a prisoner that his or her case is dealt with on a correct factual basis and in some cases a mistake of fact can justify an order for reconsideration. It will not render the decision irrational unless it played a material part in the panel's reasoning (see para. 14 above). There would appear to be a mistake of fact in the decision letter but I am satisfied that it made no material contribution to the decision of the panel and therefore did not make the decision of the panel 'irrational'.

17. Dealing with the specific complaints in the order as set out in para. 6 above: Ground 1: While there is merit in the complaint that para. 7 of the decision letter does not provide the detail as to why the application for release has not been met, the reasons are clearly set out in other parts of the decision letter, in particular para. 5 'Evidence of change and progress in custody' and para. 6 'Panel's assessment of current risk'. When the decision letter as a whole is considered, this complaint has no merit.

18. Ground 2 is that the decision was procedurally unfair in that the refusal to transfer to open conditions was not given separate consideration as required by various decisions of the Administrative Court (see for example the decision of King J in **R (Rowe) v the Parole Board [2013] EWHC 3828 (Admin)**). The decision letter is clear in my judgment as to the test to be applied to a decision to release and the reasons for refusal are also clear. The reconsideration mechanism does not cover decisions whether or not to recommend open conditions as set out in paras. 8 and 9 above and therefore whatever my view of this ground, it cannot support an order for reconsideration. Nevertheless, a consideration of the decision letter as a whole, does, in my judgment, make it clear why a transfer to open conditions was not considered appropriate in the Applicant's case.

19. The Applicant asserts that the hearing was unfair in that there was little questioning of him by the panel and the Chairman made a "*clear expression of dissatisfaction"* when his legal representative indicated that he wished to explore a number of other matters with the Applicant. It is for the panel to decide which matters it wishes to explore in oral evidence. The panel has a great deal of evidence submitted on paper which may make it unnecessary in the panel's view to explore aspects of the case in oral evidence. This is a matter where a considerable amount of discretion vests in the panel bearing in mind their expertise. It is also perfectly proper for the Panel Chair to explain that there may be a limited amount of time available. Cases have to be concluded within a reasonable time while ensuring that there is a fair hearing. There is no suggestion made in the application that there was any evidence that the Applicant was

prevented from putting before the panel which was relevant to the inquiry. I am satisfied that the Applicant had a fair hearing and that the panel were able to consider all relevant matters as is set out in the decision letter. In terms of the quotations from **Osborne**, it is for the panel in the first instance to decide in what areas the prisoner can contribute something useful by oral evidence. The second part of the quotation is a reference to the need for the Board to be, and to appear to be, impartial. The matters raised by the Applicant, in my judgment, do not demonstrate that the panel infringed either of those principles. It is not unusual for an unsuccessful litigant to believe subjectively that he has not had a fair hearing. The contents of the decision letter which is balanced, do not support that contention.

20. The panel, while acknowledging that the Applicant had not been physically violent in custody for some time, considered there was still a risk that faced with the pressures of being in the community as there was no guarantee that the Applicant would not be violent. The panel went on to say that the "*level of threat to which you remain prone is such as to give rise to a risk of at least psychological harm.*" It is argued that this finding is irrational. In my judgment there was ample material on which the panel could form this conclusion. The Applicant has been convicted of burglaries and robberies in which he used the threat of force and carried weapons. His victims were often elderly people. The risk is that he would resort to that behaviour if he failed to comply with the terms of his licence and rehabilitate himself into society. If he did resort to similar behaviour then there is a likelihood of psychological harm being caused which would amount to serious harm. Burglars who target elderly people and carry weapons cause very serious psychological harm.

21. Finally, it is argued that the decision of the panel was irrational in that it failed to acknowledge the numerous positives attributed to the Applicant in their decision letter. In considering release the panel are bound to focus principally on the areas of risk because of the nature of the test for release. In the decision letter, the panel does acknowledge the difficulties the Applicant is facing as an IPP prisoner who is considerably over tariff but as the panel points out the test remains the same.

22. I have considered all the points made on the Applicant's behalf both individually and cumulatively, but I am not persuaded that the decision was either irrational or procedurally unfair. The evidence in the case pointed overwhelmingly towards a refusal to release, and in so far as certain things can be properly criticised, they would not have affected the decision of the panel.

Decision

23. Accordingly, the application for reconsideration is dismissed.

Sir John Saunders QC
16 January 2020

3rd Floor, 10 South Colonnade, London E14 4PU
www.gov.uk/government/organisations/parole-board
info@paroleboard.gov.uk
@Parole_Board
0203 880 0885