[2020] PBRA 162

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Application for Reconsideration by Allen

Application

1. This is an application by Allen (the Applicant) for reconsideration of a decision of an oral hearing of the Parole Board not to release the Applicant dated 29 September 2020.

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) A dossier of 371 pages which is the same as the dossier before the panel at the oral hearing and was disclosed in full to the Applicant;

    b) The decision letter dated 29 September 2020;

    c) The Applicant's request for reconsideration dated 19 October 2020; and

    d) A letter from the Applicant's former partner dated 13 October 2020.

Background

4. The Applicant was convicted of murder and sentenced to life imprisonment on 27 May 2004. His minimum tariff was originally set at 13.5 years but was reduced on appeal to 11.5 years. The Applicant was 37 years old at the time of the Index Offence and 39 years old when sentenced.

5. The victim of the index offence was involved in the sale of drugs and the victim had failed to pay the co-accused the profits of his sale. A number of individuals were recruited to severely beat the victim with who died from the injuries he sustained in the attack. The sentencing judge made clear that the group did not intend to kill the victim, only to cause him serious harm. The judge also differentiated the Applicant's role in that he was responsible for telling his co-accused the victim's whereabouts rather than directly inflicting the injuries.

6. The Applicant was released on 8 August 2016 but his licence was revoked on 11 September 2019 after the police informed the probation service that the Applicant had been arrested for attempted murder. The alleged victim of that incident had stabbed the Applicant in the leg and it was then alleged that the Applicant had driven a vehicle at high speed towards the victim. The Applicant was subsequently tried for dangerous driving and attempted Grievous Bodily Harm and was acquitted.

Request for Reconsideration

7. The application for reconsideration is dated 29 September 2020.

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

Irrationality

9. It is submitted that no other rational panel would have arrived at the same conclusion based on the evidence provided;

10. Various statements cited in the decision letter (pages 3,5 and 8) are misleading and inaccurate;

11. That the panel did not consider the allegations of domestic violence made objectively, based on the information and evidence provided and what could properly be inferred from that information and evidence; and

12. That there had been no evidence contained within the dossier that there had been concerns relating to the Applicant's attendance for appointments.

Procedurally unfair

13. Although the Applicant focusses on irrationality in his application. Two further grounds are raised which, if substantiated, would amount to procedural unfairness:

14. That the panel failed to apply the 'balance of probabilities' test; and

15. That the panel did not apply the correct test when assessing the Applicant's risk.

Current parole review

16. The Applicant's case was referred to the Parole Board by the Secretary of State to consider his release, or if his release was refused, a recommendation for transfer to open conditions. The referral was made on 2 October 2019 when the Applicant was 54 years of age.

17. An oral hearing took place on 16 September 2019. Due to the Covid 19 restrictions the hearing took place by remote video hearing. The panel comprised 3 members, including a psychologist member. The panel considered the dossier of 371 pages and took evidence from the Applicant as well as the Applicant's Offender Supervisor (the official supervising him in custody) and Offender Manager (the community probation officer).

The Relevant Law

18. The panel correctly sets out in its decision letter dated 29 September 2020 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019

19. 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

20. 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."

21. 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.

22. 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

23. 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.

24. 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.
    The overriding objective is to ensure that the Applicant's case was dealt with justly.

25. 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.

The reply on behalf of the Secretary of State

26. On 20 October 2020 the Secretary of State confirmed through PPCS that he offered no representations in respect of this application.

Discussion

27. The panel found that there is a risk of domestic violence if the Applicant feels insecure or jealous within an intimate relationship. The panel cites in support of this risk assessment police call outs and other allegations made against the Applicant when in the community. The Applicant relies in his legal submissions (and appends) a statement from his partner stating that the Applicant had not in fact been violent towards her. The Applicant gave evidence about these allegations at his hearing. The panel acknowledged in their decision that the allegations had not resulted in any charge or conviction against the Applicant in respect of intimate partner violence but nevertheless concludes that the Applicant does pose a risk of this nature.

28. No good reason has been provided as to why the new evidence dated 13 October 2020 from the Applicant's former partner was not put before the panel. The Applicant does not appear to have been unfairly prevented from doing so and indeed the Applicant was represented at his hearing and had a full opportunity to rely on any evidence of his choosing. The panel did hear evidence in respect of these allegations, including the Applicant's own account of what had happened. For the

purposes of the reconsideration decision, I am bound to examine the rationality of the panel's decision based on the information before the panel at the oral hearing and at the time of the decision. I have not therefore taken in to account the letter when deciding the question of irrationality. For the avoidance of doubt, I have also found there to be no procedural unfairness in the panel not having taken account of this evidence given that it did not exist at the time of the hearing and appears only to have been prepared for the purposes of this application. The purpose of this process is not for me substitute my findings for that of the panel and I therefore make no observations on how, if at all, the letter might have influenced the panel's findings.

29. Allegations of this nature should be treated by the Parole Board in accordance with the Parole Board Guidance on Allegations dated March 2019. That provides that a panel faced with a relevant allegation will need to 1) disregard it, or 2) making a finding of fact or 3) make an assessment of it. Although the panel do not expressly state how they were treating the allegations of domestic violence (and the grounds for their findings might have been slightly clearer if they had) it is clear from their risk assessment that the panel did assess these allegations as they were entitled to do so. They do not, however, appear to have made findings of fact in respect of what happened.

30. The panel had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant as well as the Applicant's Offender Supervisor and Offender Manager. Where there is a conflict of opinion, it was plainly a matter for the panel to determine which opinion they preferred, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above. I do not therefore find any ground on which this risk assessment could be said to be 'irrational'.

31. The Applicant cites further various alleged inaccuracies in the matter in which the panel recorded his evidence. (For instance, in relation to what he said to his Offender Manager about his relocation on licence). The Applicant suggests this means that his evidence appears to have been disregarded by the panel on these points or at least given very little weight.

32. In respect of the circumstances of his recall, the Applicant complains that the panel found that the account the Applicant gave for his actions which led to recall was implausible. The Applicant points out that this was the same account provided to the jury at trial which subsequently resulted in his acquittal. The panel in fact acknowledged this was the case in their decision but correctly states that the *'panel's scope is much wider than that and has to take into account all of the circumstances surrounding the incident'.* Whilst the Applicant may well have answered questions about those circumstances in his evidence the panel were fully

entitled to find his answers were implausible or put weight on him not actually answering the questions the panel had put to him.

33. The test a jury at a criminal trial must apply is very different to the statutory test a panel of the Parole Board must apply. The jury must acquit if they are not certain the defendant committed the offence in question. This must include all the relevant physical acts and mental elements of any specific offence on the indictment. The Parole Board is entitled, and indeed is bound by its statutory test to examine all the surrounding circumstances including matters which may not have been relevant or even admissible before a jury, in order to determine the much broader question of risk of harm to the public. In this case the broader circumstances (the Applicant's associates and his offence paralleling behaviour in meeting with those concerned in the supply of drugs) were central to the question of risk, regardless of whether the Applicant did exactly what was alleged by the prosecution in terms of his conduct in driving the vehicle. This does not, as the Applicant suggest, undermine the panel's intention to *'respect the Jury's verdict'* but simply reflects the panel's proper focus on a much wider set of factors than the jury would have taken into consideration.

34. In reaching this conclusion the panel took into account all the evidence before them, including the agreed description of the CCTV of the incident in question as well as the Applicant's own account of what happened. This was an objective conclusion based on all the information and evidence available to the panel. The panel were fully entitled to make their own conclusions about what this incident- and the context in which it took place - told them about the Applicant's risk of serious harm and I could not find anything that the panel had 'improperly inferred' from that evidence.

35. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.

36. The Applicant suggests that at certain points the decision has inaccurately recorded the Applicant's evidence. It is a well-established ground for judicial review that the tribunal has taken into account information which it is accepted is inaccurate. The grounds for reconsideration mirror those for Judicial Review and therefore it is also a ground for reconsideration. I accept that it is capable of being both irrational and procedurally unfair to take into account inaccurate factual information in making a decision. It is important that decisions are not only fair but are also seen to be made according to a fair procedure. If incorrect information is included in the decision letter, the fairness of the procedure is called into question. However, it will not invariably follow that if there is an inaccurate fact or facts in the decision letter that an application for reconsideration will be granted. Reconsideration, like Judicial

Review, is a discretionary remedy and, if I am satisfied that the incorrect fact did not affect the decision then the application is likely to be refused.

37. The application for reconsideration itself concedes that the Applicant's evidence was in part not 'articulated well' to the Parole Board. Making a clear, accurate and agreed record of every part of his evidence was obviously a difficult exercise. I am not able to determine whether or not the Applicant correctly asserts that the panel have inaccurately described his evidence and I do not consider it to be a necessary expense to request a transcript of the hearing for this purpose. So, for these purposes I have assumed that the Applicant is correct. I do not consider though that these mistakes were in any way fundamental to the panel's overall decision. The factual details on page 5 of the decision letter were not at all central to the determination that his continued detention remains necessary to protect the public from serious harm.

38. The Applicant also asserts that the panel have inaccurately recorded detail in respect of his compliance with probation appointments. Again, even if this is inaccurate and not merely the panel preferring the Offender Manager's evidence to that of the Applicant, I do not find that to be fundamental to the panel's decision. The panel was concerned with compliance with licence conditions in circumstances where the Applicant had re-associated with drug dealers and put himself in a situation which paralleled the index offence. The precise number of appointments the Applicant had kept prior to the circumstances of his recall are not central to the panel's decision.

39. The Applicant suggests that the panel has applied an incorrect test to the release decision. I can see nowhere in the decision which suggested that the panel have applied the wrong legal test or the incorrect standard of proof.

40. The Applicant further suggests that the panel applied an incorrect test of 'prospects of compliance with licence conditions' in place of the correct test of whether it is 'necessary for the protection of the public for the Applicant to remain in custody'. The question of the likelihood of compliance with licence conditions is, of course, often of central relevance to whether continued detention remains necessary for the protection of the public. The panel had to really test this risk management plan and explore whether the Applicant would comply with it in order to answer the very question as to whether it was still necessary for the Applicant to remain confined (the corollary question to that question being whether his risk could now safely be managed in the community?). This was not about ensuring compliance for its own sake but ensuring adherence with conditions which would be necessary to manage the Applicant's risk of serious harm and which were proportionate to that aim. Addressing compliance with licence conditions does not mean that the panel has addressed their minds to the wrong legal test. On the contrary, satisfying themselves of this was a pre-requisite to their overall decision that the risk management plan before them was not capable of managing the Applicant's risk and therefore his continued detention remained necessary for the protection of the public.

Decision

41. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

Kay Taylor
4 November 2020