[2020] PBRA 171

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Application for Reconsideration by The Secretary of State for Justice in respect of Marchment

Application

1. This is an application by the Secretary of State for Justice (the Applicant) for reconsideration of a decision of a panel at an oral hearing dated 5 October 2020 to direct the release of Marchment (the Respondent).

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. The dossier of 264 pages (including the decision letter the subject of this application);
    b. The application; and
    c. The representations in reply submitted on behalf of the Respondent.

Background

4. In December 2016 the Applicant's sentence was set, following an appeal to the Court of Appeal Criminal Division, at 8 years imprisonment with an extension period of 4 years.

Request for Reconsideration

5. The application for reconsideration is dated 26 October 2020. The grounds for seeking a reconsideration are that the decision was irrational. It is submitted that the panel failed to *"properly apply the test for release due to limited consideration of lack of risk reduction work and ongoing risks in the community."*

Current parole review

6. The Respondent is serving an extended determinate sentence set on appeal on 8 December 2016 at 8 years' custody with an extension period of 4 years. His Parole Eligibility Date (PED) was 22 October 2020, his Conditional Release Date (CRD) is 21 February 2023, and Sentence Expiry Date (SED) is 23 August 2027.

7. On 08 April 2016 the Respondent was convicted of the rape of a female aged under 16. He had previously pleaded guilty to the sexual assault of another female. He was also made the subject of a Sexual Harm Prevention Order (SHPO) for 10 years together with sex offender registration requirements. The Respondent was 23 years old when he committed the rape and 24 when he committed the sexual assault. He is now aged 30. The panel heard from the Respondent's Offender Supervisor (OS) and Offender Manager (OM), a Prison Service Psychologist (PSP) and the Respondent himself.

The Relevant Law

8. The panel correctly set out in its decision letter dated 4 October 2020 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. 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

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. 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.

14. 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 Respondent

15. In reply the Respondent submits:

    a. That the Applicant has not "engaged" with the case law summarised above and the test quoted at paragraph 9 above; and
    b. In particular that the two grounds on which the submission relies are themselves without substance, and in any event fall far short of the requirements of irrationality as:

    i. There is no legal requirement for offenders to have completed particular offending behaviour programmes before release may be directed;
    ii. The Respondent has in fact completed two such programmes, and has, as the Panel noted in its decision letter, expressed his willingness to engage with such programmes; and
    iii. The panel explained why they had come to the conclusion that if released on licence it would become apparent if the Respondent was showing signs of relapsing into the sort of lifestyle which he had led when committing offences of violence whether sexual or physical in the past.

Discussion

16. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm while also protecting the prisoner from unnecessary incarceration if they failed to do just that. As was observed by the Divisional Court in **DSD** (above), they have the expertise to do it.

17. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board 2019 EWHC 2710.**

18. Where a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact that it 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.

19. The Reconsideration Mechanism is not a process whereby the judgment of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute any view of my own of the facts as found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

20. As to the specific issues raised in the Applicant's application:

a. <u>Limited consideration of lack of risk reduction work</u>

i. It is clear from the DL that the panel considered this carefully. There are some 13 references in the DL to the training course addressing sex offending programme which two of the professionals suggested would be necessary to reduce the risk still posed by the Respondent of causing harm to members of the public. The third was unwilling to offer a view on the question until a psychological assessment had been carried out. No such assessment had been carried out in anticipation of the Parole hearing in spite of requests from the respondent's legal representatives and a direction from the Parole Board in advance of the hearing since the service was said *"to be no longer operating".*

'Neither the (OM) nor the (PSP) recommended your release. Their recommendations turned on whether or not the programme is deemed core risk reduction work that needs to be completed in custody prior to release. No other work was identified as being outstanding. They were concerned that areas of risk relating to further sexual offending had not been adequately addressed and would be through completion of the programme. Upon examination of a document prepared by the (PSP) the panel noted there were no treatment needs identified in the 'healthy sexual interests' domain. After careful consideration the panel concluded you should complete the programme but in their judgement, it is not core risk reduction work and can therefore be completed on licence in the community.'

The Decision Letter contains a licence condition which reflects that conclusion.

b. 'Ongoing risks in the community':

i. It is clear that the panel considered the undoubted facts that the Respondent has a substantial criminal record and that it includes many breaches of previous court orders. (See paras 3-4 of the Decision Letter). When dealing specifically with the possibility that the Respondent might revert to his previous lifestyle of non-compliance with legal requirements and offending behaviour the panel said:

'When considering likely future risk scenarios, the panel agreed with the trajectory identified by (the OM). Future offending is likely to be preceded by a relapse into drug and/or alcohol misuse, a return to a chaotic lifestyle and an irresponsible attitude. Such a deterioration will almost certainly be accompanied by warning signs that would be detected through drug testing or be visible through, for example, a disengagement from probation and other services.

You are assessed as posing a high risk of serious harm to children and a medium risk to the public and known adults. Your risk of both sexual and non-sexual violent re-offending is assessed as medium. These levels are unlikely to reduce further until you have demonstrated through time spent time in the community that your changes are genuine, you are actively managing your risks and you are living a pro-social lifestyle.

The panel reminded itself that the 'risk period' until your CRD in February 2023 is just over 2 years. The panel assessed the risk management plan to be sufficiently robust to manage your risks during this period and you presented as motivated to comply with your licence conditions. You appear to have matured in custody, you have reflected upon your past lifestyle and behaviour and appear to genuinely want to make the best of your life and stay out of prison.'

21. It is undoubtedly the case that a decision not to direct release would not have been surprising in view of the concerns of the witnesses concerning the training course addressing sex offending and the Respondent's extensive criminal record and his record of previous non-compliance with legal requirements both when at liberty and during the early part of the current sentence. However, the panel also had the benefits of the evidence of the Respondent which clearly impressed them and of an expert (psychiatrist) member on the panel. Measured against the strict criteria set by the courts referred to above it cannot be contended that the panel's decision was one which no reasonable tribunal could have reached.

Decision

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

Sir David Calvert-Smith
12 November 2020