[2020] PBRA 77

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Application for Reconsideration by St Cyr

Application

1. This is an application by St Cyr (the Applicant) for reconsideration of a decision of a panel dated 23 April 2020 not to direct release.

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 dossier, containing 462 pages, including the Decision Letter now under review, and submissions on behalf of the Applicant containing 11 pages. The Secretary of State has not made any submission. Within the dossier there are, *inter alia:*

    (a) Some 28 pages dealing with the index offence and the Applicant's Criminal Record;
    (b) Some 20 pages of previous Parole Reviews;
    (c) Some 29 pages of reports from Offender Supervisors;
    (d) Some 115 pages of reports from Offender Managers;
    (e) 138 pages of probation service assessment report;
    (f) Some 116 Pages of psychiatric and psychological reports from 2007 until 2020;
    (g) Some 16 pages devoted to accredited courses attended by the Applicant during his sentence; and
    (h) In view of the grounds submitted I asked for, and have listened to, the recording of the hearing.

Background

4. On 12 October 2007, the Applicant was convicted on his pleas of guilty to an offence of causing grievous bodily harm with intent, an offence of possession of a firearm with intent to cause a fear of violence, and a second firearms offence concerning the possession of ammunition. He was sentenced on each count to Imprisonment for Public Protection with a minimum term of 48 months. This term expired in October 2010. On 29 March 2017 he was released on licence following a direction by the Parole Board. On 23 May of the same year he was recalled to prison.

Request for Reconsideration

5. The undated application for reconsideration was received at the Parole Board on 11 May 2020.

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

   (a) The panel's conclusions concerning the incident on 22 May 2019 which led to the Applicant's recall were irrational;
   (b) The procedure adopted by the panel when considering that incident was unfair;
   (c) The panel irrationally failed to consider/attach the proper weight to an incident on the 5 May 2019;
   (d) The panel irrationally failed to act on the evidence of the Offender Manager that the proposed Risk Management Plan (RMP) was adequate;
   (e) The panel irrationally concluded that the RMP was not complete;
   (f) The panel irrationally concluded that the Applicant only complies with rules and restrictions when he chooses to do so when his conduct since recall has proved the contrary; and
   (g) The panel irrationally concluded that the Applicant displayed fragile emotions and fear of change.

Current parole review

7. The hearing the subject of this application was originally scheduled for November 2019 but was adjourned. It eventually took place on 22 April 2020 with a combination of video link to the prison and Skype as the result of the COVID-19 'lock-down' measures. The panel heard evidence from the Applicant, his current and future Offender Managers, his Offender Supervisor, and two Psychologists. The hearing lasted approximately four hours 30 minutes.

The Relevant Law

8. The panel correctly set out in its decision letter dated 23 April 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

9. Under Rule 28(1) of the Parole Board Rules 2019 the only type of decision which is eligible for reconsideration is one that the prisoner is or is not suitable for release on licence. This is therefore an eligible decision.

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.

Procedural unfairness

13. Procedural unfairness means some procedural impropriety or unfairness which has resulted 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 focuses on the decision itself.

14. In summary an Applicant, who complains 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; or
    (b) he was not given a fair hearing; or
    (c) he was not properly informed of the case against them; or
    (d) he was 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.

15. It is possible to argue that mistakes in findings of fact made by a decision maker resulted 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.

16. 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

17. The Secretary of State has indicated that he does not wish to make representations.

Discussion

Grounds (a) & (b)

18. These grounds concerns the 'irrational' and 'procedurally unfair' way in which, it is alleged, the panel dealt with the incident which led to the Applicant's recall. The application correctly sets out the legal principles against which allegations which have not led, and may never lead, to charge or conviction may be relevant to the assessment by the panel of risk. The recall was provoked by the chance finding by a police officer of the Applicant's mother in the street in a distressed condition on 22 May 2017. She at once made allegations against the Applicant. These allegations have not yet resulted, and are now most unlikely to result, in criminal proceedings against the Applicant. I have listened to the way in which the Applicant described those events and read the statement of his mother and the other witness. In my judgment the Decision Letter provides a clear summary of the panel's reasoning which cannot be faulted. The incident was clearly capable both of justifying the recall of the Applicant, and of being one of the factors which the panel was bound to consider when assessing the risk now posed by the Applicant to the public or particular members of it. Ground (b) also criticises the procedure adopted by the panel in coming to its conclusion concerning the incident on 22 May 2017. However no contention is put forward as to how the procedure was defective or should have been conducted differently. Once again, I have listened to the recording with particular attention to the parts of the hearing in which the incidents were discussed by witnesses and the panel. The Panel Chair suggested that it would be helpful to hear first from the Applicant about the events which had led to his recall. His legal representative and the Applicant agreed. All in all, the Applicant, both in evidence and via the written submissions sent in after the hearing, was afforded a proper chance to put his case.

Ground (c)

19. In addition, there had been an incident on 5 May 2017 at the address of the Applicant's mother. This had resulted in the police being called and allegations made which the Applicant's mother did not wish to pursue. It is perhaps surprising that no reference is made to it in the Decision Letter. However, it is plain too that the panel's conclusion on the appropriateness of the decision to recall the Applicant was fully justified by the facts surrounding the later incident, and inconceivable that the panel would have come to a different conclusion concerning the recall decision.
In reaching these conclusions on Grounds (a) to (c) I have borne well in mind the authorities referred to at paragraph 15 of the Applicant's written application.

Ground (d)

20. The Board's decision to accept the recommendations of the Offender Managers was irrational. I have considered this ground carefully. Two psychologists and the Offender Supervisor expressed the opinion that the Applicant's risk of serious harm was sufficiently low to be manageable in the community. The first of the Offender Managers, who had had conduct of his case during his sentence, agreed that the Applicant met the test for release although maintained her opposition to it. The second, who would have had responsibility for his case were his release to have been directed, did not accept that his risk was sufficiently low to be manageable in the community. It is common for there to be differences of view between the professionals as to the suitability for release of a prisoner, and often the case that the greatest concerns are expressed by the person or persons who may have responsibility for the case post-release. Although I can well understand the acute disappointment of the Applicant and accept the possibility that another panel on another day might have reached a different conclusion, it is impossible to characterise the decision as 'irrational' within the definitions set out above at paragraphs 10 & 11 above.

Ground E

21. This ground concerns the panel's conclusion that the proposed Risk Management Plan (RMP) was not sufficient to manage the risk posed by the Applicant. During the hearing the panel considered the RMP with each witness. The Decision Letter is clear in the second paragraph of paragraph 10 of the Decision Letter that its concerns were at "*[the Applicant's] ability to adhere to licence conditions and the authorities' ability to observe and act upon signs of escalating risk*" as to why it reached the conclusion that it did. Although I can well understand the acute disappointment of the Applicant and accept the possibility that another panel on another day might possibly have reached a different conclusion, it is impossible to characterise the conclusion as 'irrational' within the definitions set out above at paragraphs 10 and 11 above.

Ground (f)

22. This ground alleges that the panel came to an irrational conclusion concerning the Applicant's tendency only to accept rules and timescales which he believes to be necessary. There was ample evidence to justify this conclusion. It was the case that since his recall the Applicant had been, with minor exceptions a model prisoner and had completed all the work required of him satisfactorily, as well as improving his chances of finding work following release. However, it was clear from his history and the long period in which he has been in custody, twice previously having been transferred back to closed from open conditions, that he has a strong personality and has found it difficult to accept and comply with decisions or rules with which he disagrees. Although due allowance has to be made for the circumstances in which the hearing took place with the panel, the witnesses, the Applicant, and his lawyer all in separate locations as the result of the current restrictions, there were a number of occasions during the hearing, both when responding to questions and during the

evidence of other witnesses when the Applicant's strong desire to progress on his own terms was apparent.

Ground (g)

23. This ground alleges that the panel wrongly concluded that the Applicant had displayed "*fragile emotions*" and "*fear of change*", at least since his return to custody in 2017. There was material to evidence this conclusion – albeit most of it predated his recall in 2017. There had however been incidents when he had taken illegal drugs in 2017 and 2018. His strongly expressed opposition to a transfer to open conditions expressed during the hearing during the evidence of another witness was another example even if mitigated by the somewhat artificial circumstances in which the hearing had to be conducted.

Decision

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

David Calvert-Smith
18 June 2020