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[2021] PBRA 129

Application for Reconsideration by Smyth

Application

1. This is an application by Smyth ('the Applicant') for reconsideration of the decision of a Member Case Assessment (MCA) panel of the Parole Board ('the panel') which on 3 June 2021 issued a decision adverse to the Applicant.

2. The decision was made 'on the papers' (i.e., on the basis of the dossier provided by the Secretary of State). The panel decided (a) not to direct the Applicant's release on licence (b) not to recommend that he should be transferred to an open prison and (c) not to send the case for an oral hearing for it to be considered by another panel with the benefit of oral evidence.

3. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.

Background

4. The Applicant is now aged 42 and has a significant criminal record. He is currently serving an indeterminate sentence of imprisonment for public protection which he received in September 2007 when he was aged 28.

5. The sentence was imposed for arson with intent to endanger life and four counts of sexual activity with a child. The arson involved setting fire to the flat occupied by the child's father. In the flat at the time were the child herself, her father and her boyfriend.

6. The Applicant's 'tariff' (i.e., the period which he was required to serve in prison before becoming eligible for release on licence) was fixed at 6 years less the time which he had served in custody on remand. It expired in August 2012.

7. The Applicant was released on licence on 25 August 2017 but recalled to prison on 21 May 2018 as a result of breaches of his licence conditions.

8. Following his recall, the Secretary of State referred his case to the Parole Board to decide whether he should be re-released on licence and, if not, whether to recommend a transfer to an open prison. His case was sent for an oral hearing which took place on 27 May 2019. The result of that hearing was a decision not to

direct the Applicant's re-release on licence and not to recommend a transfer to an open prison.

9. On 23 July 2020 the Secretary of State again referred the Applicant's case to the Parole Board, in the same terms as before. In December 2020 an MCA panel deferred the case for a psychological risk assessment to be carried out and other documents to be obtained.

10. The deferred MCA assessment of the case eventually took place on 3 June 2021 when, as indicated above, the panel made the decision which is the subject of this application.

11. The evidence considered by the panel was contained in the dossier provided by the Secretary of State. The dossier included the directed psychological risk assessment report and reports from the officials responsible for the supervision of the Applicant in prison and (prospectively) in the community. Everything in the dossier had been disclosed to the Applicant. There were no representations by or on behalf of the Applicant at that stage. None of the professional witnesses supported re-release on licence.

12. As he was entitled to do, the Applicant applied to the Board through his solicitor for a direction that - notwithstanding the panel's decision - his case should proceed to an oral hearing. That application was supported by detailed representations made by the solicitor on the Applicant's behalf.

13. On 16 July 2021 the application was refused by a Duty Member of the Board. The Duty Member's decision was not received by the Applicant's solicitors until 27 July 2021.

14. On 16 August 2021 the Applicant's solicitor submitted this application for reconsideration of the panel's decision.

The Relevant Law

The test for re-release on licence

15. The test for re-release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the panel in the introductory section of its decision.

The rules relating to reconsideration of decisions

16. Under Rule 28(1) of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.

17. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by
(a) a paper panel (Rule 19(1)(a)) (as in this case) or
(b) an oral hearing panel after an oral hearing (Rule 25(1)) or
(c) an oral hearing panel which makes the decision on the papers (Rule 21(7)).

18. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both of two grounds: (a) that the decision is irrational or (b) that it is procedurally unfair.

19. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. The panel's decision not to recommend a move to open conditions is not eligible for reconsideration; nor is the Duty Member's decision not to direct an oral hearing.

The test for irrationality

20. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin) (the "Worboys case")**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It stated 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 was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.

22. 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.

23. The Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied.The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see **Preston [2019] PBRA 1** and other cases.

The test for procedural unfairness

24. 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 from the issue of irrationality which focusses on the actual decision.

25. It has been established that the things which might amount to procedural unfairness include:
    (a) A failure to follow established procedures;
    (b) A failure to conduct the hearing fairly;
    (c) A failure to allow one party to put its case properly;
    (d) A failure properly to inform the prisoner of the case against him or her; and/or
    (e) Lack of impartiality.

26. This is not an exhaustive list. The fundamental question on any complaint of procedural unfairness is whether, viewed objectively, the case was dealt with fairly.

Mistake of fact

27. A mistake of fact made by a panel may be a ground for directing reconsideration of a panel's decision. However, that is not always the case. For example, reconsideration will not be directed if it is clear that the panel's decision would have been the same if the mistake had not been made. This principle is sometimes explained by pointing out that reconsideration (like judicial review by the High Court) is a discretionary remedy.

28. A mistake of fact is sometimes categorised as a procedural irregularity and sometimes as evidence of irrationality. It does not make any difference which label is attached to it. The principle is the same.

The Application for Reconsideration in this case

29. The Applicant's solicitor makes the following submissions in support of this application:

    (1) The panel stated in its decision that there was no risk management plan for the panel to consider. This was a mistake: an extremely detailed and robust risk management plan was set out in the dossier.

    (2) The Applicant is significantly 'over-tariff'. His case is complex given the amount of offending behaviour work he has completed, the circumstances surrounding his recall and the recommendations by professionals that he should complete a significant piece of offending behaviour work before re-release on licence. By making a decision on the papers the Board did not sufficiently scrutinise whether his risk requires his continued confinement in prison.

    (3) The Applicant was unable to put forward his case properly: he was not able to give oral evidence about the work which he had completed, or to provide an oral explanation about why he disagreed with the recommendations of the professional witnesses and why he felt he was ready for release.

    (4) The applicant struggles to see how the Board were impartial in making their decision: the member who refused his application for an oral hearing had been involved in his last three parole reviews and had previously made a decision against release.

30. These submissions will be discussed in more detail below.

Documents considered

31. I have considered the following documents which have been provided for the purpose of this application:

a) The 564-page dossier provided by the Secretary of State (which includes the panel's decision letter and the Duty Member's decision not to direct an oral hearing);
b) The representations submitted by the Applicant's solicitors in support of the application for reconsideration; and
c) An e-mail from PPCS dated 31 August 2021 stating that on behalf of the Secretary of State they offer no representations in response to the application.

Discussion of the issues raised by the Applicant's solicitor

The mistake of fact

32. There is no doubt that a mistake was made by the panel. Under the heading 'Evaluation of effectiveness of plans to manage risk' the panel stated that there was no risk management plan for the panel to consider. In fact, there was a comprehensive risk management plan provided by the official prospectively responsible for the management of the Applicant's case if and when he is released into the community. That plan occupied 11 pages of the official's report. Although she was not supporting re-release on licence, she was required (as is always the case) to present a risk management plan for consideration by the Board.

33. The panel's mistake was, I believe, a significant one which fundamentally affected its decision. In making a decision about a prisoner's suitability for release or re-release on licence a panel has to perform two exercises: (1) to assess the prisoner's current and likely future risk of serious harm to the public and (2) to decide whether that risk would be safely manageable on licence in the community. If it would, his continued confinement in prison is not necessary and the test for release or re-release is met.

34. The second exercise, which is therefore an important one, necessarily involves assessing the likely effectiveness of the proposed risk management plan. As the panel was unaware that there was a proposed risk management plan in this case, it failed to carry out that exercise. Its decision was therefore fatally flawed: there was a procedural irregularity resulting in unfairness to the Applicant, and the panel's decision could also be described as irrational.

Other grounds

35. In the light of my conclusion on the first ground, which is sufficient to show that this case must be re-considered, I can deal with the other grounds quite shortly.

36. ***The 'over tariff' point***. There are many cases where a prisoner is substantially over-tariff but (a) there is no realistic prospect of a progressive move (b) an oral hearing would clearly not serve any other useful purpose, and therefore (c) it is appropriate not to direct such a hearing. There are some grounds for suggesting that this is not one of those cases, and that a direction for an oral hearing would have been appropriate. As the case is going to be reconsidered, it is unnecessary for me to examine those grounds in any detail: no doubt the solicitor will make appropriate representations to the next MCA member who will consider them.

37. I would merely observe that within the risk management section of the report referred to in paragraph 32 above (of which the panel was evidently unaware) it was recorded that the recommendation made by the psychologist for the Applicant to remain in prison for treatment in a special unit was no longer available as the Applicant had been assessed as unsuitable for it. The panel referred to that recommendation in its decision and was clearly unaware that it had already been ruled out.

38. ***The Applicant's inability to put forward his case properly.*** Again, as this case is going to be reconsidered, I need not go into this point in detail. The solicitor will be able to elaborate on it in his representations to the next panel. I note from his representations in support of the unsuccessful request for an oral hearing that there are a number of factual disputes about the circumstances leading to the Applicant's recall which may need to be explored at an oral hearing. That is a matter for the next panel to decide.

39. ***The Duty Member's previous involvement in the case.*** I can understand the Applicant's concern that the Duty Member who refused his application for an oral hearing had had substantial previous involvement in his case and had been a party to a previous decision adverse to him. However, I am afraid that for two reasons this is not a ground for reconsideration of the panel's decision.

    (i) The application for reconsideration relates to the panel's decision and not to the Duty Member's decision.

    (ii) It is not uncommon for a case to be allocated to a member who has previously been involved in the same case at an earlier stage. Parole Board members are accustomed to approaching each case with an open mind, and in the absence of specific evidence of bias or pre-judgment (of which there is none in this case) it must be assumed that that is what they have done.

Decision

40. For the reasons explained above this application must succeed and I must direct reconsideration of the panel's decision.

Jeremy Roberts
15 September 2021