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[2021] PBRA 130

Application for Reconsideration by Powell

Application

1. This is an application by Powell (the Applicant) for reconsideration of a provisional decision by the Parole Board under Rule 25(1) of the Parole Board Rules 2019 (the 2019 Rules) that the Applicant was unsuitable for release (the Decision). The letter by which the Decision was communicated is dated 9 August 2021 (the Decision Letter).

2. I have considered the application on the papers comprising:

a) A dossier of 481 numbered pages;
b) The Decision Letter; and
c) Written submissions by the Applicant's solicitors dated 27 August 2021 in which reconsideration is requested (the Applicant's Submissions).

Background

3. In October 1999, the Applicant was sentenced to a discretionary life sentence for offences of robbery, kidnapping and false imprisonment. The minimum tariff was reduced upon appeal in 2001 to 6 years 7 months & 7 days and expired in 2006.

4. The Applicant was aged 26 when he received the sentence and is now aged 48.

5. In March 2019, the Applicant was transferred to an open prison as recommended by the Board in its previous review of the case.

6. The current review is the eighth review of the Applicant's case by the Board.

Current parole review

7. The Decision was made on the Secretary of State's referral of the Applicant's case to the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release.

8. The Decision was made by a three-member panel of the Board that considered the Applicant's case at an oral hearing in May 2021 (the Panel). The oral hearing was conducted remotely by telephone links due to constraints imposed by the COVID pandemic.

Application and response

9. The Applicant's submissions assert that the Decision is marred by irrationality.

10. By an email dated 7 September 2021, the Public Protection Casework Section notified the Board that the Secretary of State offered no representations in response to the Applicant's reconsideration application.

The Relevant Law

11. 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.

Irrationality

12. 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."

13. 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.

14. 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. The application of this test has been confirmed in previous decisions on applications for reconsideration under Rule 28: **Preston [2019] PBRA 1** and others.

15. The duty of statutory bodies to give reasons was summarised by Lord Carnwath in the Supreme Court case **Dover District Council v CPRE Kent [2017] UKSC 79** as follows:

*"51.Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed (see **R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531; R v Higher Education Funding Council, Ex p Institute of Dental Surgery [1994] 1 WLR 242, 263A-D;** De Smith's Judicial Review 7th ed, para 7-099). Doody concerned the power of the Home Secretary (under the Criminal Justice Act 1967 section 61(1)), in relation to a prisoner under a mandatory life sentence for murder, to fix the minimum period before consideration by the Parole Board for licence, taking account of the "penal" element as recommended by the trial judge. It was held that such a decision was subject to judicial review, and that the prisoner*

was entitled to be informed of the judge's recommendation and of the reasons for the Home Secretary's decision:

"To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed. If there is any difference between the penal element recommended by the judges and actually imposed by the Home Secretary, this reasoning is bound to include, either explicitly or implicitly, a reason why the Home Secretary has taken a different view…" (p 565G-H per Lord Mustill).

"It is to be noted that a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so make effective the right to challenge the decision by judicial review."

16. The application of those principles to decisions of the Parole Board where the liberty of the subject is at stake has been expressed in recent judgments by the High Court authorities including **R (Wells) v Parole Board [2019] EWHC 2710 (Admin)**, **R(PL) v Parole Board and Secretary of State for Justice [2019] EWHC 3306 (Admin)** and **Stokes, R (On the Application Of) v Parole Board of England and Wales [2020] EWHC 1885 (Admin)**.

Procedural unfairness

17. 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.

Consideration

18. The Applicant raises two broad grounds:

    18.1. That the Board erred in law by failing to take into account important points of evidence raised during the hearing and highlighted in closing submissions; and

    18.2. That the Board has failed to provide a logical and coherent assessment of risk and, by this omission, has incorrectly applied the test for release.

19. In relation to the first ground, the Applicant notes that the decision makes reference to an assessment by a psychologist but omits to mention a statement by the psychologist to the effect that the Applicant showed no indication of violent intent and that there had been no evidence of physical violence over a significant period of time. It is said that the Prison Offender Manager and Community Offender Manager witnesses were in agreement with that statement, and it is asserted that the Board acted irrationally in omitting that evidence when assessing whether or not the Applicant represented a risk of serious harm.

20. The Applicant further asserts that the Board acted irrationally in failing to take account of the fact that it was the Prison Offender Manager's evidence that his concerns regarding the release of the Applicant centred around the Applicant's potential to breach licence conditions rather than his risk of serious harm. It is asserted that the Prison Offender Manager stated the opinion that the Applicant would not be violent but that he might fall foul of rules and be returned to custody.

21. In relation to the second ground, the Applicant asserts that the Board was irrational in finding that it could not discount the possibility that the Applicant posed *'a potentially imminent and serious risk of serious harm'.* The Applicant asserts that no evidence was presented, either orally or in writing, that the Applicant's risk was *'potentially imminent'*, that the evidence of both witnesses was to the effect that risk was not imminent because they stated the opinion that the Applicant was likely to succeed while in designated accommodation and, that the Board has given inadequate reasons for reaching the conclusion that the Applicant's risk was *'potentially imminent'*. The Applicant moreover asserts that the legal test for release is not the Board's ability to 'discount a potentially imminent and serious risk of serious harm'.

22. I am not persuaded by the assertion in the Applicant's Submissions that the Decision is irrational.

23. The Decision Letter reveals that the Board correctly directed itself that, in order to direct the Applicant's release, it must be satisfied that it is no longer necessary for the protection of the public that the Applicant is confined in prison.

24. The Decision Letter also reveals that the two professional witnesses recommended that the Applicant remain in open conditions and undergo a gradual introduction into the community involving release on temporary licence and resettlement visits to the Applicant's home area, in order to facilitate the development of his resettlement plan and test the Applicant's ability to engage and behave appropriately within the community. The Board noted that the release on temporary licence enjoyed by the Applicant to date had been encouraging on those terms, and that there had been delays in the schedule of such releases due to the COVID pandemic. The Board also expressly directed itself that such testing might not be required in every case. However, the Decision Letter also provides cogent and adequate reasons why the Board considered that further testing of that nature was necessary in the Applicant's case in order to be sufficiently confident that the level of risk he posed to the public had reduced to a level that was manageable.

Decision

25. The Decision is not marred by irrationality. The application for reconsideration is accordingly refused.

Timothy Lawrence
9 September 2021