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[2021] PBRA 148

Application for Reconsideration by Goldsmith

Application

1. This is an application by Goldsmith (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 14 September 2021 (the decision letter).

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

(a) A dossier of 1152 numbered pages, including the decision letter; and
(b) Written submissions by the Applicant in-person dated 2 October 2021 in which reconsideration is requested (the Applicant's Submissions).

Background

3. In December 1999, the Applicant received an indeterminate Life sentence for two counts of rape and one of false imprisonment. The minimum tariff was increased after referral by the Attorney General to the Court of Appeal to six years and expired in December 2005.

4. The Applicant was aged 36 when he received the sentence and is now aged 58.

Current parole review

5. 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.

6. The decision was made by a two-member Panel of the Board that considered the Applicant's case at an oral hearing in September 2021 (the Panel). The Panel comprised of a Judicial Member of the Board and a Psychologist Member. The oral hearing was conducted remotely.

Application and response

7. The Applicant's submissions assert that the decision is marred by irrationality and procedural unfairness.

8. By an email dated 22 October 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

9. Rule 28(1) of the 2019 Rules 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

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.

12. 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.

Procedural unfairness

13. 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

14. The Applicant's Submissions were drafted by the Applicant in person and are lengthy, which is relevant to the grounds on which the application succeeds.

15. The Applicant complains that he was restricted to ten minutes to address the Panel after oral evidence was heard. The Applicant states that he asked for more time than that and that that request was refused by the Panel Chair for reasons including that the Applicant had had the opportunity to speak during his oral evidence and that he was represented by counsel. The Secretary of State has not sought to impugn those matters of fact that are stated by the Applicant and I have no reason to doubt that they are true.

16. I have considered whether the restriction of the prisoner's address to the Panel to ten minutes had the result that the proceedings were fundamentally flawed.

17. The Applicant was represented by counsel. He complains that he was only able to speak to his barrister for one hour prior to the hearing. In fact, it is apparent that the Applicant's solicitor was also present during the hearing, and can be expected to have briefed counsel on the Applicant's instructions beforehand and been present at the conference. In any event there is no suggestion that any concern was raised during the oral hearing that there had been insufficient time for the Applicant to speak to his barrister.

18. The Applicant refers to rule 24(9) of the 2019 Rules, which provides that, after all the evidence has been given, if the prisoner is present at the hearing, the prisoner must be given an opportunity to address the Panel. The Applicant asserts that that provision does not indicate such a severe limitation of time. The provision in rule 24(9) appears to me to apply regardless of whether the prisoner is represented and I do not consider that the requirement is satisfied by allowing a prisoner's representative to address the Panel.

19. Case management powers are invested in Panel chairs by the 2019 Rules that allow for a timetable for the proceedings to be set, and for adjournment of a hearing on the day to reconvene at a later date, which may for example be used if time is too short to accommodate oral submissions. There could also be direction that the Applicant make his submissions in writing prior to a decision being made, if that was considered to be a fair compromise, bearing in mind the requirement to allow the Applicant to participate.

20. The Applicant refers to paragraph 68 of the judgment of the United Kingdom Supreme Court in **Osborn v The Parole Board [2013] UKSC 61**, delivered by Lord Reed, in which his Lordship approved Lord Hofmann's observation in **Secretary of State for the Home Department v (AF (No 3) [2009] UKHL 28** that the value of a fair hearing includes the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel, which would in Lord Reed's consideration arise because justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. His Lordship explained that such respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken.

21. The length and detail of the Applicant's Submissions is supportive of his assertion that, given the opportunity, he would have had things to say that were in my consideration relevant to the decision to be taken. It has not been suggested by the Secretary of State for Justice, and it is not apparent from the decision letter, that all of the points the Applicant would have wished to make when addressing the Panel under 24(9) were made by his barrister, nor that all of those points are addressed in the decision Letter in any event. Responses given to questions in oral evidence cannot be any substitute for the opportunity to address a Panel after all such evidence is heard, as required by rule 24(9), which is an opportunity of an entirely different character.

22. It is also relevant, as noted in the decision, that there was a consensus amongst psychologists that the Applicant presents with traits of autism, and that one of the psychologists offered a definite diagnosis of Autism Spectrum Condition (ASC). The Equal Treatment Bench Book (February 2021) suggests the potential difficulties with the legal process that autistic parties and witnesses may have in court, depending on the nature of their autism, which include difficulty with time-scales, expectations and unwritten rules. Suggested reasonable adjustments include explaining in advance what the hearing procedure will be like and sending a written timetable, and explaining at the outset in detail the hearing procedure including length and timing of breaks. I am unable to discern whether any such adjustments were made, but the point is that a prisoner with ASC may be unfairly disadvantaged with regard to their participation in a hearing if the required opportunity to address the Panel after all the evidence is restricted to a short period of time as appears to have occurred in the Applicant's case, and especially so if that restriction is not made clear prior to the hearing.

23. Considering those issues in the round, I am driven to the conclusion that there was procedural unfairness in the restriction of the Applicant's address to the Panel. The restriction without advance notice of the Applicant's opportunity to address the Panel after all of the evidence was heard, which he was required to be given under rule 24(9), deprived him of an important opportunity to participate in the procedure by which the decision is made.

Decision

24. The decision is marred by procedural unfairness and reconsideration is directed accordingly.

Timothy Lawrence
29 October 2021