[2020] PBRA 203

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Application for Reconsideration by Hughes

Application

1. This is an application by Hughes (the Applicant) for reconsideration of a decision of an oral hearing dated 23 November 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 Oral Hearing Decision Letter.
    - The Reconsideration Mechanism Application from the Applicant's solicitors.
    - The dossier, which contains 320 numbered pages. The dossier is identical to that considered by the Oral Hearing Panel [OHP], with the addition of the Decision Letter.

Background

4. The Applicant was born on 27 March 1966. He is now 54. He was sentenced on 8 February 2007, when he was 40, to imprisonment for public protection, with a tariff of 6½ years less time on remand. The Tariff Expiry Date was 18 January 2014.

5. The offences for which he was sentenced were grave sexual assaults on a child under 10. When his computer was examined it contained videos of sexual abuse of children, violent sex and another form of sexual offending. He had earlier convictions for burglary and dangerous driving with excess alcohol. His bail for the index offences was withdrawn when he contacted a witness.

6. The Applicant was released on licence in 2016, and recalled on 3 July 2019, when the police checked his mobile phone and found evidence of his use of a pornographic website.

Request for Reconsideration

7. The application for reconsideration is dated 12 December 2020.

8. The grounds for seeking a reconsideration are as follows:

   (a) The decision does not evidence due consideration of the recall circumstances and the relevance of those circumstances to a risk assessment.

   (b) The decision does not identify any difference between sexual preoccupation and sexual interest.

   (c) The decision is arguably *ultra vires* because the Panel makes determinations which are arguably a matter for expert evidence, in the absence of expert evidence.

   (d) The decision disputes the relevance of the offending behaviour work completed by the Applicant and its effectiveness in reducing his risk, in the absence of full information about the reasons for his inclusions in these programmes and how his success was evaluated.

   (e) The decision contains factual errors.

9. The Grounds are expanded upon in the Application. Following that expansion, it seems that Grounds (a), (b) and (e) assert irrationality, and Grounds (c) and (d) assert procedural unfairness. Although in Ground (c) the expression *ultra vires* is used, it does not appear to have the meaning usually attributed to it. The suggestion is not that the OHP exceeded its powers, but that it could not properly have exercised those powers as it did on the evidence before it.

Current parole review

10. The case was referred to the Parole Board on 9 September 2019 to consider a direction for release or a recommendation for open conditions. This was the first review of the Applicant's case following his recall.

11. The hearing took place on 6 November 2020, during the coronavirus pandemic, by video link with the consent of the Applicant's legal representative. The panel considered a dossier containing 309 pages, including written legal representations from the Applicant's representative. The Applicant was represented throughout. The Secretary of State was not represented and made no submissions. The OHP heard evidence from the Applicant, a Police Sergeant, the Prison Offender Manager and the Community Offender Manager. The panel considered written submissions on the Applicant's behalf before its decision.

The Relevant Law

12. The panel correctly sets out in its decision letter dated the test for release.

13. The Application sets out some of the relevant law, but it is necessary that I should do so again.

Parole Board Rules 2019

14. 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)).

15. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

16. 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."

17. 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.

18. 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

19. 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 to the issue of irrationality which focuses on the actual decision.

20. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:

    (a) express procedures laid down by law were not followed in the making of the relevant decision;
    (b) they were not given a fair hearing;

    (c) they were not properly informed of the case against them;

(d) they were 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.

Other

21. 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.

22. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them.

The reply on behalf of the Secretary of State

23. The Secretary of State has indicated that he does not seek to respond to the application.

Discussion

24. I will consider the grounds under the headings of Irrationality and Procedural Unfairness, as discussed above.

Irrationality

(a) The decision does not evidence due consideration of the recall circumstances and the relevance of those circumstances to a risk assessment.

25. The ground here is amplified to assert that the online pornographic site in question is among the first 3 search results generated by a Google search; that the public has free access to this site; that the POM gave evidence that she was aware of

colleagues discussing sites such as this; that Applicant had disclosed his use of the site; that his use of the site would have been apparent to the police during previous searches; and that there is no evidence of behaviours paralleling his index offence.

26. None of this, except perhaps the last, seems particularly to the point. The evidence before the panel was that the Applicant's phones were found to have accessed sites where there were images of male and female children, incest and rape. It is relevant that the victim of the index offences was part of the household he lived in. His internet history was, for whatever reason, unavailable. The Applicant's evidence that he did not consider himself to have done anything wrong. The police officers who viewed the images that appeared when they used his search terms estimated the children were aged between 7 and 10. The OHP was entitled to prefer that evidence.

27. Furthermore, the evidence was that the Applicant had used search terms plainly and notoriously indicating an interest in young children and incestuous or quasi-incestuous sexual activity. He admitted clicking on tabs for videos, the titles of which included a family relationship. The COM told the panel that the Applicant had said he was using the website, but falsely asserted that it contained only adult pornography. The police officer's evidence was that the Applicant would have had to take a positive action for websites plainly labelled as involving young children to be in his search history. She also said that her colleagues, who said the children they viewed each time they accessed those websites were aged 7-10, were experienced sex offender managers and therefore qualified to make such a judgement. All this could properly be regarded as offence-paralleling behaviour.

28. In short, the panel in fact analysed the circumstances of the recall closely and came to reasoned and evidence-based conclusions.

(b) The decision does not identify any difference between sexual preoccupation and sexual interest

29. This is presumably a reference to the panel's finding, in the light of the Applicant having been found to be searching for and viewing pornography involving children, that his long-standing sexual preoccupation had not been sufficiently addressed, and would not be addressed by a programme in the community.

30. The amplification here is that the Applicant admitted sexual preoccupation at the time of the index offences but denies it now. The COM apparently said in evidence that the Applicant had sexual interest, but not preoccupation. The complaint is that the panel did not receive evidence of the extent to which the Applicant used the pornographic website for adult pornography rather than child pornography; the panel did not receive evidence for how frequently he accessed the site, and how long he was spending on the site on each occasion.

31. The Applicant submits that without the evidence mentioned above the panel could not make a finding of sexual preoccupation. The sole source of this evidence would have to have been the Applicant, since the internet history was not available on his phone, and only he could speak to his level of sexual preoccupation. He gave evidence at the oral hearing. The panel concluded that the Applicant was searching for indecent images of children, which indicated that his core risk factors remained active.

32. If there is a significant difference so far as risk is concerned between the Applicant's sexual preoccupation and his sexual interest in children, which I doubt, it remains material, as the OHP found, that he continued to use a website which gave him access to images of child abuse. This manifestly would support a finding that, despite his denials, he continued to be sexually preoccupied, bearing in mind the decision of an earlier panel that fear of returning to prison would enable him to control his activities. His explanation that the images popped up on his phone and he didn't look at what they were is the same explanation as he gave for the appearance of similar material on his computer at the time of the index offences. Sexual preoccupation, as narrowly defined, is a perfectly reasonable explanation for this behaviour, despite the Applicant's denials.

(e) The decision contains factual errors.

33. These are specified as:

- Incorrectly stating that the Applicant's female friend was not fully informed by the police of his offending;

- Incorrectly stating that the Applicant's phone contained indecent images, when in fact the phone was used to access a streaming service, which when clicked on streamed images which the police deemed indecent, but it could not be proved that the Applicant saw any of them.

- Asserting that he appeared to have deleted his internet history, when the evidence was to the contrary and no charges were brought.

- Incorrectly stating that the Applicant does not have contact with a specified family member, when he does.

34. Assuming the application accurately sets out these inaccuracies, they are insufficient either individually or cumulatively to affect the rationality of the panel's decision. They do not amount to anything fundamental to the decision.

35. In fact, the panel specifically stated that the Applicant did not download any indecent images, saying a critical question was whether he was proactive in seeking them or viewed them inadvertently. The panel found there to be evidence that he had searched for indecent images and rejected his explanation as implausible.

Procedural irregularity

36. I take Grounds (c) and (d) together: *The decision is arguably* ultra vires *because the Panel makes determinations which are arguably a matter for expert evidence, in the absence of expert evidence. The decision disputes the relevance of the offending behaviour work completed by the Applicant and its effectiveness in reducing his risk, in the absence of full information about the reasons for his inclusions in these programmes and how his success was evaluated*.

37. This amounts to a complaint that the panel should have directed an up-to-date psychological assessment and determination of any future offending behaviour work. It is argued that the panel acted unfairly in making determinations about these matters without expert opinion evidence. Nor, it is said, should the panel have decided that the rolling version of a training course addressing sex offending, together with an individual intervention in the community, underpinned by a strengths-based approach, could not have addressed the Applicant's interest in children when the Community Offender Manager expressed his dissent from that position.

38. 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**, they have the expertise to do it.

39. It is not suggested that at any stage the Applicant or his legal representative asked for an up-to-date psychological assessment to be prepared. The panel decided the case on the evidence before it. See Paragraph 22 above.

40. The panel explained its reasoning about the two programmes in the light of the Applicant's conduct on licence. The panel considered on the evidence that the programmes in custody had not sufficiently reduced his risk, and the proposed programme in the community (were he to be released again without his risk being reduced) would not do so.

41. This was a judgement the panel was entitled to make on the evidence.

Decision

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

Patrick Thomas
7 January 2021