[2021] PBRA 40

the Parole Board
working with others to protect the public

Application for reconsideration by Lewis

Application

1. This is an application by Lewis (the Applicant) for reconsideration of the decision of an oral hearing panel dated 4 February 2021. The decision of the panel was not to direct release and not to recommend open conditions.

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 written representations by the Applicant's solicitor dated 4 March 2021, the oral hearing decision letter, and a dossier consisting of 606 pages

Background

4. The Applicant is serving a sentence of Imprisonment for Public Protection (IPP) with a minimum term of 7 years and 214 days. The index offences were kidnapping, false imprisonment, robbery and sexual assault. The victims were two elderly women. The offence occurred on 20 September 2009.

5. At the time of the oral hearing. The Applicant was 32 years old. He was 20 at the time of the index offence.

Request for reconsideration

6.The grounds for seeking a reconsideration are as follows.

   a. That the panel failed to correctly record in the decision letter the reason for the Applicant's prison transfer in April 2019. The panel had noted that the transfer related to antisocial behaviour. The Applicant argues that the transfer was in fact as a result of a request for the Applicant to be nearer to his family. The importance of the point being that antisocial behaviour was the basis of the decision not to recommend release or progression.

   b. That the panel placed 'unjust over reliance' on security intelligence in the case.

   c. That the panel placed too much reliance upon the possibility of contact with former gang members because of redundant telephone numbers on the Applicant's prison telephone list.

d. That the decision was irrational because of the contradiction between imminence of reoffending and reduction in risk.

e. That the panel were wrong to conclude that core risk reduction work in relation to gang involvement remained outstanding. They were wrong because the evidence of the professional witnesses did not support this contention.

Current Parole Review.

7. The Parole Board in this case received a reference from the Secretary of State to consider whether the Applicant should be released on licence or whether a recommendation for progression to open conditions was appropriate.

8. The oral hearing panel heard evidence from the Applicant's Offender Supervisor and Offender Manager. The Applicant also gave evidence at the hearing. The Applicant was legally represented at the hearing.

9. The panel correctly set out in its decision letter dated 12 February 2021, 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.

The Relevant Law

Parole Board Rules 2019

10. By virtue of 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 when made by an oral hearing panel after an oral hearing rule 25 (1).

11. 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 a previous reconsideration application, namely **Berkeley (2019), PBRA 6.**

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. 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.

14. 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

15. 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 focusses on the actual decision.

16. In summary, an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either: express procedures laid down by law were not followed in the making of the relevant decision; they were not given a fair hearing; they were not properly informed of the case against them; they were prevented from putting their case properly; and/or the panel was not impartial. The overriding objective is to ensure that the Applicant's case was dealt with justly.

17. Procedural unfairness is not argued in this case.

Findings of Fact

18. 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.

Opinions of others

19. 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 fail to do just that, as was observed by the court in **DSD** they have the expertise to do it.

20. However, if the panel were to make a decision contrary to the opinions and recommendations of all professional witnesses, it is important that it should explain clearly reasons for doing so and that the stated reasons should be sufficient to justify its conclusions as noted in the case of **R (Wells) the Parole Board 2019 EWHC 2710**

21. Where a panel arrive at a conclusion, exercising its judgement based on the evidence before it, having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.

22. The reconsideration mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as found by the panel, unless of course, it is manifestly obvious that there was an error of fact of egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

Reply by Secretary of State

23. The Secretary of State made no representations in response to this application for reconsideration.

Discussion

24. I deal below with the individual issues raised in the Application.

Failing to correctly consider a reason for prison transfer

25. I have considered the complaint relating to the accuracy of the recording of the reason for the transfers of the Applicant from one prison to another. There is evidence on the dossier that the transfer of the Applicant in January 2018 between one prison establishment to other was a security transfer relating to antisocial behaviour. The dossier does not give a clear indication relating to this transfer. The panel may therefore have incorrectly alluded to the earlier security transfer in their reference within the decision letter. The panel were not, however, incorrect in noting that there had been concerns about antisocial behaviour which led to a prison transfer. For this reason, I am not persuaded that, if the reference to the transfer in 2019 was in error, it made any material difference to the decision of the panel. The evidence was that in relatively recent times there had been concerns in another prison about antisocial behaviour on the part of the Applicant.

Unjust over reliance on security information

26. The panel noted in the decision letter that there had been numerous security intelligence entries over the past year. These entries related to suspicion about the Applicant selling drugs and persuading others to hold drugs and phones. There were also reports of unexplained payments in connection with suspicious packages. The Offender Supervisor observed that there were "*clear patterns"* in the intelligence. The Offender Manager had apparently not previously been informed about the security intelligence and had raised concerns about it not being further investigated. The panel commented that the *'unremitting pattern'* of security intelligence, albeit of varying reliability, suggested continued involvement in gang related behaviour while in prison. The panel acknowledged that there were difficulties with reliability in relation to the evidence, particularly, as is commonly the case, the intelligence consisted of narrative reporting without witnesses or other support. A decision as to the weight to place upon the security evidence was one for the panel. The panel clearly considered the security intelligence with the background of the Applicant's lifestyle before entering prison and his association with gangs before conviction. Whilst it may be that other panels would take a different view, as is noted above, it is for the panel to exercise its judgement based upon the evidence before it. Having regard to the fact that they saw and heard the witnesses. It would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of panel. In this case the panel had clear concerns about the nature of the security intelligence. Their reliance on the security intelligence was based upon the number of reports and the frequency of the reports being recorded. I do not find that reliance on the security information amounts to an irrational decision as set out in the test above.

Redundant telephone numbers

27. The Applicant complains that too much reliance was placed upon the possibility that redundant telephone numbers on the Applicant's telephone list may have been associated with the use of phones which were disposable and therefore draw an inference of association with criminals. Although the evidence of association between redundant telephone numbers and those involved in criminal behaviour is not strongly developed in the decision, I am again satisfied that this was an area that the panel were entitled to consider and reach a conclusion upon. Again, other panels may have reached a different conclusion, but the panel were entitled to be concerned about the possibility of redundant telephone numbers being on a list without explanation.

The decision was irrational because of the contradiction between imminence of reoffending and reduction in risk

28. I have considered the complaint relating to what is said to be a "contradiction" between a conclusion that the risk of serious harm is not imminent and the test as set out above. It is clear that where there is a view that a prisoner's risk of serious harm was imminent, it is highly likely that that prisoner would not be found by a panel to meet the test of a person whose risk in the community is manageable.

29. However, I do not find that it therefore follows that where a prisoner's risk is not considered imminent the statutory test is inevitably met. The test relates to protecting the public from harm. In the case of an IPP prisoner, the risk must be considered for the entirety of his potential period under licence. For this reason, I reject the contention that there is a contradiction as argued on behalf of the Applicant. The panel appropriately applied the statutory test. Imminence is a factor and is often used by the probation service in order to distinguish between high risk and very high risk. However, a Parole Board panel is obliged to take a broader view and to apply the statutory test at all times to the entirety of the evidence. I therefore reject the representations that the panel were in error in their conclusions relating to imminence or otherwise.

That the panel were wrong to conclude that core risk reduction work in relation to gang involvement remained outstanding

30. The panel in explaining the basis of the decision not to recommend release or progression indicated that it took the view that further work was required in addressing the Applicant's association with gang culture. In the application for reconsideration, it is suggested that professionals had not recommended that the Applicant undertake any work relating to gang culture and therefore the panel were in error in suggesting that further work was required in this area. I note generally that the role of the Parole Board is not to manage a sentence plan or to make any detailed suggestions as to work to be undertaken in relation to risk. However, the panel were entitled to indicate that in their view, there were concerns about the possibility that the Applicant's association with the world of gangs was a continuing area of risk and should be addressed. The panel indicated in their decision that the security intelligence was concerning and may well indicate a continuation of the behaviour of the Applicant before coming into custody. Again, I reject the submission that on the basis of this suggestion the matter should be reconsidered.

Decision

31. For the reasons I have set out above, I do not consider that the decision of the Parole Board panel was irrational and accordingly the application for reconsideration is refused.

HH S Dawson
8 April 2021