[2022] PBRA 117

Application for Reconsideration by Davey

Application

1. This is an application by Davey (the Applicant) for reconsideration of a decision of an oral hearing dated the 9th August 2022, not to direct her 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:

    a. The dossier of 442 pages including the Decision Letter (DL) the subject of this application.
    b. The application dated 19th August 2022.
    c. An email dated 5th August 2022 from the Applicant's legal representative to the Parole Board case worker asking for further information within the email to be passed to the panel.
    d. Confirmation (which I sought) from the Parole Board that that email was forwarded to the panel the same day, and that no reply was received from the recipients.

Background

4. The Applicant's index offence and the subsequent sentence and parole history are accurately set out in the DL. In summary,
    a. She was 14 years old when she committed the index offence of murder of a 71-year old woman. She was sentenced, aged 15, to a life sentence with a 'tariff' period to be served of 8 years.
    b. She has been released on licence on 7 occasions since her first such release in March 2013. Each of those licences has been revoked and she has been recalled to prison. The last such release was on 2nd August 2021 and her recall was instigated on 2nd November 2021. The parole hearing now under consideration was her 12th such hearing.

Request for Reconsideration

5. The application for reconsideration is dated 19th August 2022.

6. The grounds for seeking reconsideration are in summary as follows:

a. The decision was procedurally unfair. The email referred to above at 3c. and 3d. above is not referred to in the DL issued four days after it was sent to the Parole Board and forwarded to the panel. The panel's failure to deal with its contents renders the DL procedurally defective such as to warrant a direction for reconsideration.
b. The decision was irrational for the following reasons:
   i. The panel's consideration of the Applicant's previous relationship with a man with whom she had been in a relationship while on licence, a relationship which might well resume upon her release. While it is accepted that his relationship was a relevant matter for consideration the panel's consideration of it as set out in the DL was based on a misunderstanding of certain important facts, in particular the circumstances which led to the Applicant's most recent recall.
   ii. In addition, while it is conceded on behalf of the Applicant that a possible resumption of a relationship with the man concerned was a relevant issue for the panel, when assessing the risk presented by the Applicant if released, the imposition of a licence condition forbidding any such contact should have persuaded the panel that that issue should not stand in the way of a direction for release.
   iii. The panel placed too much weight on the fact that while in prison since her most recent recall the Applicant had used the drug Subutex. In particular,
      1. The reason – pain relief – for her taking the drug no longer existed.
      2. The fact that only low doses were found on examination of samples was an indication that she took the drug 'responsibly'.
      3. The recent evidence was strongly to the effect that she had now stopped taking the drug.
   iv. The fact that she is now the mother of two young children should have been regarded as a "protective factor" when the assessment of risk was made. It is submitted that a proper assessment of that fact together with the other matters summarised above should have persuaded a 'rational' panel to direct her release.

Current parole review

7. The Applicant's case was referred to the Parole Board by the Secretary of State for Justice (SoSJ) on 8th December 2021.

8. A 3-member panel containing a psychologist and two independent members heard the case remotely on 1st August 2022. (The hearing had been adjourned from the 13th June 2022 because of the imminent birth of a child to the Applicant. A fourth panel member was unable to attend the adjourned hearing.) The dossier then contained 417 pages. The panel heard evidence from the Applicant's Prison Offender Manager (POM) and Community Offender Manager (COM) and the Applicant herself.

The Relevant Law

9. The panel correctly sets out in the DL the test for release.

Parole Board Rules 2019

10. 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)).

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 - **Barclay [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 of one or more of the following:
    (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.

17. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Other

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.

19. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

20. 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. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

The reply on behalf of the Secretary of State

21. No submission has been received from the SoS.

Discussion

22. Ground 6a: Procedural unfairness: The paragraph in the email which was forwarded to the panel after the hearing but before the issue of the decision contained a report from the Applicant to her legal representative of meetings on 4th and 5th August between the Applicant and *"her social worker"* attended by the COM concerning procedures to be adopted in the event of a direction for release. A study of the dossier reveals that the *"new information"* adds very little if anything to the

information before the panel within the dossier which was no doubt explored in some detail during the course of the hearing. While it is unfortunate that no specific reference is made to the email of 5th August it cannot be argued that the absence of such a reference, amounts to a procedural irregularity of the kind described in paragraphs 15-16 above.

23. Ground 6b, i and ii:': These concern the Applicant's past and possibly future relationship with a man, the father of the Applicant's child and possibly the father of her recently born child, and the panel's concerns that any resumption of that relationship would increase the risk of serious harm the applicant might pose to the public as a result. The DL deals with this issue at length in paragraphs 2.32 and 2.36-7. Sadly, the existence of licence conditions forbidding certain types of behaviour etc has not in the past prevented the Applicant from breaching those conditions and being returned to custody. I do not find that the panel's treatment of the issue was irrational.

24. Ground 6b, iii: Once again the panel dealt at length with the *"Subutex issue"* in the DL and it was no doubt the subject of further scrutiny during the hearing – paras 2.21-23, 2.27-29, 4.5 and 4.9. The findings at paragraphs 4.5 and 4.9 concerning the use of the drug were no doubt the subject of anxious discussion. It impossible to characterise the panel's findings as "irrational" within the test set out above.

25. Ground 6b, iv: The panel's conclusion – also at para 4.9 of the DL - concerning the strength, if any, of the two children as a "*protective factor*" sufficient on its own or together with others and the proposed licence conditions to reduce the risk posed by the Applicant on release sufficiently to enable a direction for release to be given cannot in my judgment be impugned as irrational.

26. Finally, taking the grounds above as a whole, while it is possible to understand and sympathise with the disappointment the decision will have caused the Applicant, I do not find that taken separately or together they reach the standard necessary for the order sought.

Decision

27. 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.

Sir David Calvert-Smith
31st August 2022