[2022] PBRA 40

Application for Reconsideration by Needham

Application

1. This is an application by Needham (the Applicant) for reconsideration of a decision of a panel of the Parole Board at an oral hearing dated the 1 March 2022 not to direct release. The application was made by the Applicant's solicitors.

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 dossier considered by the panel, the decision letter and the application for reconsideration (the application).

Background

4. The Applicant is serving an extended sentence comprising 12 years in custody with 5 years extended for the offence of rape of a child under the age of 13. He was concurrently sentenced for several further similar rape offences and several counts of indecent assault of a child under the age of 14. He became eligible for release in December 2020 but has not been released on licence at this time. His conditional release date is 18 December 2024, and his sentence will expire on 18 December 2029. He was 62 years when sentenced.

Request for Reconsideration

5. The application for reconsideration is dated 17 March 2022.

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

Irrationality

a) The panel failed to provide sufficient reasons for departing from the recommendations of witnesses. There was a mistake of fact where the panel stated the Applicant was in the extension part of his sentence when he isn't.

Procedural Unfairness

b) The panel applied the wrong legal test for release.

Current parole review

7. The Secretary of State's referral is dated April 2021, and it is the second review of the Applicant's sentence by the Parole Board. The referral invites the Parole Board to consider release on licence, any conditions to be placed on the release should it be directed, and to provide full reasons of the decision. The Applicant's age at the time of this review was 71.

8. The hearing was on 22 February 2022 before a panel made up of two independent members and a psychologist member. They considered a dossier of 451 pages and heard a Victim Personal Statement read out prior to the hearing commencing. Evidence was taken from the Applicant's Community Offender Manager, Prison Offender Manager, Prison Psychologist and Psychologist instructed by the Applicant's solicitors.

The Relevant Law

9. Although the correct test is provided on the first page of the decision letter dated 1 March 2022, this test is automatically generated by the template when populating the fields for sentence.

10. Regrettably, the panel does not cite the correct test in the body of the decision letter. The Application quite rightly points out that the test stated in the letter is incorrect, that of the case of ***R (Sim) v the Parole Board [20O3] [EWCA] Civ 1845.***

Parole Board Rules 2019

11. 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)).

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:

    (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.

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.

The reply on behalf of the Secretary of State

19. On 23 March 2022, the Secretary of State indicated that they would be making no submissions in relation to the Application.

Discussion

20. I first considered procedural unfairness in light of the panel's use of the wrong test. The Applicant is serving an extended sentence. He was past his parole eligibility date, but not his conditional release date. Even had he been released at his parole eligibility

date in December 2020, he would not be anywhere near the extension period of his sentence. In any event he is not a recalled prisoner. Therefore, on all accounts, the test for release should have been the *'LASPO' test*. This states: *"The Parole Board must not give a direction [for release] … unless the Board is satisfied that it is no longer necessary for the protection of the public that the person should be confined".* This test was imposed on the Parole Board by the **Legal Aid, Sentencing and Punishment of Offenders Act 2012.**

21. As I indicate above, the template first page of the dossier, parts of which are automatically filled, provides the correct test. The test is automatically filled in when the sentence and sentence dates are put in by the panel chair. However, in its conclusion in the decision letter the panel states:

    *"The panel carefully considered the evidence available and has taken full account of the statutory test. [the Applicant] is now serving the extension part of an extended sentence and there is a presumption in favour of release as set out in **R (Sim) v the Parole Board [20O3] [EWCA] Civ 1845** unless the Board is positively satisfied that it is necessary for the protection of the public that he be confined.*

    The panel is positively satisfied that it is necessary for the protection of the public that [the Applicant] be confined and makes no direction for his release".

22. It is clear, therefore, that the panel used the wrong test. It is not, as sometimes happens, a misstatement of the correct test. If that had occurred, I would have looked elsewhere to see whether the panel had, despite the error, correctly interpreted the test in its deliberations and conclusions. However, the above paragraphs make it clear that it its approach to considering the evidence and arriving at its decision, the panel used the *Sim* test.

23. In my view this is an error that is serious enough to put the panel's conclusion in doubt. It is accepted that the *Sim* test is arguably more generous to the prisoner than the LASPO test but nonetheless I find that using the wrong test is a fundamental procedural irregularity.

24. Having decided that this is the case, I have not considered the other grounds for reconsideration.

Decision

25. Accordingly, whilst I have not considered the grounds of irrationality as provided by the Applicant's legal representatives, I do consider, applying the test as defined in case law, that the decision of the panel as detailed in the decision letter dated 1 March 2022 to be procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

Chitra Karve
25 March
2022