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[2023] PBRA 218

Application for Reconsideration by Douglas

Application

1. This is an application by Douglas (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated the 17 November 2023 refusing his application for release and making no recommendation to the Secretary of State (the Respondent) for a transfer to open conditions following an oral hearing dated 25 September 2023.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.

3. I have considered the application on the papers. These are the decision of the Panel, the application for recommendation and the dossier.

Background

4. On 9 January 2007 the Applicant was sentenced to imprisonment for public protection with a tariff of 2 years and 6 months for an offence of robbery. In September 2020, following a recommendation from the Parole Board, the Applicant was transferred to an open prison. He was returned to closed conditions in October 2020. A decision was initially taken by PPCS (Public Protection Casework Section) to return the Applicant to open conditions but the Applicant was then charged with an offence of blackmail said to have been committed while he was at the open prison and the decision to return the Applicant was rescinded. In December 2022 the Applicant was convicted of an offence of money laundering committed while he was at the prison as an alternative to the offence of blackmail and he was sentenced to five weeks in prison.

Request for Reconsideration

5. The application for reconsideration was received by the Board on 6 December 2023.

6. The grounds for seeking a reconsideration are that 1) the decision was irrational and procedurally unfair in that an incorrect name is used for the Applicant in one paragraph in the decision and 2) it was irrational and procedurally unfair to rely on the evidence of witnesses who relied, in making their assessments, on allegations which were not accepted by the panel.

Current parole review

7. The case was referred to the Parole Board in April 2021. An oral hearing was directed but there were adjournments of the hearing because the Applicant was charged with an offence of blackmail. He appeared in court in December 2022 when he was sentenced for the alternative offence. The parole hearing did not take place until 25 September 2023.

8. On 25 September 2023 the panel heard evidence from the Applicant, two psychologists, one instructed by the Prison service, and another instructed by the Appellant, the Prison Offender Manager (POM) and two Community Offender Managers (COMs). One of the panel was a psychologist. Attempts were made by the panel to obtain the sentencing remarks of the Judge who sentenced the Applicant in December 2022, but these were unavailable.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 17 November 2023 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.

Parole Board Rules 2019 (as amended)

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)). The decision of the panel not to release is eligible for reconsideration.

11. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28.

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 test for irrationality is that

no reasonable panel could have reached the decision that it did. The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.

Procedural unfairness

14. 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.

15. 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.

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

17. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin), R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:
    (a) the progress of the prisoner in addressing and reducing their risk;
    (b) the likeliness of the prisoner to comply with conditions of temporary release
    (c) the likeliness of the prisoner absconding; and
    (d) the benefit the prisoner is likely to derive from open conditions.

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 Respondent

19. The Respondent has made no submissions in response to this application.

Discussion

20. This is a concerning case as the Applicant has served a considerable time in prison beyond his tariff without ever being released on licence. No doubt this does affect his behaviour in prison which then makes it more difficult for him to achieve his release. Whatever one's view of that, as the law presently stands, the Parole Board can only release the Appellant if and when it is satisfied that it is no longer necessary for the protection of the public that he remain in prison. That is the test which the panel applied in the Applicant's case as they had to.

21. The first ground for reconsideration is that in para 2.9 of the decision, the Applicant is referred to twice by the wrong name. This should not have happened. The decision should have been checked and the mistake noticed and corrected, and it is understandable that the Applicant is upset about it.

22. That does not mean that that error gives any ground for reconsideration. It is perfectly clear that it is simply a mistake. All the information in that paragraph clearly relates to the Applicant so it cannot sensibly argued that the panel was mistaking the case they were dealing with. Nor can it be said that the mistake could conceivably have made a difference to the result.

23. In para 19 of the application for reconsideration the Applicant refers me to two cases. I am by no means sure that they say what it is suggested they say but if a case is going to be quoted then its full reference should be set out which has not been done in the case of **R(on the application of Grinham) -v- the Parole Board 2020 EWCH 2140**.

24. Those cases establish that where a hearing has been unfair, the decision should be quashed if it is possible that the result would have been different if there had been a fair hearing. I am satisfied that there was no possibility that the result of the application has been affected in anyway by the use of the wrong name in one paragraph of the decision.

25. In my judgment this mistake about the name, while regrettable, does not render the decision irrational or procedurally unfair.

26. The second ground for reconsideration, again put on the basis of both unfairness and irrationality, is that the panel should not have placed weight on the recommendations and risk assessments of the POM, COM, and prison psychologist as they were based on unproven allegations on which the panel did not rely.

27. I can see no basis on which it can be asserted that what is alleged by the Applicant amounted to procedural unfairness. There was nothing procedurally unfair in the way the hearing was conducted and this part of the application in my judgement stands or falls on it whether the decision was irrational.

28. It is correct that initially the prison psychologist and the POM and COM were under the impression that the last offence, which was first said to be blackmail, included bullying of another prisoner. By the time of the hearing the finding of the court did not include any finding of bullying and the panel ignored bullying as being a part of that offending.

29. The hearing was conducted on the basis that the last offence did not involve bullying. The witnesses were questioned on that basis. The bullying and violence alleged as part of the blackmail offence was not the only basis on which the witnesses considered the Applicant not suitable for release. Those witnesses considered that the behaviour of the Applicant in custody meant it was unlikely he would be safe to release, and he was unlikely to respond to the conditions of his licence. The psychologist instructed by the Applicant considered that the Applicant's custodial conduct was typical of a "*stuck IPP prisoner*" and that his risk was manageable on licence. The prison psychologist took the view that there was work that still needed to be done as she was concerned about the Applicant's behaviour when in open conditions and did not consider his risk at present could be managed if released. There was in her view more work to be done in closed conditions.

30. The panel which included a psychologist was not satisfied on considering all the evidence that the test for release was met as they were not satisfied that the Applicant's risk could be managed on licence. There was evidence on which the panel could come to that decision which they have identified in their decision, and they were entitled to prefer the evidence of the prison psychologist to that of the evidence of the psychologist instructed by the Applicant.

31. It cannot sensibly be argued that that was a decision that no reasonable panel could have come to and accordingly the decision is not irrational.

Decision

32. 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.

John Saunders
20 December 2023