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[2024] PBRA 70

Application for Reconsideration by Gurney

Application

1. This is an application by Gurney (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated the 1 March 2024 which made no direction for release and no recommendation for open conditions following an oral hearing on 16 February 2024.

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 application for reconsideration, the oral hearing decision, and the dossier.

Background

4. On 16 December 1998 the Applicant was sentenced to life imprisonment with a minimum term of 8 and a half years for offences of rape, an attempt to strangle with intent to rape and assault occasioning actual bodily harm. The minimum term expired on 16 December 2005.

5. The Applicant was first released on licence on 18 April 2013 and recalled on 22 April 2014. He was released again on 21 May 2019 and recalled on 11 November 2019. The Applicant was released on 5 August 2021 after a Parole Board panel found on examination of the evidence that there were insufficient grounds for recall which was understandably an important element of their decision to re-release him. He was recalled on 26 April 2022 and the panel on this occasion found that his recall had been justified. That decision is not criticised and was accepted at the hearing.

Request for Reconsideration

6. The application for reconsideration is dated 20 March 2024.

7. The grounds for seeking a reconsideration are that the hearing was procedurally unfair and/or that the decision not to release was irrational. In essence the submission is that the panel without good reason failed to follow the

recommendation for release from all of the professionals and has failed to give any or any sufficient weight when considering risk to the return of the Applicant's cancer.

Current parole review

8. This was the second Parole Board review following recall on 26 April 2022.

9. At the hearing on 16 February 2024 the panel heard from the Applicant and five additional witnesses: a nurse to give evidence as to the Applicant's health; the present and former Community Offender Managers (COM); the Prison Offender Manager (POM) and an independent psychologist.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 1 March 2024 the test for release and the issues to be addressed in making a recommendation to the Secretary of State (the Respondent) for a progressive move to open conditions and applied them in reaching its decision.

Parole Board Rules 2019 (as amended)

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)). This decision is eligible for reconsideration.

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

Irrationality

13. 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."

    This test is derived from and is in accordance with the Wednesbury unreasonableness test i.e. was the decision of the panel on the evidence it heard one that no reasonable panel could have reached.

14. 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.

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.

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

17. 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.

18. 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.*"

The Reply on behalf of the Secretary of State

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

Discussion

20. While the Applicant argues his case on grounds of procedural unfairness as well as irrationality, it is difficult to identify in the grounds supporting procedural unfairness anything that arguably made the hearing unfair. The only matter that could come under the heading of procedural unfairness is in paragraph 37 of the application which is part of the grounds in support of the submission on irrationality where it is said '*No points in the decision indicate active consideration had been given to the management of [the Applicant's] risk or the support systems in place in the release plan. These had been precluded by a seeming bias against him, founded upon flawed opinion'.* This is an allegation of bias or appearance of bias on the part of the panel and if there was evidence to support such an allegation that would render the hearing unfair. However, in my judgment there is no evidence to support that suggestion in this case and I have no hesitation in dismissing it.

21. The matters argued as procedural unfairness are capable of being relevant to the submission that the decision was irrational but in so far as it is submitted that the hearing was procedurally unfair, I can find nothing to support that. I shall consider the matters argued in support of procedural unfairness as part of the claim based on irrationality.

22. As is clear from the statement of the law at paragraphs 13 and 14 above, the test for establishing irrationality is a very high one. It is right that it should be. The panel asks the questions; hears the witnesses' answers and is able to make up its mind what weight to attach to their evidence. It is not for me when dealing with a request for reconsideration to substitute my view of the evidence for that of the panel as it would not be for a Judge conducting a judicial review. I can understand the disappointment of the Applicant at the result, when all the witnesses supported his release and particularly in the light of the recent discovery that his cancer had returned.

23. It is clear that the panel carefully considered the views of the witnesses and took them into account, but it was perfectly entitled to disagree with their assessment provided the panel made clear its reasons for doing so.

24. The panel were rightly concerned with what had happened after the last release of the Applicant and the fact that he had indulged in what the panel considered to be *'very significant offence parallelling behaviour'.* In my judgment the panel were entitled to reach that conclusion. The Applicant had returned to drinking. He was associating with women in a way which breached his licence conditions and was putting himself into 'risky' situations.

25. The panel heard evidence from the witnesses that the Applicant has been reacting in a positive way to his recall since his return to prison; is addressing the problems that his recall demonstrated and has assured the professionals that he has learnt

his lesson and will be more open with his COM in the future so that any breaches of his licence will not have to be adduced from him during a lie detector test. The panel were not satisfied by those assurances particularly in light of the fact that the Applicant had given assurances as to his future conduct when he was released on the last occasion.

26. The difference on this occasion is that the return of his cancer means that the Applicant faces the possibility that he will die in prison which he wishes unsurprisingly to avoid.

27. It is for the panel to attach the weight that it considers appropriate to the different factors in the case. It is argued that the panel should have attached more weight to the return of the cancer than it did. It could only be a ground for reconsideration if the weight attached to the return of the cancer was so unreasonable that no reasonable panel could have reached the same decision. I do not consider that the limited weight attached to it by this panel was unreasonable.

28. At para 4.1 of the decision while saying correctly that '*sympathy is not a basis on which the panel can assess risk'* the panel did also say that '*the evidence does not show that his physical abilities have declined to such an extent that that can be a major factor in considering whether the risk of serious harm he would present in the community has sufficiently reduced.'*

29. At para 4.4 the panel said '*The panel does not consider that the evidence shows any real reduction in [the Applicant's] risk of serious harm since his recall. All there is, is his assurance that he appreciates that he made "mistakes" and does not wish to repeat them, that he has had time to think about his position, and he wishes to avoid returning to prison lest he die there. He has made similar promises before and broken them'.*

30. While it is true that the Applicant has never before made the statement that he wishes to avoid returning to prison lest he die there, the panel were entitled to categorise this as a promise which was similar to ones that he had made before.

31. The Applicant complains that the panel misrepresents the facts when it said that the Applicant and K were '*both drunk at the time'* that sexual activity took place between them which led the panel to have doubts that the Applicant really understood the meaning of consent. It is said that the evidence only justified a finding that the two of them were both under the influence of alcohol at the time of their sexual activity. It is not possible for me to say whether or not there was other evidence which would support the panel's finding but in any event, I do not think that the nature of the mistake of fact, if there was one, could possibly have affected the decision of the panel. I do not agree with the Applicant's submissions at para 35 as to the significance of this finding.

32. The panel was further entitled to look at the risk management plan to decide whether it was sufficiently robust and thought out to manage the Applicant's risk. That is not the responsibility of the Applicant, but the effectiveness of a risk management plan is always something which a panel has to take into account.

33. While this panel has decided against the recommendations of the professionals, it is for the panel to decide about the safety of release and if it disagrees with the professionals, it is entitled and bound to say so.

34. It is difficult to see whether the Applicant is complaining that the reasons given for the decision were inadequate but a number of cases which establish the requirement to give adequate reasons are quoted in the application. In my judgment the panel has fulfilled its obligation to give adequate reasons to explain its decision. The Applicant disagrees with them but that does not mean the reasons were inadequate.

35. As I have said it is not for me to substitute my view for that of the panel. I do understand the disappointment of the Applicant particularly in the light of his new diagnosis, but I would need to be satisfied that one of the grounds for reconsideration had been made out before ordering reconsideration.

Decision

36. 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
04 April 2024