

[2019] PBRA 34

Application for Reconsideration by Hudson

Application

1. This is an application by Hudson (the Applicant) for reconsideration of a decision of the Parole Board set out in a Decision Letter dated 17 September 2019 following an Oral Hearing on the 9 September 2019 not to direct his release nor to advise the Secretary of State that he should be transferred to open conditions.

Background

2. The Applicant is serving a sentence of life imprisonment following his conviction for murder in September 1989. His tariff expired in January 2001.

Request for Reconsideration

3. The application for reconsideration was first made in a letter written by the Applicant dated 23 September 2019, then followed by a more formal application served on his behalf by his legal representative and dated 25 September 2019. The latter is a more concise and accurately expressed version of the former and I propose to treat it as the relevant application.

Current parole review

4. In July 2018 the Secretary of State referred the Applicant's case to the Parole Board to consider whether or not it would be appropriate to direct his release or, if not, to advise the Secretary of State on whether or not he should be transferred to open conditions.

The Relevant Law

5. Rule 25 (Decision by a panel at an Oral Hearing) and Rule 28 (Reconsideration of Decisions) of the Parole Board Rules 2019, apply to this case to the extent that the application for reconsideration relates to the panel's decision not to direct release. Rule 28 does not apply to the panel's advice that the prisoner should not be transferred to open conditions. See Rule 28(1) which has the effect of restricting the scope of the reconsideration procedure to cases involving decisions as to release (that is, decisions made in accordance with Rules 19(1), 21(7) and 25(1)).

6. Rule 28(1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case to the extent I have indicated.
7. In **R (on the application of 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 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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

Discussion

8. The Parole Board panel set out its conclusion and decision at section 8 of the decision letter. They set out the submissions made on the Applicant's behalf and set them against the opinions of the professionals. They preferred the latter to the former and made a finding that the Applicant continues to pose a high risk to the public and known adults. The panel also observed that he had been disbelieved by the jury at his trial and by two previous panels and stated that they found much of his evidence unconvincing or plainly not true. The decision letter as a whole recites material and sets out reasons which support the panel's findings as to risk and its decision not to direct release nor to advise a progressive move. The complaints made are on a narrow basis, as set out below.
9. The Application submits that *"the decision was irrational and procedurally unfair in that the panel accepted the following five factual issues as being true when in fact they are incorrect"*.
10. The issues are identified as:
 - (a) That the Applicant has been in open conditions twice when he has in fact only been in once;
 - (b) That he has no medical issues with his heart when he has had three heart attacks;
 - (c) He denies ringing his mother for money;
 - (d) He did not lose his red band;
 - (e) He is not in weekly contact with his children.



11. The application does not go on to set out the basis upon which it is submitted that these errors of fact, if that is what they were, should lead to the conclusion that the decision was irrational or procedurally unfair.
12. I accept that it is capable of being both irrational and procedurally unfair to take into account inaccurate factual information in making a decision. Reconsideration, like Judicial Review, is a discretionary remedy and if the Reconsideration Assessment Panel is satisfied that the incorrect fact did not affect the decision then the application is likely to be refused.
13. It appears that the factual matter set out at Paragraph 10(a) above relates to a period between April 2011 and November 2011 (not to a later period commencing in November 2013 when it is accepted that he was in open conditions). There is material in the dossier which supports the conclusion that the Applicant was indeed in open conditions during the 2011 period. There is, however, other material suggesting otherwise. No blame can be attached to the panel for this error, if error it was; they relied on material in the dossier which they were fully entitled to accept as accurate.
14. This matter is referred to in passing in the first section of the decision letter and is clearly no more than a part of the general introductory narrative. There is no further reference to it, and it is not identified as having any relevance to the decision made by the panel. In any event, at its highest it could only have been relevant to the Applicant's custodial behaviour at that time; the panel had before it abundant material showing that his behaviour then was very poor (described as "*lamentable*").
15. In those circumstances, I am unable to accept that if there was a factual error it had any bearing on the panel's assessment of risk.
16. The remaining complaints relate to particular findings of fact made by the panel which are either denied by the Applicant or asserted by him to be incorrect.
17. It is not for me to determine whether these findings were or were not correct. My role is limited to determining whether it was reasonably open to the panel to make them and, if it is demonstrated that it was not, whether in those circumstances the decision can be characterised as unfair or the result of procedural unfairness.
18. The second complaint relates to a passage in the decision letter in which the panel mentioned hospital admissions and tests leading to a conclusion that the Applicant had no issues with his heart. This replicates, almost verbatim, a finding of an earlier panel (set out in a decision letter of 8 March 2017): "*After tests, it revealed you did not have any heart problems and no further appointments were necessary*".
19. It is difficult to understand, in those circumstances, why it is asserted that the making of an identical finding by the present panel can be subject to valid criticism. Just as the dossier before the previous panel supported this narrative, so also with the present panel.



20. In addition, the present panel did in fact address the issue elsewhere in the decision letter. At section 8 it is recorded that one of the submissions made on behalf of the Applicant was that his health problems meant that he was no longer a risk. The panel, as set out above, rejected these submissions.
21. There is no substance of any kind in the third complaint, which amounts to nothing more than a continuing denial by the Applicant. The panel were entitled to disbelieve the Applicant in his evidence to them, as they made clear they did in many respects. The allegation was well documented (for example, in a Sentence Planning and Review Report of 11 October 2018).
22. The fourth complaint equally lacks substance. As above, the panel were entitled to disbelieve the Applicant. In addition, there was abundant evidence supporting this finding of fact. For example, a passage in the Sentence Planning Report (SPR) of 30 August 2019 which includes an entry in relation to the 19 May 2019: The Applicant "*is upset that he has been sacked from his red band litter picking job for inappropriate behaviour*".
23. As to the fifth complaint, the panel recorded as part of its evaluation of plans to manage risk that the Applicant had not had any social visits for a long time and neither of his children appeared to wish to retain contact. It is not submitted that the latter finding was unsupported by evidence, merely that it was incorrect. This bare assertion does not amount to a basis for a determination that it was not open to the panel to make this finding on the evidence before them.
24. Accordingly, I am satisfied that no material error of a kind which affected the decision was made in relation to the first complaint and that in relation to all other complaints there is no basis on which I could determine that the findings made by the panel were not reasonably open to them.

Decision

25. For the reasons I have given and having considered the matters complained of individually and cumulatively, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

Alistair McCreath
10 October 2019

