

[2020] PBRA 118

## Application for Reconsideration by Rothery

### Application

1. This is an application by Rothery (the Applicant) for reconsideration of a decision of a Parole Board Oral Hearing dated 14<sup>th</sup> July 2020 which declined to direct his release. The hearing, under the restrictions imposed by the COVID-19 pandemic, was held remotely.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases 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 dossier containing 493 pages including the decision letter the subject of this application, representations submitted on the Applicant's behalf, together with email correspondence appended to the application for reconsideration and correspondence which I have had with the Parole Board Secretariat since receiving the papers in an attempt to clarify relevant matters within the application.

### Background

4. On 4<sup>th</sup> August 2006 the Applicant was sentenced to Imprisonment for Public Protection. His tariff expired in 2010. His most recent release on licence in February 2019 was ended by his recall to prison in March of the same year. Following the hearing, the Decision Letter (DL) declined to order the Applicant's release. He was aged 35 years old at the time of the conviction and now 49 years old at the time of this review.

### Request for Reconsideration

5. The application for reconsideration is dated 3<sup>rd</sup> August 2020.
6. The grounds for seeking a reconsideration are in summary as follows:
  - (a) The panel fell into error in the DL when it asserted that the Applicant's acquittal by an adjudication panel at the prison was based on a technicality and that the underlying accusation of an assault indicated "*an inability or unwillingness to be open and honest*" and gave rise to a concern that the Applicant has a willingness to resort to violence, when there was no sound basis for such findings within the oral evidence or the papers then available



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to the panel. These findings, taken together, are said to render the decision both 'irrational' and 'procedurally unfair'.

- (b) The panel decision contained the words "*by agreement, following the hearing [the Applicant's] legal representative ... submitted written representations on [the Applicant's] behalf.*" In fact, the legal representative had not submitted such representations by the time the DL was issued. This mistake, it is submitted, represents a serious procedural irregularity, since not only is the statement in the DL in error, but the panel did not consider any representations which, it had been agreed, were to have been submitted by agreement with the panel after the hearing.

## Current parole review

7. The panel heard evidence from the Applicant, his Prison Offender Manager, his Community Offender Manager, a Key Worker and a Psychologist at the hearing.

## The Relevant Law

### *Parole Board Rules 2019*

8. Under Rule 28(1) of the Parole Board Rules 2019 the only type of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. This is therefore an eligible decision.

### *Irrationality*

9. 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."*

10. 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.

11. 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*



12. Procedural unfairness means some procedural impropriety or unfairness which resulted in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result.
13. 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) s/he was not given a fair hearing;
  - (c) s/he was not properly informed of the case against them;
  - (d) s/he was 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.

14. 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.

15. 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

16. Representations were submitted by the Secretary of State but (because an attachment to an email appears to have come loose) did not come to the attention of the Reconsideration Assessment Panel.

### Discussion

17. I have considered the second ground first. The hearing was conducted under the restrictive COVID-19 regime currently essential for the progress of parole hearings. It is clearly common ground, as appears from the passage quoted above in the DL



at paragraph 6(b) above, between the panel and the Applicant, that his legal representative was given time to submit closing submissions in writing. I have made inquiries, via the Parole Board Secretariat, of the Panel Chair, as to the accuracy of the statement in the DL as to receipt of representations. I learned, as a result, that the DL which was actually sent out was not the final version of the DL which should have replaced the one that is the subject of this application, and have seen the version which the Panel had finally approved which commented on the fact that, although expected, no representations had been received. Unfortunately, the DL the subject matter of the application is the applicable letter and it is clearly in error. A concession to a prisoner that time will be given for him and his legal representative to compose and send through final submissions is a procedural step of some importance. Whether the fault in this case lies with the legal representative in failing to submit such representations in a reasonable time for the decision to be issued or with the Parole Board in failing to issue the correct DL, or both, matters not for the purposes of this application. The issued DL's assertion does in my judgment engage the principle summarised above at paragraph 13(d) and does amount to a serious procedural irregularity.

18. In those circumstances it is unnecessary to rule on the first ground.

## Decision

19. Accordingly I consider, applying the test as defined above in case law, the decision to be procedurally unfair. I do so solely for the reason set out above. The application for reconsideration is therefore granted.

## Directions

20. I have given careful consideration to whether this case should be reconsidered by the original panel or whether it should be considered afresh by another panel.

21. I have no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, the question of justice being seen to be done arises in this context. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was wrong. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh panel.

22. The following further directions are now made:

- (a) The re-hearing should be expedited and it is a matter for the new Panel Chair to decide whether this should proceed as a remote or face-to-face hearing given the potential COVID-19 restrictions.
- (b) The original decision must be removed from the dossier and must not be seen by the new panel.
- (c) The new panel should be told that this is a reconsideration but not made aware of the reason why it was ordered.
- (d) The new panel should also be advised that the fact that this is a reconsideration should not in any way affect their decision. It is a complete re-hearing.



- (e) The new panel would be assisted by any further information now available to supplement that already in the dossier concerning the allegation of assault of another prisoner in April 2020.

**David Calvert-Smith**  
**3 September 2020**