[2020] PBRA 137

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Application for Reconsideration by Bird

Application

1. This is an application by Bird (the Applicant) for reconsideration of a decision of an oral hearing of the Parole Board dated 25 August 2020.

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 application for reconsideration dated 14 September 2020, the decision letter dated 25 August 2020 and a dossier of 731 pages.

Background

4. The Applicant was sentenced to an extended determinate sentence of 17 years on 28 October 2010 following his conviction for 4 counts of rape and 8 counts of indecent assault against a child. The Applicant's Parole eligibility date was 28 April 2019 and his non parole date is said to be 26 February 2022.

5. The Applicant was 52 years old on conviction and is now 62. He arrived at his current prison on 29 March 2018 and it appears that the Applicant has behaved very well in open conditions since then and has undertaken a number of temporary releases to the same specified location where he was hoping to be directed to reside on release.

Request for Reconsideration

6. The application for reconsideration is dated 14 September 2020.

7. The ground for seeking a reconsideration is that the decision was irrational. In particular:

   (a) That the decision is irrational as it appears to have been formed on the basis that the Applicant's Community Offender Manager did not support release to a specified location;

   (b) That the panel failed to say how release to the specified location would increase the risk of serious harm even where the Applicant had low risk scores;

(c) That there is no link between the Applicant's accommodation upon release and his risk of reoffending; and

(d) That the panel incorrectly stated that the Applicant had not completed any offending behaviour work.

Current parole review

8. The Applicant's case was referred to the Parole Board in July 2018 in order to ask the Parole Board to consider whether it would now be appropriate to direct the Applicant's release. An oral hearing first took place on 14 August 2019. This hearing was adjourned for further enquiries. The case was due back on 31 January 2020 but at that point the Applicant requested a 6 month deferral to enable him to find suitable accommodation. The panel chair and the psychologist member from the 14 August 2019 hearing then reconvened on 11 August 2020 to conclude the Applicant's review as a two-member panel.

9. On 11 August 2020 that panel heard from the prison psychologist, the Applicant's Community Offender Manager, the official supervising his case in custody, and from the Applicant himself.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 25 August 2020 the test for release.

Irrationality

11. 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."*

12. 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.

13. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

Other

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.*"

The reply on behalf of the Secretary of State

15. On 18 September 2020 the Public Protection Casework Section on behalf of the Secretary of State offered no representations in response to this application for reconsideration.

Discussion

16. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.

17. It is clear from the decision letter that the focus of the panel, as well as the evidence given by the witnesses at the oral hearing, was the suitability of the specified location as a release address. Indeed, the professional witnesses all supported release but none supported release to the specified location. The panel was aware that the withdrawal of probation support for the specified location as a release address had been the subject of a complaint just prior to the hearing. As was inevitable this conclusion was properly and comprehensively tested at the hearing. It would also have been obvious to the Applicant and his representatives that this was going to be the main focus of the decision and it is notable in this context that the Applicant was given an opportunity at different points during the hearing to seek an adjournment to allow him to find an alternative release address, once the strength of concern about that address became obvious in evidence. The panel reiterated to the Applicant on a number of occasions that release would be unlikely without a suitable release address.

18. Whilst the focus of the decision was on the suitability of the release address, I do not accept the Applicant's assertion that this concern was not relevant to the Applicant's risk of serious harm. The suitability of a risk management plan is inextricably linked to the Parole Board's legal function to assess whether it is no longer necessary for the protection of the public that the offender should be confined. It is not possible to answer that question without an assessment of whether an offender's risk of serious harm can safely be managed in the community. A suitable release address is almost always a central plank of a comprehensive risk management plan and the success of other requirements in a risk management plan will inevitably rely on an offender living permanently in suitable accommodation. This particular risk management plan

proposed depended on close monitoring of the Applicant's activities and safeguarding of individuals who the Applicant otherwise might encounter. In the Applicant's case it was made clear in evidence that release with no fixed abode would mean a significant escalation in the Applicant's risk of serious harm precisely because it would make this risk management plan more difficult to enforce. A release with no fixed abode was not something that could be supported by the professional witnesses at the hearing. The panel also had police reports in the dossier and evidence from the witnesses at the hearing about concerns raised by the community and the views of two police constabularies that the specified location was not a suitable release address. Weighed against that the panel took in to account the proximity of the specified location to the Applicant's support network and the availability of work at that address. The panel agreed, as it was entitled to do, with the professional witnesses that despite there being some benefit to this address, it was not suitable as a release address.

19. The panel then concluded that without a suitable release address it was *'impossible'* to manage the Applicant's risks and that there was evidence to suggest that residence at that address could increase risk and that the lack of suitable accommodation meant that the risk management plan would be unlikely to manage the Applicant's risk. I do not find this conclusion to be irrational. Indeed, the panel took a significant amount of care to explore the issue and to test the evidence provided by the professional witnesses on this point. In the circumstances, I see no reason to interfere with their conclusion.

20. Having found that the decision of the panel is not irrational in this respect, I have gone on to consider whether the apparent error of fact made by the panel concerning the nature of the Applicant's risk reduction work in custody should make a difference. The Applicant correctly asserts that he completed a 1:1 intervention based on a programme to reduce the risk of sexual offending. The panel does therefore appear to have proceeded with an error of fact when they said the applicant had not conducted any risk reduction work in custody. I do not, however, find that this made any material difference to the panel's decision. It is clear from the decision letter that the central issue was not the nature of the risk reduction work completed by the Applicant in custody but rather the question of whether the risk management plan was sufficient to manage the Applicant's risk in the community. The Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel. I do not therefore find that this error is sufficient to mean that the decision of the panel was irrational.

Decision

21. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

Kay Taylor
30 September 2020