[2020] PBRA 192

the Parole Board
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Application for Reconsideration Clarke

Application

1. This is an application by Clarke (the Applicant) for reconsideration of a decision of an oral hearing dated 29 October 2020 not to release him.

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:

   i. A dossier of 290 pages;

   ii. The oral hearing Decision Letter dated 29 October 2020 (and amended on 3 December 2020 to correct two inaccuracies regarding the type of sentence and the age of the Applicant);

   iii. The application to for reconsideration dated 23 November 2020; and

   iv. An email from PPCS on behalf of the Secretary of State dated 3 December 2020 stating that the Secretary of State has no representations in respect of this application for reconsideration.

Background

4. The Applicant is serving a Sentence for an Offender of Particular Concern (SOPC) of 9 years comprising a custodial period of 8 years and a 1year extension period for offences of indecent assault. The sentence was imposed in June 2016. At the same time, he was also made subject to an indefinite restraining order and a Sexual Harm Prevention Order (SHPO). The Applicant was 43 years old at the time of his conviction and sentence.

5. The Applicant's Parole eligibility date was 4 May 2020. His conditional release date is 4 May 2024 and his sentence expiry date is given as 4 May 2025.

6. The Applicant has been in an open prison since November 2019 and his custodial behaviour since his arrival at the prison establishment has been very good. Due to the Covid 19 pandemic, and through no fault of his own, the Applicant has not been able to access temporary release by the time of the Oral Hearing.

Request for Reconsideration

7. The application for reconsideration is dated 23 November 2020.

8. The grounds for seeking a reconsideration are as follows:

Irrationality

(a) That the panel incorrectly stated that the Applicant had refused to complete offending behaviour work;
(b) That the panel were negative in their line of questioning; and
(c)That the decision is irrational in light of the evidence given at the oral hearing and another panel would have arrived at a different conclusion.

Current parole review

9. The Applicant's case was referred by the Secretary of State to the Parole Board on 1 May 2019 seeking a decision as to whether his release was appropriate. This was the Applicant's first review.

10. The case was first listed for Oral Hearing on 29 June 2020 but was adjourned at the Applicant's request to allow a Risk Management plan to be drawn up to allow him to resettle in a different area.

11. The Hearing was re-listed for 15 October 2020 when the Applicant was 48 years old.

12. The Hearing took place by video link due to the Covid 19 pandemic and the Panel comprised one independent Member and one Judicial Member of the Parole Board. The Panel considered a dossier of 288 pages and after the hearing they considered email representations from the Applicant's solicitors (this brought the dossier to 300 pages in total which I have seen). The panel heard evidence from the Applicant's Offender Supervisor, the Offender Manager and from the Applicant.

The Relevant Law

13. The Panel correctly sets out in its Decision Letter dated 29 October 2020 the test for release.

Irrationality

14. 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."

15. 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.

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

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.

The reply on behalf of the Secretary of State

18. The Secretary of State confirmed that he had no representations in respect of this Application on 3 December 2020.

Discussion

19. It is accepted by the Applicant that he has not completed any Offending Behaviour work to address his risk of sexual offending during the course of his prison sentence. The Applicant states in his reconsideration application that the Panel inaccurately recorded in their decision letter that this omission was a result of a refusal on behalf of the Applicant to undertake the work. The Applicant stated in evidence that he would be willing to undertake work as long as he could maintain his innocence. He remains concerned that if he were made to admit his guilt during the course of any such programme this would have a negative impact on a future appeal.

20. The Applicant further states that the reason he has not been eligible for an accredited sex offender behaviour programme in prison is that his score on the risk matrix designed to assess risk of future sex offending is not sufficiently high. The Applicant's

Offender Manager gave evidence that he could instead complete 1 to 1 work in the community immediately on his release.

21. The Panel reached the view that the '*Applicant declined to complete offending behaviour work in custody and the panel had no confidence [he] would complete any in the community'.*

22. I do not find that the Applicant has established that the Panel did take in to account inaccurate information in reaching their decision. The Applicant accepts that he has completed no offending behaviour work and would not do so if that meant he had to admit his index offences. Whilst the Panel do not refer to the non-availability of certain courses, in any event as a result of the Applicant's risk matrix scoring, they are correct they do focus on the central point which is that the Applicant remains untreated.

23. It follows that the Panel did not refuse to release the Applicant simply because he continued to maintain his innocence. The Panel did, however, explain that the Applicant's denial played a significant role in their decision. Due to his denial professionals are not able to discuss the index offences with the Applicant. This mean is that it is difficult to identify the factors which caused the Applicant to offend and therefore to carry out any targeted risk reduction work in respect of those factors. In turn, this meant that the risk management plan would have to rely on external controls alone to manage the Applicant's risk. The Panel therefore considered that not enough is known about why the Applicant offended and that there would be insufficient warning signs of increasing risk to take appropriate action before a new offence took place and that his risk could not therefore be managed in the community.

24. Whilst the Applicant does not accept this position, this is a logical conclusion for the Panel to have reached based on his continued denial and the absence of risk reduction work which has flowed from that. I do not find that the Panel reached this conclusion on the basis of inaccurate information.

25. The evidence of the Applicant's Offender Supervisor was supportive of release giving examples of how he had been tested within the prison environment as evidence of how he would cope with struggles on release and he recommended release on the basis of his compliance in prison. The Community Offender Manager was also supportive and gave evidence that she felt the risk of serious harm was manageable in the community and that the Applicant would comply with his licence conditions and complete any work asked of him. The Community Offender Manager also put forward a detailed risk management plan which she stated was sufficient to manage the Applicants risk.

26. The Panel did not accept this evidence and did not consider the licence conditions to be sufficient given the Applicant is '*an untreated and untested sex offender'*.

27. The Applicant now states that the Panel was irrational in not following the recommendations made by the professionals supported by their evidence at the hearing. I disagree. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

28. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, **per R (Wells) v Parole Board 2019 EWHC 2710.** In this case the Panel has justified its conclusions clearly and succinctly by explaining that they disagree with the professional witnesses that external controls are sufficient to manage the Applicant's risk, that warning signs but not be obvious to professionals (given that they still do not know what triggered the Applicant's offending) and that the Applicant has not been tested in the community.

29. 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. I do not find there are any such reasons in this case to interfere with that decision.

30. Finally, the Applicant further claims that the parole board were negative in their questioning of the witnesses and of the Applicant who has the right to maintain his innocence.

31. The forensic approach of a parole panel will be unique to its own constitution. Each member of the Board has his or her personal style, developed with experience and training towards achieving an effective technique. It is important that the evidence of each witness is appropriately tested and I do not find anything in the Panel's decision which suggests the Panel did not adopt an appropriate manner of assessing the potential risk of serious harm that the Applicant would pose if released at this stage in to the community.

Decision

32. 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
17 December 2020