the Parole Board

working with others to protect the public

[2021] PBRA 173

Application for Reconsideration by Dobson

Application

1. This is an application by Dobson (the Applicant) for reconsideration of a decision of a Parole Board panel which heard his case at a telephone oral hearing on 15th October 2021 and, in its Decision Letter of 21st October 2021, declined to order his release while recommending that he should continue to be held in open conditions.

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:

    a. The dossier of 657 pages including the decision letter (DL)
    b. Representations from the Applicant under review; and
    c. Undated representations submitted by and on behalf of the Applicant.

Background

4. The Applicant was born in 1970 and is now 51. In 2007 he was sentenced, following his appeal to the Court of Appeal Criminal Division, to imprisonment for public protection with a 'tariff period' of 4 years less time spent on remand.

Request for Reconsideration

5.The application for reconsideration is dated 6th November 2021.

6.The grounds for seeking a reconsideration are, in summary, as follows:

    a. The panel's decision was irrational in that it failed to put any or any proper weight on a number of facts:
        i. The Applicant is still protesting his innocence of the index offences and this has been made a "bar" to release. The Applicant has evidence which can prove his innocence but the panel failed to consider this evidence properly or at all. The result is that the panel has refused to direct release in effect because the Applicant will not admit guilt.

ii. The Secretary of State has acted irrationally by declining the Applicant the chance of temporary release and the panel compounded that irrationality by using the fact that the Applicant had not completed temporary releases as a factor in reaching its decision not to direct release.
iii. The panel failed to put the proper weight on the evidence of a psychologist who recommended release in spite of the current lack of opportunity for temporary release. In the grounds submitted by the Applicant himself it is said that the Prison Offender Manager also indicated that she would support release in spite of the lack of opportunity for temporary releases.
iv. The two psychologists who gave evidence agreed that in their opinion risk was not imminent and that there would be warning signs before any such risk became a reality.

b. The panel's decision was also procedurally unfair because the evidence of the Community Offender Manager (COM) was inaudible to the Applicant who was thus unable to give instructions to his legal representative about it. This ground goes on to state that before she gave evidence the COM was *'forced to leave the hearing'.* This ground has been amplified by grounds submitted by the Applicant himself which in summary suggest that while he was able to make out some of what was said by the COM he could not understand it all. Some of the references he could make out suggest that the COM was citing the suicide of a particular person in support of the conclusion that release should not be directed.

Current parole review

7. Following referral by the Secretary Of State for Justice (SoSJ) to the Parole Board an oral hearing was directed. A face-to face hearing was directed and had been due to take place on 15th June 2021. For various reasons, in particular the late submission of a psychological report, the case was adjourned.

8. The case was heard on 15th October 2021, with the agreement of the Applicant's legal representative, by video link, due to the restrictions imposed by the pandemic. The panel heard oral evidence from the Applicant's Prison Offender Manager and COM as well as from 2 psychologists and the Applicant himself. The Applicant's legal representative submitted that the panel should direct release.

The Relevant Law

9. The panel correctly set out the test for release in its decision letter (DL) dated 21st October 2021.

Parole Board Rules 2019

10. 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 its decision on the papers (Rule 21(7)).

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.

Procedural unfairness

14. 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.

15. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that:

    (a) express procedures laid down by law were not followed in the making of the relevant decision; and/or

    (b) they were not given a fair hearing; and/or

    (c) they were not properly informed of the case against them; and/or

    (d) they were prevented from putting their case properly; and/or

    (e) the panel was not impartial.

16. The overriding objective is to ensure that the case was dealt with justly.

Other

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 Respondent

19. The SOSJ indicated that he had no representations to make.

Discussion

20. The Decision Letter correctly set out the tests to be applied.

Irrationality

21. As to Ground a (i) above. This ground suggests that the panel should have reviewed the question of the Applicant's guilt of the index offences 14 years after his conviction and that its acceptance of his guilt has unfairly prejudiced him. There is nothing in this ground. The decision of the trial court and – if the conviction was appealed – of the Court of Appeal, is binding on the Parole Board.

22. As to Ground a (ii). The decision of the Prison Governor is currently the subject of challenge in the High Court. If the challenge is successful and the Applicant is still in prison it will be important, since the question of ROTL was central to its decision, that his case be speedily referred to the Board and expedited by the Board following referral. The further contention, that the Board should have – in effect – ignored the fact that the Applicant has not been able to complete ROTL is clearly unsustainable. The prison psychologist, the POM, and the COM were all of the opinion that ROTL were an essential element to be included before the Applicant's release could be safely directed. The DL points out that a previous period in open conditions had ended because of problems with ROTL.

23. As to Ground a (iii). It is right that the independent psychologist was prepared to recommend release even in the absence of the ROTL ingredient. It is not the case however, as submitted by the Applicant in his grounds, that the same was true for the POM. The panel explained clearly in the DL why it preferred to accept the

recommendations of the POM, COM and the prison Psychologist, and pointed out that even the independent psychologist's recommendation was based on the requirement of a condition of residence at designated accommodation for 6 months – which was not achievable.

24. As to Ground a (iv). Clearly the panel considered this issue carefully as set out towards the end of Paragraph 6 of the DL. And, as referred to above at para 22, the independent psychologist based her recommendation on the availability of a designated accommodation place for 6 months – unfortunately not available at this time. It is impossible to categorise the finding as irrational within the legal parameters set out in the judgments quoted above.

Procedural unfairness

25. The contention set out in the grounds concerning inaudibility is of course a serious one. I have listened to the recording of the hearing – and in particular to the COM's evidence. While the sound quality was not as good as it had been in respect of most of the other witnesses, the panel and the legal representative, it was sufficiently clear and audible to me – and clearly audible to the Applicant's legal representative. However, at the end of the hearing the Applicant did raise the issue. The panel chair raised the matter with the Applicant's legal representative, and among other suggestions indicated that if the Applicant and his legal representative thought it appropriate the recording of the evidence could be made available to him and the Applicant. His legal representative (who did not indicate that he had had a problem hearing the evidence) indicated that he had made full notes of her evidence and would speak to the Applicant and send in final submissions on the case generally at the end of the hearing. This he did (pp646-8 of the dossier). Those submissions are silent on this topic.

26. I have considered this ground carefully. The evidence of the COM was important and clearly influenced the ultimate decision. However, it accorded with her previously expressed opinion (and the opinions of the POM and the prison psychologist) within the dossier as to the correct disposal of the case. The Applicant raised the issue at the end of the hearing after his legal representative had indicated that he would speak with the Applicant immediately after the hearing and submit his representations by the end of the day. Her evidence was broadly similar to, and in accordance with, her report within the dossier. Understandably therefore, as with the other witnesses, there was no request from the legal representative to consult his client before he asked questions, and no request after the hearing for the recording to be made available.

27. The principles against which I have considered this ground are those set out in summary at paragraph 15 b), c) and d) above.
    a. As to b) the hearing was fairly conducted and the Applicant's case was competently put to the witnesses by his legal representative and likewise competently summarised at the end of the case in the written submissions sent in the same day. Importantly no complaint was made in those submissions on this point.
    b. As to c), the "case" was clearly set out in the extensive dossier and the SoSJ's witnesses all – including the COM – gave their evidence in accordance with their reports. By the time the COM gave her evidence the Applicant had given his and his legal representative did not seek to recall

his client to give evidence again because of some factual dispute which had arisen. The "facts" were in essence already clear. What was in issue was the proper conclusion to be drawn from them. The Applicant had already given evidence in support of his application for release.

c. As to d), it cannot be said that the Applicant had no opportunity to put his case properly. He had given evidence and the panel had heard from witnesses who had recorded his statements, behaviours and the like up until the days before the hearing. The case put to the COM was in essence the case put to the other witnesses who opposed release.

28. There was nothing in the recording of the COM's evidence to indicate that her recommendation was based on the suicide of another person.

29. The panel clearly indicated that its decision had derived in large part from the evidence given by the Applicant and the finding that he seemed to be avoiding questions by giving *"tangential"* answers, which would therefore make it difficult or impossible to identify warning signs which might indicate that his risk to the public was increasing.

Decision

30. For the reasons I have given, I do not consider that the decision was irrational.

31. Likewise, although concerned by the Applicant's claim that he could not hear much of the COM's evidence, I do not consider that that obvious procedural irregularity, and the exchanges which took place after that between the Applicant, the panel and his legal representative after that irregularity had been exposed invalidated the hearing to the extent that I should direct reconsideration of the case under the principles set out above.

Sir David Calvert-Smith
9th December 2021