[2021] PBRA 179

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Application for Reconsideration by Hill

Application

1. This is an application by Hill (the Applicant) for reconsideration of a decision of a Panel of the Parole Board that is undated, following an oral hearing on 22 November 2021. The hearing was conducted remotely via video-link, due to current Covid-19 restrictions on face-to-face hearings.

2. The Panel made no direction for release or recommendation for a move to open conditions.

3. 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.

4. I have considered the application on the papers. These are the dossier of 285 pages (that includes the decision letter) and the application for reconsideration.

Background

5. The Applicant was aged 21 at the time of sentence and is now aged 32 years old.

6. He was sentenced to Imprisonment for Public Protection on 11 May 2012 for an offence of attempted murder. The tariff was set at 4½ years (with allowance for time on remand) and expired on 8 May 2015.

7. The Applicant was released on 20 April 2020 and recalled on 18 May 2020, although he was not returned to custody until March 2021.

Request for Reconsideration

8. The application for reconsideration is dated 1 December 2021.

9. The grounds for seeking reconsideration are set out in a narrative format over 34 paragraphs. There are three grounds set forward, under the hearing of illegality and a failure to give sufficient reasons.

10. I note at this stage that illegality is not included as ground for reconsideration under Rule 28(1). It is limited to irrationality and procedural impropriety.

11. That this is not an oversight, and that it is not permissible to 'read in' a test of illegality, is confirmed in the judgment of Stacey J in **R (Dickins) v The Parole Board of England and Wales [2021] EWHC 1166 (Admin)** at paras 35-50.

12. From that, it follows that I am not permitted to consider any challenge on what would be, in Judicial Review proceedings, a challenge of illegality.

13. As is recognised at para 40, the exact line between an allegation of illegality versus one of irrationality may not always be easy to determine in practice. However, although the grounds are put forward under the heading of illegality, it appears to me that, when considered, the complaints actually fall within the permitted grounds.

14. There is nothing from the Secretary of State to suggest that that is incorrect, or to suggest that any of the application is inadmissible on the grounds that it falls outside the scope of the reconsideration mechanism.

15. In those circumstances, I shall consider the application in full.

Current parole review

16. The Applicant's case was referred to the Parole Board in March 2021. An oral hearing was directed in July 2021.

17. The oral hearing was conducted remotely on 22 November 2021. The Panel heard evidence from the Applicant, as well as from the prison probation officer and the community probation officer.

The Relevant Law

18. The panel correctly sets out in its decision letter the test for release and the issues to be addressed in making a recommendation to the Secretary of State for suitability to remain in open conditions.

Parole Board Rules 2019

19. 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 the decision on the papers (Rule 21(7)).

20. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

21. 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."

22. 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.

23. 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

24. 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.

25. 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) They were not given a fair hearing;
    (c) They were not properly informed of the case against them;
    (d) They were prevented from putting their case properly; and/or
    (e) The panel was not impartial.

26. The overriding objective is to ensure that the Applicant's case was dealt with justly.

27. 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

28. The Secretary of State has submitted a document which is stated to be representations in response to the application although it does not, in fact, contain any representations as to the proper outcome of the case.

29. There is a comment on para 11 of the Applicant's grounds, along with further evidence from the Community Probation Officer.

30. The reconsideration mechanism is '*not an opportunity for persons disappointed by a decision of the Parole Board to put fresh evidence before it'* **(Nightingale [2019] PBRA 40**, at para 37).

31. I do not consider that this material is admissible and put it to one side.

Discussion

32. I shall consider the grounds as they are set out in the application.

33. Ground 1 (which is headed 'illegality' but appears to be wider than that) is at paras 6-20 application.

34. Most of this consists of a comment on the Applicant's case and is, in effect, a re-arguing of the case as would have been put before the original Panel.

35. There are references (see para 17 for example) to the Panel failing to take into account evidence given by the Applicant in the hearing.

36. However there has not been any attempt to substantiate this (for example by way of a signed witness statement with a statement of truth, or copies of the representative's notes of the hearing). In those circumstances little (if any) weight can be placed on an assertion.

37. In any event, all this ground is, in effect, a disagreement with the conclusion of the Panel and reasons why the contrary view should be preferred. It does not establish that the decision was an irrational one.

38. Ground 2 is also headed 'illegality', at paras 21-26.

39. Again, there is reference to the evidence given at the hearing without anything to substantiate it.

40. In any event, the grounds state that the community probation officer recommended release and gave further conditions that could be applied with reasons given why this should have persuaded the Panel to direct release.

41. Again, this does not amount to an error of law.

42. The one substantive point is that *'if the panel did not consider the risk management plan to be sufficient (on the basis that it was poorly composed by [the Applicant's] [community probation officer]), the panel would be under a duty to adjourn'* the hearing in order to put together such a plan.

43. No authority is cited for that duty, and I do not consider that such a duty exists.

44. There may well be cases where a Panel would decide to adjourn, although this is most likely to be in a case where the prisoner is unrepresented. In this case it is not suggested that there was an application to adjourn.

45. This would likely mean that whenever a panel is considering refusing the case, it would be necessary to adjourn to see if the release plan could be added to so that release could be directed.

46. In any event, the Panel's reasoning for refusing the application was more because of concerns over the Applicant's lack of internal controls rather than the external controls. In those circumstances, an adjournment would have served no purpose.

47. The third ground is at paras 27-31 and is headed 'Failure to provide sufficient reasons and irrationality'.

48. These acknowledge that a Panel is not obliged to follow the recommendation of the professionals.

49. It should be noted that the recommendation of the community offender manager (and, it appears by implication, the prison offender manager) was not that the Applicant should be released, rather that he was suitable to be moved to open conditions.

50. That seems to me to be fatal to the application. The professionals all agreed that the Applicant was not ready to be released, which was the decision that the Panel came to. That decision could not be considered to be an irrational one. As noted above, the question of open conditions is outside the scope of the reconsideration mechanism.

51. In any event, what is required is that sufficient reasons are given so that the reader of the letter knows what decision was made and why. It appears to me that this letter discharged that obligation, and that there was no error of law.

Decision

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

Daniel Bunting
10 December 2021