[2022] PBRA 111

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Application for Reconsideration by Attab

Application

1. This is an application by Attab (the Applicant) for reconsideration of a decision of a Parole Board panel which heard his case at an oral hearing on 26th June 2022, and in its Decision Letter declined to order his release.

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 206 pages including the decision letter (DL) under review; and
   (b) Representations dated 7th July 2022 submitted on behalf of the Applicant.

Background

4. The Applicant was born in 1968 and is now 54. In 2018 he was sentenced to a substantial term of imprisonment for sexual offences committed against young boys.

Request for Reconsideration

5. The application for reconsideration is dated 7th July 2022.

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

   That the panel's decision was procedurally unfair and/or irrational in that,

   i. The panel based its decision in part on a finding that no 'risk reduction' work had been done with the Applicant when it was plain from the evidence that there was no such work available while he remains in prison.
   ii. The decision failed to take into account adequately, or at all,
      (a) the Applicant's good behaviour in prison.
      (b) His pleas of not guilty at trial.
   iii. The panel's decision was (unlawfully) based on the fact that the Applicant pleaded not guilty at trial and continues to maintain his innocence.
   iv. The panel failed to consider the "positive effects of the release supervision plan".

Current parole review

7. Following referral by the Secretary of State for Justice (SOSJ) to the Parole Board on 6th May 2021, the case was heard on 23rd June 2022. The panel heard oral evidence from the Applicant's Prison Offender Manager (POM) and Community Offender Manager (COM) as well as from a psychologist and the Applicant. The Applicant's legal representative submitted that the panel should direct release.

The Relevant Law

Parole Board Rules 2019

8. 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

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. I note the reference in the Applicant's helpful grounds to the judgment of Saini J in **Wells [2019] EWHC 1885 which did not purport to cast doubt on let alone overrule the decisions of the House of Lords and Divisional Court referred to above.**

Other

12. 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.

13. 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.*"

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.

The reply on behalf of the Respondent

17. No representations were received in response to this application from the SoSJ.

Discussion

18. The DL correctly set out the test to be applied.

19. Before turning to the grounds and the decision on reconsideration it is worth referring to matters which may bear on that decision but which were not referred to in the DL or in the grounds submitted by the Applicant.

A. The Dossier (p27 and elsewhere) describes his sentence as an extended sentence of 9 years with an extension period of one year. The judge's sentencing remarks describe it as a 10 year sentence. The dossier (at pp 61 and 139) contains references to a Court of Appeal decision of July 2020 on an appeal against sentence as having reduced the sentence to one of 8 years with an extended licence period of one year. The formal documents recording the original and substituted sentence are not in the dossier, and neither is the judgment of the Court of Appeal, which would have contained the Court's opinion not only as to the seriousness of the offences but, very likely, of the progress or lack of progress made in the period since May 2018 when the original sentence was passed. The DL does not express an opinion on the actual sentence being served.
B. The sentencing remarks record the imposition of a Sexual Harm Prevention Order (SHPO) made under the Sexual Offences Act 2003 as amended, breach of which constitutes an offence carrying a maximum sentence of 5 years imprisonment. The Order is not within the dossier. It should have been. There is thus no information as to the extent of the prohibitions contained within it or as to the length of the order, whether fixed or indefinite. There is no reference to its existence in the DL.

20. The POM and COM both recommended release on the bases that such work as was needed to be done to reduce the risk still posed by the Applicant could be completed in the community and was not available in prison, and further that the remaining risk could be safely managed by the licence conditions which were proposed – and presumably, though this is not apparent from the reports submitted or the DL, the existence of the SHPO. The only witness opposing release was the psychologist.

Irrationality

21. The panel's decision not to direct release was clearly based to a large extent on the following:

- *'None of the professionals working with him could say with confidence that they possessed a good understanding of his risks.'* (Para 3.6). To that may be added the facts that the COM who recommended release did so in part because there was no prospect of the work he believed necessary being done in prison (Para 4.5) and that there had just been a recent change of COM and there was likelihood of a further change in the near future.
- The fact that although there had been a gap of 10 years or more between the offences committed against the two victims, the second series of offences committed in 2012-2015 had been more serious than those committed in 2001, and that it was possible that he had in fact offended in a similar way during the period.

22. So far as the grounds submitted are concerned:

- I see no force in the first ground. While it is unfortunate in this and no doubt other cases that work thought necessary or even advisable to reduce risk is not available while the prisoner is in prison the panel's first duty is to the public and its protection from serious harm.

- As to the second ground. It is correct that the panel made no reference to the Applicant's good behaviour in prison. However the panel's focus was clearly, and rightly, on the particular type of offending which led to the imposition of the sentence for which there was no opportunity while a serving prisoner. It was not in dispute that aside from offending against male children the Applicant had led a law-abiding life.
- As to the third ground. The fact that the Applicant denied, and continues to deny, the offences was clearly a relevant factor. The panel is obliged to accept the Court's decisions and proceed on that basis. The unwillingness of the Applicant to engage with programmes which require an acceptance of guilt as a starting point was therefore potentially relevant to the panels' estimation of the risk he now poses. In addition the concern expressed in the DL that the fact that the Applicant's family and friends believed that he was innocent would likely increase the chance that he would have, and then exploit, opportunities to offend again cannot be characterised as irrational.
- So far as Ground 4 is concerned –the DL does not specifically refer to the proposed release management plan or the suggested additional licence conditions and why in its opinion such conditions would not be sufficient to eliminate the risk of serious harm by providing information sufficient to provoke either the imposition of further licence conditions or recall.
- There is no reference either in the DL – since it was not in the dossier – to the possibility that the existence of the SHPO and the independent penalties imposable for breach of it might act as a deterrent to the Applicant were he tempted to reoffend.

Procedural Unfairness

23. While the lack of clarity within the dossier concerning the sentence now being served by the Applicant was a serious procedural defect it is clear that a considerable period remains before the Applicant's Conditional Release Date and thus did not lead to unfairness.

24. However, the apparent absence from consideration by the professional witnesses, the Applicant's legal representative, and the panel, of the SHPO, an important part of the sentence designed to reduce the risk of reoffending by offenders following conviction and, if relevant, release from prison whether on licence or otherwise, together with the absence from the dossier, and therefore from the panel's consideration, of the Court of Appeal's judgment on the Applicant's appeal against sentence were serious procedural flaws.

Decision

25. I have hesitated before reaching the decision to grant the application and order a fresh hearing since the full basis for it is not to be found in the grounds submitted on the Applicant's behalf, and since the Applicant, through his legal representative, should have been in a position to supply the necessary information concerning the SHPO and the Court of Appeal judgment. However, the matters set out above concerning Ground 4 have led me to the conclusion that the DL was procedurally defective and thus resulted in an 'irrational' decision. This is of course not to say that a future panel, in possession of all

the relevant information together with any new information emerging since the hearing, would not come to the same conclusion as this one.

Sir David Calvert-Smith
13 August 2022