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[2023] PBRA 25

Application for Reconsideration by Hawker

Application

1. This is an application by Hawker (the Applicant) for Reconsideration of a decision of the 20 December 2022. The decision was by an Oral Hearing Panel. The Oral Hearing Panel determined not to direct release.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.

3. I have considered the application on the papers. The papers were the dossier consisting of 1550 pages, the Oral Hearing Panel decision, the application for Reconsideration submitted by the Applicant's solicitor and the response by the Secretary of State (the Respondent).

Background

4. The Applicant is serving a sentence of life imprisonment. He was sentenced in February 2011. His tariff expired in November 2017. The index offences were conspiracy to commit robbery, causing grievous bodily harm with intent and attempted grievous bodily harm.

Request for Reconsideration

5. The application for Reconsideration is dated 4 January 2023.

6. The application was not made on the published form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how the decision maker will look for evidence to sustain the complaints and reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made.

7. I would emphasise the importance of using a guide in preparing applications of this sort. This application was unfocused and muddled and failed to direct the reader to the issues in a well-ordered fashion. Applicants and their solicitors are in danger of creating an injustice to themselves or their clients if their drafted applications are not clearly ordered and focused.

8. In simple terms the applications should contain numbered grounds. Those grounds should shortly set out each complaint separately, followed by a focused argument as to how that ground is evidentially said to be supported. The application should also ensure that the Applicant has set out for each ground which of the reconsideration headings is being argued namely procedural irregularity, errors of law or irrationality. Applicants and their solicitors should also take account of the fact that the reconsideration process cannot assist (other than in highly exceptional circumstances) in connection with decisions relating to transfers to open conditions.

Current Parole review

9. This case was referred to the Parole Board by the Secretary of State in October 2020. The referral requested that the Board consider release of the Applicant, and if not released consider whether there should be a recommendation for a transfer to open conditions. The oral hearing was adjourned on the first date scheduled to allow for more information to be made available. The hearing eventually took place in November 2022.

10. The hearing was conducted by a three-member panel. An independent Chair, a further independent member and the psychologist member of the Board. The witnesses at the hearing included a Prison Offender Manager (POM), a prison and independent psychologist, a neuropsychologist and The Community Probation Officer. (COM)

The Relevant Law

11. 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 a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

12. 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)).

13. 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

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.

Procedural unfairness

17. 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.

18. 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.

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

20. Justice must not only be done but be seen to be done and so procedural unfairness includes not only an unfairness of process, but also the perception of unfairness (for example, failure to deal with the arguments or evidence advanced in an appropriate manner or not at all).

21. It is for me to decide whether I consider the procedure adopted by the panel in conducting the parole hearing was unfair to either of the parties.

22. 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.

23. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

The reply on behalf of the Respondent

24. The Respondent made no representations.

The grounds for seeking a reconsideration

25. I have attempted to draw out the grounds which appear to be argued in this case, however as indicated above, the application was not clearly focused or comprehensible. The numbering of each ground is my own and is an attempt to deal with each of the complaints sequentially.

Grounds and Discussion

26. **Ground 1**- The Applicant argues that the panel were not able to make a full risk assessment due to witnesses not being available.

    Discussion- In the case of **Williams [2019] PBRA 7** (cited above) it was clearly explained that procedural unfairness does not arise in circumstances where it is argued that other information could have been before the panel. This ground is therefore rejected.

27. **Ground 2 -** A witness appears to have reported that the panel misreported his evidence.

    Discussion- It would not be appropriate for me to consider the views of a witness (presumably commenting after evidence had been adduced) or to consider the witnesses' views upon the reporting or recording of the witnesses' evidence. The purpose and role of the Reconsideration Mechanism is to consider the evidence adduced at the hearing and the decision based upon that evidence. I therefore reject this ground.

28. **Ground 3**- The panel placed too much weight on negative evidence (which was faulty). The panel therefore showed bias in citing evidence which supported the case for rejecting release.

    Discussion-I have read the decision in this case. It appears to me that the panel cited both positive and negative evidence which was delivered at the hearing and was in the dossier. I detected no evidence of bias. Examples of such evidence (of bias) were not clearly set out or cited in the application. I therefore reject this ground.

29. **Ground 4** -The panel were not clear in their decision as to whether they were recommending open conditions or not.

    Discussion -As set out above a decision as to whether or not to recommend open conditions is not one which is susceptible to Reconsideration. I therefore reject this ground.

30. **Ground 5** -The reporting of the views and evidence of the Prison Offender Manager and the Community Offender Manager was incorrect.

    Discussion -I have considered the written dossier in this case. It was clear to me that the reports from the two witnesses supported the view that they were concerned about the Applicant completing pieces of work by way of diaries. They were also concerned about contact with the Prison Offender Manager. I therefore reject this ground as being unsupported by the evidence in the dossier.

31. **Ground 6** -The panel should have adjourned the case and ordered a revised Risk Management Plan.

    Discussion-The parties to a Parole Board hearing are the Secretary of State and the Applicant. It is not the role of the Parole Board panel to prepare or order risk management plans. The panel's role is to make assessments based upon the evidence which is presented at the hearing. Before or during the hearing the Applicant and his solicitor were at liberty to apply for adjournments and to make representations that any plan be revised, however this is not the role of the panel itself.

32. As has been said on other occasions, where an Applicant is legally represented, it is highly unlikely that a successful appeal will be generated if there has been no challenge made to the alleged irregularity by the Applicant himself or his solicitor by way of an application. No application was made in this case for an adjournment in relation to the Risk Management Plan. Accordingly, this ground is rejected.

33. **Ground 7** -The panel indicated in their decision "*the independently instructed psychologist agreed that there was a potential risk of serious harm at any point to a partner".*

    Discussion-I note in the report by the independent psychologist that the following comment is made. The underlined word is my emphasis. "*I am <u>not</u>*

aware of any evidence which suggests that [the Applicant] would inflict harm on his current or previous partners and that 'the potential event could happen at any time'.

34. I interpret this comment as indicating that the independent psychologist was not aware of evidence of the likelihood of the Applicant inflicting harm on partners and that the psychologist was also not aware of evidence of that the inflicting of harm was likely to happen at any time (namely imminently).

35. It appears therefore that the psychologist was rejecting the likely imminence of harm and the fact of the likelihood of harm to partners.

36. On the basis of this comment within the independent psychologist's report it appears to me that the panel relied upon a view of the independent psychologists' position which was at variance with the psychologist's evidence. I have not listened to the recording of the oral hearing, however there is no indication within the decision that the view of the independent psychologist radically altered within the hearing itself.

37. This difference in interpretation may appear to be a fine point, in the light of the complications of this oral hearing and risk assessment material as a whole. However, the imminence of risk is a highly relevant factor in considering the concept of a risk of serious harm to the public. It was fundamental to record the views of the independent psychologist accurately. The panel were at liberty to reject the psychologist's opinion, which it appears they did. However, on the face of the decision it appears that the panel had interpreted the independent psychologist as supporting a view that the risk of harm to partners was likely and imminent, which was not indicated in the report.

38. I have concluded therefore that there is a mistake in a finding of fact (namely the interpretation and recording of the view of the independent psychologist as to the imminence of risk). This misrecording of fact was irrational in the sense set out above. Accordingly, I direct a rehearing.

Decision

39. Whilst I do not find there to have been a procedural irregularity, I do consider, applying the test as defined in case law, the decision to be irrational. I do so solely for the reasons set out above.

HH S Dawson
17 February 2023