

[2024] PBRA 19

Application for Reconsideration by Nevins

Application

1. This is an application by Nevins (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated 22 December 2023 not to direct his release. The review was concluded on the papers.
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. These are the application for reconsideration; the panel's decision; the dossier and further information supplied to me by the Applicant's solicitor following my request.

Background

4. The Applicant is serving a sentence of life imprisonment imposed on 3 November 2006 for the offence of murder. The minimum term which was ordered to be served before the Applicant could be considered for parole was 16 years, 5 months and 7 days. The Applicant was transferred to open conditions on 27 August 2021 following a recommendation of the Parole Board but was returned to closed conditions on 10 October 2022 having failed to return to prison after an overnight leave.

Request for Reconsideration

5. The application for reconsideration is dated 2 January 2024.
6. The grounds for seeking a reconsideration are that the failure to have an oral hearing was procedurally unfair and there were errors of fact in the decision which could have been corrected had there been an oral hearing. The relevant history as to why this was a review decided on the papers is as follows: the case was referred by the Secretary of State (the Respondent) to the Board on 11 October 2022. On 11 January 2023 a MCA member directed an oral hearing which was timetabled for 9 August 2023. The hearing was then adjourned on a number of occasions to await the result of a police investigation into an incident which occurred at the prison in



which it was suggested the Applicant was criminally involved. The Applicant denies this and says that any involvement of his was self-defence or defence of another.

7. On one of the adjournment notices dated 2 August 2023 the panel chair states that because of the possibility of extensive delays in the police investigation being finished, the review might have to be concluded on the available evidence rather than waiting for the result of the police enquiries.
8. Further panel chair directions were issued on 28 September 2023 when the panel chair returned to this issue and directed that when the directions which had been made were complied with the panel would consider concluding the review on the papers. The parties were given 14 days after the receipt of the latest update to make representation as to whether the review could and should be completed on the papers. Reports were received from the Community Offender Manager (COM) and the Prison Offender Manager (POM) and an update was obtained as to the likely time that would be taken to complete police enquiries. No representations were received from the parties including the Applicant as to whether the review could be concluded on the papers and accordingly the review was completed on the papers.
9. In light of the application and the history that I have set out I asked the solicitor for the Applicant to inform me whether she and the Applicant had received the directions referred to above. I indicated that the information was likely to be important in helping me reach a conclusion about the fairness of the procedure. The response of the solicitors was that they did not have the directions dated 27 September 2023 on file and the last directions they had on file were for 9 August 2023. I have accordingly checked with the Board, and they have a record of the directions dated 27 September 2023 being sent to the solicitors on 28 September 2023.

Current parole review

10. This was the first parole board review after the Applicant had served his minimum term and was therefore eligible for release.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 22 December 2023 the test for release.

Parole Board Rules 2019

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)).

Irrationality

13. 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."

14. 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.]

15. While irrationality is not specifically relied on in the application for reconsideration in this case, I have considered whether it is made out on the facts. In terms of a decision of a Parole Board panel, it will be irrational if no reasonable panel could have reached the conclusion this panel did on the evidence it considered.

Procedural unfairness

16. 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.

17. 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.

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

Other

19. 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 uncontroversial 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 Respondent

20. The Respondent has made no submissions in relation to this application.

Discussion

21. The complaint of the Applicant is that there should have been an oral hearing and as there wasn't one, he has not had the chance to put his case and that is procedurally unfair.

22. In this case there had been a direction for an oral hearing, but the panel exercised its power under Rule 21 of the Parole Board Rules 2019 (as amended). The relevant part of Rule 21 reads as follows:

"Decision on the papers after a direction for an oral hearing 21.—(1) Subject to the provisions of this rule, where ... a panel have directed that a case should be determined at an oral hearing under rule 19(1)(c) or 20(5), a panel chair or duty member may direct that the case should be decided on the papers if an oral hearing is no longer necessary— (a) in the interests of justice; (b) to effectively manage the case; or (c) for such other reason as the panel chair or duty member considers appropriate, including where further evidence is received by the Board. (2) The Board must notify the parties where it is considering making a direction in accordance with paragraph (1) and its reasons for doing so as soon as practicable. (3) Within 14 days of notification ... under paragraph (2), the parties may make representations on— (za) the reasons provided by the Board for the proposed direction; (a) the contents of any further evidence, and (b) whether they agree to the case being decided by a panel on the papers. (4) After the 14-day period for the parties to make representations under paragraph (3), the panel chair or duty member will consider the case, including any further evidence and any representations made, and make a direction that the case should— (a) be decided by a panel on the papers, or (b) continue to be determined by a panel at an oral hearing under rule 25. (5) Where a direction is made under paragraph (4)(a) for a decision to be made by a panel on the papers under paragraph (7), the panel may be constituted of the panel chair who made the direction or by a new panel appointed under rule 5(3)".

23. I am satisfied that the panel chair complied with the requirements of Rule 21 before deciding to dispense with an oral hearing and deciding the review on the papers. I am satisfied that the Applicant and his legal representative were given notice of the panel chair's intention to consider deciding the review on the papers and failed to make any representations to attempt to persuade the panel chair against taking that course.

24. In the absence of representations, the panel chair was perfectly entitled to proceed to consider the matter on the papers. In the absence of the completion of the police investigation into the alleged incident in November 2022 it would have been irrational for any panel to have directed the release of the Applicant. Both the psychologist and the Community Offender Manager considered that whether it was proved that the Applicant had been involved in unlawful violence was important in assessing risk.
25. While a panel could have investigated that matter it was perfectly reasonable to consider as this panel did that the police should investigate it.
26. It looked as if the result of that investigation was going to take some time and it is often preferable to decide the matter on the papers rather than keep on adjourning the oral hearing. It was a rational view to take. In my judgment the Applicant was given an opportunity to make representations about a decision being taken on the papers and, for whatever reason, failed to do so.
27. There was nothing unfair in the procedure adopted by the panel.
28. In the event the panel was able to determine the matter without considering or determining whether the Applicant had been involved in unlawful violence in November. The Applicant's submissions as part of this application that he was not involved and can demonstrate it do not take this application any further.
29. The Applicant further complains that the panel has got some of the facts wrong in their decision. That could only lead to a reconsideration if the result of the review might have been different if the correct facts had been known. Assuming for this purpose that the panel did get the facts wrong as alleged by the Applicant I am quite satisfied that that did not affect the result of the review.

Decision

30. 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. It is to be hoped that the Respondent will refer this matter back to the Board as soon as the investigation of the police is concluded.

John Saunders
17 January 2024