

[2020] PBRA 178

Application for Reconsideration by The Secretary of State for Justice in the case of Holliday

Application

1. This is an application by the Secretary of State for Justice (the Applicant) for reconsideration of a decision of a Parole Board panel which heard the case of Holliday (the Respondent) on 23 September 2020 and, in Decision Letter of 30 September 2020, ordered 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 278 pages including the decision letter under review;
 - b. The Applicant's representations dated 21 October 2020; and
 - c. Representations on behalf of the Respondent dated 7 October 2020.

Background

4. The Respondent was born in 1961 and is now 59. In 2010 he was sentenced to an extended determinate sentence of 16 years. His Parole Eligibility Date was 24 May 2018, his Non-Parole Date (NPD) is 22 January 2021, his Licence Expiry Date (LED) is 24 May 2022 and his Sentence Expiry Date is 24 May 2026. At the time of the hearing he was being held in an open prison.

Request for Reconsideration

5. The application for reconsideration is dated 21 October 2020.
6. The grounds for seeking a reconsideration are, in summary as follows:

Ground 1: The panel was guilty of a procedural irregularity when it appeared to disregard the possibility of a conviction for a particular offence of indecent assault since the evidence on whether the Respondent had been convicted of it was unclear, and later in the decision appears to accept that the Respondent had pleaded guilty to it.

Ground 2: The panel's decision was irrational in that it failed to put proper weight on:



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- a. The fact that the Respondent continued to deny his guilt of all but one of the index offences;
- b. The existence of risk factors which militated against his release; and
- c. The panel erred in suggesting that the fact that the Respondent continued to deny his guilt would likely mean that the support of his family would be withdrawn and that he would be reported to the authorities if he offended in the same way again.

Current parole review

7. Following referral by the Applicant to the Parole Board an oral hearing was directed. This was adjourned.
8. The case was heard by remote video/telephone link on 17 September 2020 due to the restrictions imposed by Covid-19. The panel heard oral evidence from the Respondent's Offender Supervisor (OS) and Offender Manager (OM), and the Respondent who was legally represented. The Applicant was not present and submitted no written representations.

The Relevant Law

9. The panel correctly set out the test for release in its decision letter dated 30 September 2020.

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.

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

Other

16. 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.

17. 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

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18. On 3 November 2020 the Respondent submitted representations by his legal representative opposing the application. In summary he submits:
- That the panel had not erred procedurally, or at least not in such a way as to engage the principles set out in summary above at paras 11-15 above.
 - That there was no irrationality in the decision.
19. The period in question – until January 2021 – will involve the Respondent being housed in Designated Accommodation, with his movements closely monitored. Any interaction with his family – in particular possible supervised access to his grandchildren – will likewise be closely monitored.

Discussion

20. The Decision letter is lengthy and detailed. As is impliedly conceded it correctly sets out the test to be applied.

Ground 1

21. The Respondent had been convicted of a number of serious sexual offences – including rape - against 2 children between 1986 and 2004. There was no issue that the commission of those offences rendered the prisoner Respondent “dangerous” within the terms of the relevant sentencing legislation at the time of his sentence in 2009.

22. The case has an unfortunate history which was summarised in a Parole Board Decision letter of 19 March 2019. The Respondent’s Parole Eligibility date had been 24 May 2018. Accordingly, a hearing was convened on 26 April 2018. During discussions before that hearing proper began the panel decided that there was no alternative but to adjourn the case.

“During the course of the pre-hearing discussion, at that first hearing, the panel concluded that it had insufficient evidence on which to make an assessment of risk. [The Respondent] maintained [his] innocence to these offences, and no accredited work to address [his] risk of sexual offending against children has been completed. This is a sensitive case in which both professionals reporting in this case were recommending release. It was proposed that when [the Respondent] moved on from [designated accommodation] [he] intend to live at your home address and reside with [his] wife, who considers [the Respondent] to be innocent and who is the mother of the two victims. From the content of the dossier the panel were unable to ascertain whether [the Respondent’s partner] was interviewed before the trial, made a statement or was called as a witness at the trial.”

23. The hearing was due to reconvene on 14 August 2018 by which time the panel had still not been provided with all the information it had requested. A further adjournment had to take place and additional directions were set in a second attempt to obtain the additional information.

24. By 4 March 2019 the Respondent had been transferred to a different prison. The hearing was almost adjourned again because 3 days before the hearing the panel “was informed that, Offender Supervisor was to be supported by [A]. There was insufficient time to contact [the Respondent’s] representative regarding this change of

arrangements, and the panel chair therefore raised it with [his] solicitor at the hearing. On the day of the hearing the panel were informed that (in fact) [A] was taking over as Offender Supervisor. At the outset of the hearing raised her concern about the late change of Offender Supervisor and the fact that [the Respondent] were not aware until the morning of the hearing about this change. [The Respondent was] also not aware of the recommendation [A] was to make to the panel and had not been given 14 days notice in accordance with the Rules. The panel gave [the Respondent's legal representative] the opportunity to apply for an adjournment, which she declined."

25. Both the then OS and OM recommended release in spite of the fact that the Respondent – and his wife – were still maintaining his innocence and had not completed any work related to his offending. However, on that occasion the panel declined to direct release.
26. By the time of the hearing now under review the state of knowledge of the Applicant, and therefore of the panel conducting the hearing was the same. The Applicant had not apparently sought or, in any event, provided any evidence since then which would have answered the question concerning the indecent assault. The complaint is made that at some points of its decision the panel seems to accept that the Respondent did in fact plead guilty to the offence and at others that the situation is unclear and that the conviction should be disregarded. This is said to amount to a procedural irregularity. The implied suggestion within this ground seems to be either that the panel should have assumed that he had been convicted of the offence or that the case should have been further adjourned (previous hearings having already been adjourned for that purpose without success) – and in effect (since his conditional release date is in January 2021) abandoned.
27. I accept that it is capable of being both irrational and procedurally unfair to take into account inaccurate factual information in making a decision. It is important that decisions are not only fair but are also seen to be made according to a fair procedure. If incorrect information is included in the decision letter, the fairness of the procedure is called into question.
28. However, it does not invariably follow that if there is an inaccurate fact or facts in the decision letter that an application for reconsideration will be granted. Reconsideration, like Judicial Review, is a discretionary remedy and, if I am satisfied that the incorrect fact did not affect the decision then the application is likely to be refused. In particular, if the error or confusion is the result of a failure by the party making the complaint to establish the correct position after the issue had been raised in earlier proceedings.
29. Although the Decision Letter is not entirely clear on the matter it does refer to the fact of the offence – indecent assault on a person over the age of 16 – in contrast to the much more serious offences of indecent assault and rape committed against the same victims when both were much younger.
30. The question for the panel was whether the risk he undoubtedly posed to his stepchildren at the time he committed the offences still subsisted in respect of any children with whom he may come into contact following release, and if so whether suitable licence conditions could be imposed which would enable the authorities to see warning signs and take appropriate action over the few months which remain until his conditional release date. The OM was of the opinion that his risk could be managed on

licence. The OS was not – a change from the view apparently expressed to the panel by his then OS at the hearing in 2019. She held to the view that the Prisoner needed to complete an offending behaviour programme relevant to his sexual offending and was concerned that his family, which still supports his claim of innocence of the index offences albeit that his wife has said to the OM that "*she does not know what to believe*", would not provide the support necessary to reduce his risk sufficiently to justify his release. The panel considered – and explained clearly – that bearing in mind his now long-time compliant behaviour in prison, in particular the more relaxed conditions in open prison, his successful completion of such courses as he had undertaken, and the fact that during the two months in question he would be living at Designated Accommodation and thus be closely monitored, the risk he still presented could be managed.

31. I find no procedural irregularity on behalf of the panel sufficient to render the decision procedurally irregular within the terms of the principles set out above. For the panel to have further adjourned the hearing in order to allow the Applicant to find the answer to the unanswered question from the previous hearings would, in the circumstances of this case, have resulted in the prisoner being deprived of any opportunity for his release to be considered by the Parole Board in advance of his Conditional Release date, created by the relevant legislation. To have adjourned again in those circumstances may well have constituted a procedural irregularity.

Ground 2

Denial of index offending, while always a highly relevant factor, can never be determinative of the decision whether to release an offender on licence. While all those concerned with contributing to, or making that decision will base their recommendations and conclusions on the fact that he committed the offence(s) the ultimate question for each is whether there remains a significant risk that he will (re)offend in such a way as to cause serious harm of any kind to a member of the public, and whether any such risk can be managed in such a way to eliminate the danger of the risk becoming a reality. It is often the case – as was the case here – that the professionals entrusted with the supervision of a prisoner will come to different conclusions as to the risk (and its manageability) posed by a particular prisoner. The Parole Board panel entrusted with the decision has to decide, whether on the papers or, as here, at an oral hearing, the risk posed by the prisoner can be managed in the community over the relevant period. In this instance there was ample evidence in the form of a robust risk management plan, to be accompanied by relevant work aimed at further reduction of the risk the prisoner still presents, that his release would not result in an unacceptably high risk to the public and children in particular. As set out above, over a year earlier, both the then OS and OM had recommended release at a time when the factors now said by the new OS to militate against it were present. The panel's decision carefully rehearsed both the risks and the steps which were to be taken to reduce the risk. In particular the question of the future role of his family which had taken his part following the complaints made by his two victims was carefully considered. In view of the very high bar set by the courts for "irrationality" it is impossible so to characterise this decision concerning the release on licence of the prisoner for some 3 months until January 2021 as irrational.

32. The risk factors, in particular the likelihood of (supervised) contact with his grandchildren, were carefully considered and made the subject of the licence conditions.

33. The comment complained of was clearly not an integral part of the decision and is not expressed as such.

Decision

34. For the reasons I have given, I do not consider that the decision was either irrational or procedurally unfair. Accordingly, the application for reconsideration is refused.

Sir David Calvert-Smith
19 November 2020