

[2021] PBRA 122

## Application for Reconsideration by Holmes

### Application

1. This is an application by Holmes (the Applicant) for reconsideration of a decision of a Parole Board panel which heard his case at a telephone oral hearing on 7 July 2021, and, in its Decision Letter of 16 July 2021, declined to order his release but recommended to the Secretary of State for Justice (SOSJ) that he be transferred to open conditions.
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 235 pages including the decision letter (DL) under review; and
  - b) The Applicant's representations dated 5 August 2021.

### Background

4. The Respondent was born in June 1965 and is now 56. In 2003 he was sentenced to life imprisonment for murder with a 'tariff period' of 15 years less time spent on remand.

### Request for Reconsideration

5. The application for reconsideration is dated 5 August 2021.
6. The grounds for seeking a reconsideration are, in summary, as follows:
  - a) The panel's decision was irrational in that it failed to put any or any proper weight on a combination of agreed factors;
  - b) Both the professional witnesses called by the SOSJ recommended release; and
  - c) The current restrictions imposed by the Covid-19 pandemic mean that the Panel's recommendation is unlikely to be acted upon, and, even if it is, that it is unlikely to



provide the usual relaxation of restrictions concomitant upon such a transfer, such as opportunities to work outside the prison or spend nights away from it.

## Current parole review

7. Following referral by the SOSJ to the Parole Board an oral hearing was directed.
8. The case was heard on 7 July 2021 by remote telephone link due to the restrictions imposed by the pandemic. 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 16 July 2021.

### *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*



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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;
  - 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;
  - e) the panel was not impartial.
16. The overriding objective is to ensure that the case was dealt with justly.

### Other

17. 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.
18. 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

19. No reply has been submitted by the SOSJ.

### Discussion

20. The DL correctly sets out the tests to be applied.



21. The restrictions created by the pandemic have created enormous problems for the prison estate and will certainly result in some offenders being detained for longer than they otherwise would have been before March 2020. The Applicant has already suffered the consequences in that a previous Parole Board recommendation that the Applicant be transferred to open conditions was accepted by the SOS but not implemented because of restrictions caused by the pandemic. The Applicant's behaviour – with the alleged exceptions set out in the intelligence reports – has not deteriorated in spite of the obvious disappointment he must have suffered. The applicant is also right to raise the unanswerable question of whether the pandemic situation will have altered, for better or worse, following the period until the next review.
22. The reaction of the two professionals has been to reflect the Applicant's praiseworthy reaction to that disappointment in their recommendations. However, the Board is required to reach its own decision applying the statutory test. In summary: 'If released now will the offender pose a significant risk of serious harm, whether mental or physical, to the public.'
23. This panel set out the evidence clearly in the DL and, equally clearly, its reasons for deciding not to recommend release. It considered carefully the points made by the Applicant's legal representative and effectively repeated in the grounds. It is notable too that the DL records that the Applicant's advocate '*emphasised that although [the Applicant's] application was for release, [the Applicant] would not decline the opportunity for a progressive move to open conditions*'.
24. The question whether following transfer to open conditions, the anticipated opportunities to adapt to life outside prison will be unavailable is of course impossible to answer. That fact however cannot result in the Board deciding not to apply the statutory test in individual cases however "hard".
25. It is impossible to argue therefore that the ultimate decision was irrational in the strong terms described in the cases summarised above.
26. There is no suggestion in the grounds of any procedural irregularity.

## Decision

27. For the reasons I have given, I do not consider that the decision was irrational. Accordingly, the application for reconsideration is refused.

**Sir David Calvert-Smith**  
**26 August 2021**

