[2021] PBRA 125

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Application for Reconsideration by Barker

Application

1. This is an application by Barker (the Applicant) for reconsideration of a decision of a Panel of the Parole Board dated 19 May 2021 following an oral hearing on 29 April 2021. The hearing was conducted remotely via telephone-link, due to current Covid-19 restrictions on face-to-face hearings.

2. The Panel made no direction for release or recommendation for a move to open conditions.

3. 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.

4. I have considered the application on the papers. These are the dossier of 417 pages (that includes the decision letter) and the application for reconsideration.

5. Due to the content of the representations, I asked for the audio recording of the hearing. However, unfortunately, there were technical issues and this did not record.

6. In light of that, I issued directions allowing both parties to submit any further evidence or submissions that they would wish.

7. The Applicant submitted further submissions, but no further evidence.

Background

8. The Applicant was aged 23 at the time of sentence and is now aged 36 years old. He was sentenced to IPP on 20 May 2008 for an offence of s18 GBH. The tariff was set at 20 months (with allowance for time on remand) and expired on 20 January 2010.

9. The Applicant was released in 2014 and recalled less than a month later. He has remained in custody since then.

Request for Reconsideration

10. The application for reconsideration is dated 4 June 2021.

11. The Applicant relies on irrationality. The grounds are set out in a narrative format over a number of pages and are not always easy to discern.

12. In essence, it is said that the decision is irrational. There are said to be a number of factual inaccuracies in the decision letter and concerns about the conduct of the hearing. I shall set these out:

    a) The decision letter said that there was no desistance in his offending since, whereas there was a period of 18 months with convictions between 2004 and 2005.

    b) The decision letter inaccurately sets out the Applicant's evidence of a further offence on an earlier release.

    c) The decision letter inaccurately sets out the facts of the further offence.

    d) The Panel failed to explore the alleged similarities between the index and recall offences with him.

    e) The decision letter failed to accurately set out the evidence in relation to possible routes of progression in custody.

    f) The Panel's decision was made with reference to the wrong risk period.

    g) The decision was contrary to the recommendations of the professionals, and therefore irrational.

    h) The Panel's questioned the Applicant in a 'hostile' way which made the proceedings unfair.

Current parole review

13. The Applicant's case was referred to the Parole Board in February 2020. An oral hearing was directed in August 2020.

14. The hearing was heard, and concluded, on 29 April 2021.

15. The Panel heard from the Applicant, as well as from his Prison and Community Probation Officers, and a prison psychologist.

The Relevant Law

16. 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 suitability to remain in open conditions.

Parole Board Rules 2019

17. 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)).

18. 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

19. 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."

20. 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.

21. 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

22. 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.

23. 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.

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

25. 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.

26. 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 Secretary of State

27. The Secretary of State has stated that he does not wish to make any representations.

Discussion

28. I shall consider the grounds individually before considering whether the decision as a whole was flawed:

a) As the application notes, this could appear to be a 'trivial' point. I agree. Even if it was an error (which I do not consider that it is given that there is no specific definition of 'desistance') it could hardly be said to have made a difference when set against the 49 sets of convictions recorded on the PNC.

b) I shall set out the ground as it is set out in the application:

On page 4 it states "[the Applicant's] account of the Robbery differs from the account provided in the sentencing remarks. The sentencing remarks indicate that CCTV had identified [him] stalking the victim for over five minutes". [The Applicant denies] that [he] did so and contended any sightings on the CCTV showing [him] close to the victim were coincidental".

This was not the account that my client provided at the oral hearing. The Applicant did not deny following the victim from the taxi rank but did deny following the victim through the town centre. On page 252 of the Parole Dossier the Judges sentencing remarks confirm the following "I have watched the recordings of the victim's movements taken from various CCTV cameras around

the town centre. They record her walking along with you stalking her some yards behind". [The Applicant] followed her for over five minutes, clearly waiting for an opportunity to strike".

Despite the panels assertions the sentencing remarks do not make it clear where the Applicant was stalking the victim it implies that this was in the town centre. For the avoidance of doubt the taxi rank was in the town centre and therefore it is credible to suggest that the Applicant's account did not necessarily differ from the account given at trial and delivered in the sentencing remarks. It is therefore concerning that the panel have misinterpreted the evidence that was presented in respect of this"

It is not easy to see exactly what the issue raised is, but it seems to me that the important point is (as the Decision Letter states in the next sentence from the one quoted above) that what was not disputed was that the Applicant robbed the victim and received a sentence of 10 years imprisonment. It should be noted that this was not the index offence, but an offence committed on a subsequent release.

c) The grounds state that the Applicant disputed having said 'drive on' during the commission of this further offence. The Panel took this directly from the Sentencing Remarks of the Sentencing Judge, so it is unsurprising that that was taken as being the account of the index offence. I do not consider that that can be an error.

d) This would appear to be a matter of procedural fairness rather than irrationality.

In any event, the Panel record in their decision letter a reference to historic concerns that there was a 'possible sexual motive', but that that had always been denied. There is nothing further said in the letter.

To the extent that it is said that the Panel failed to apply the right test, the simple answer is that the Panel did not make (or purport to make) any findings of fact that the recall offence had a sexual motive.

Complaint is further made of what were said to be 'uncomfortable parallels' between the recall offence and a further offence committed when the Applicant was a youth.

That was not a sexual offence, but a robbery of a woman in similar circumstances to the recall offence.

It will always be possible, in hindsight, to point to something that was not considered, or was not considered in detail, at a hearing. In this case, the Panel made one comment as set out above. It must be remembered that this other offence was twenty years ago. There was no obligation to engage in exploring this with the Applicant.

e) This ground (from the middle of page 5 to the middle of page 6) is essentially a combination of what evidence it is said was given at the hearing (with nothing to support this assertion) and further evidence in the guise of submissions.

In any event, these do not give reasons as to why this would make the decision irrational.

f) As the Applicant is serving an indeterminate sentence, the Panel were obliged to consider whether the risk was manageable in the community for an indefinite period.

g) It was the job of the Panel to make its own assessment of risk. To that end they must take account of the views of the professionals, but they are not bound by them.

In this case, the Panel gave reasons in section 7 why, in effect, they did not accept those recommendations. That was a decision open to them, and cannot be described as irrational.

h) It is accepted in the grounds that it was appropriate to question the Applicant about the matters asked.

It is said in the application that the Prison and Community Probation Officers both agreed that the questioning was hostile, although no statements were provided from either in support of this.

The Applicant's representative has not submitted a witness statement as to the conduct of the hearing, or a copy of his notes. Neither is there a statement from the Applicant setting out what the questions were and how it impacted on him.

I also note that it is not suggested that any complaint was made at the time by the Applicant or his representative.

I understand that an advocate may be reluctant to raise issues surrounding the conduct of the hearing for obvious reasons. However, I consider that it is the duty of an advocate (certainly an advocate who is regulated by a professional body as in this case) to raise this during the hearing or, at the latest, in submissions.

This will mean that if there is a misunderstanding, it can be resolved there and then. If there is a proper ground for complaint then it may be that the Panel will be able to take action to reassure the prisoner or, if necessary, re-panel the case if that is what fairness requires.

This does not mean that a complaint subsequently will not be well-founded, and it should be considered on its merits, but it does mean that a reconsideration panel is entitled to take account of the fact that the advocate did not consider it necessary to raise it at the time.

Whilst it is unfortunate that the hearing was not recorded, that cannot of itself mean that the application is allowed. Taking the above together, it does not seem to me that the Applicant has made good his case that the questioning was 'hostile', or that any such questioning led to an unfair hearing.

29. As always, it is necessary to step back and consider the above matters taken together.

30. Doing so, I do not consider that taking these matters together changes my view. The Panel reached a decision that was clearly open to them.

31. I should add that the representations submitted on 20 August 2021 gives further reasons why events since the hearing support the case for release. This is not something that I can take account of in the reconsideration process.

Decision

32. For the reasons I have given, I do not consider that the decision was irrational (nor was it procedurally unfair) and accordingly the application for reconsideration is refused.

Daniel Bunting
28 August 2021