[2021] PBRA 149

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Application for Reconsideration by McKenna

Application

1. This is an application by McKenna (the Applicant) for reconsideration of a decision of a Panel of the Parole Board dated 20 September 2021 following an oral hearing on 14 September 2021.

2. The hearing was conducted remotely via telephone, due to current Covid-19 restrictions on face-to-face hearings.

3. The Panel made no direction for release.

4. 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.

5. I have considered the application on the papers. These are the dossier of 424 pages (that includes the decision letter) and the application for reconsideration.

Background

6. The Applicant was aged 30 at the time of sentence and is now aged 52 years old. He was sentenced to Life Imprisonment on 3 November 2000 for an offence of s18 Grievous Bodily Harm (GBH). The tariff was set at 4 years and expired on 3 November 2004.

7. The Applicant was released in November 2019 and recalled in March 2020 after an alleged violent incident.

Request for Reconsideration

8. The application for reconsideration is dated 11 September 2021. As this is before the hearing, it appears that this is a typographical error. It is not suggested that the application was out of time.

9. Two grounds for reconsideration were put forward:

   a) In the circumstances of the Applicant's case, a telephone hearing was unfair (procedural unfairness); and

b) The Panel failed to give sufficient reasons as to why they did not accept the evidence of the professionals that the Applicant's risk was manageable in the community.

Current parole review

10. The Applicant's case was referred to the Parole Board in May 2020. An oral hearing was directed in September 2020.

11. By that stage, the Covid-19 pandemic had caused all face to face hearings to be cancelled. All hearings were being conducted remotely by either video link or telephone.

12. There were plans for there to be a very limited number of in-person hearings to be held, but that would not be for several months, and would only be in exceptional cases.

13. Various directions were made, and the case was said to be suitable for a video-link hearing.

14. The Parole Board member who directed an oral hearing used the standard Parole Board template. This had not been updated since prior to the pandemic when most cases were listed to be heard in person.

15. At that time, there was a 'drop down' box where a member could indicate whether the case was suitable for a video hearing. Before the pandemic, there were no telephone hearings, and so there was no need to delineate between telephone and video hearings.

16. The case was due to be heard at an oral hearing on 10 February 2021, but it was adjourned in order to obtain more information about the recall incident.

17. The Panel Chair had issued directions on 27 January 2021 confirming that the case was ready for an oral hearing. It was said that this would be heard by a 'Skype Video Link', although this appears to have been a typographical error, as at that time all Skype hearings were telephone only ones.

18. This appears to have been confirmed in the adjournment notice dated 12 February 2021. It was stated that all parties had attended by telephone.

19. The oral hearing was conducted remotely on 14 September 2021, again by telephone. The Panel heard evidence from the Applicant, as well as from the prison probation officer, the community probation officer, a representative from a rehabilitation agency and from a psychologist.

The Relevant Law

20. 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

21. 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)).

22. 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

23. 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."

24. 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.

25. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

The duty to give reasons

26. The decision as to the assessment of risk is one for the Parole Board, who are not bound by the views of the professionals.

27. However, where the Panel makes a decision contrary to the recommendations of the professionals, it is incumbent on it to give clear reasons for this, and sufficiently justify its conclusion (**R (Wells) v the Parole Board [2019] EWHC 2710 (Admin)**).

28. In considering an application for reconsideration, I should remember that the question is to do with the liberty of the subject. In those circumstances, I should adopt an anxious scrutiny of the Panel's decision.

Procedural unfairness

29. 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.

30. 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.

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

32. 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.

33. 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

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

Discussion

Ground (a) – Fairness of the hearing

35. The history of the case is set out above. It should be noted that at no time was there a request for a video or face to face hearing, rather than a telephone hearing.

36. In addition, there is nothing in the decision letter or the papers before me to suggest that the Applicant had opposed having a hearing by telephone.

37. Further, the representations do not suggest that the Applicant at any time raised the question of whether a telephone hearing would be unfair, whether at the hearing or before. This appears to have only been raised after the decision letter was issued.

38. That is not determinative; a hearing that is unfair cannot be made fair by the lack of objection, but generally the time for objections to the logistics to be raised is before, or at, the hearing.

39. An Applicant's representative is in many ways best placed to consider whether their client would be prejudiced by a telephone hearing and a Panel is entitled to assume that the lack of objection is the best evidence that there is no unfairness.

40. Another factor to take account is that none of the witnesses appeared to suggest during the hearing that there was any unfairness or difficulty during the hearing.

41. The reason why, it is said, a telephone hearing was unfair was due to the Applicant's health difficulties. It is not explained why that would be the case, and it seems to me that there was no reason why a face to face hearing could have made a difference.

42. In those circumstances, I do not consider that it was unfair to proceed, or that it can be said that proceeding by telephone made the hearing unfair or the decision unlawful.

Ground (b) – Failure to follow the recommendations of the professionals

43. The fact that all the professionals were recommending release is something that the Panel were bound to take into account, but were not bound to follow, provided that proper reasons were given.

44. In this case the Panel has set out a full summary of the evidence and the reasoning behind the recommendations.

45. It then goes on to explain (in nearly a full page of the decision letter) the concerns that the Panel had, and the reasons for not accepting the recommendations.

46. These reasons are clear, and are certainly sufficient for the Applicant to understand why he was unsuccessful and contain no error of law.

47. Further, the decision that the Panel reached was one that was clearly open to it in the circumstances of the case.

Decision

48. 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.

Daniel Bunting
3 November 2021