the Parole Board

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[2021] PBRA 176

Application for Reconsideration by Dirom

Application

1. This is an application by Dirom (the Applicant) for reconsideration of a decision of a Parole Board panel which heard his case at a telephone oral hearing on 1st November 2021, and, in its Decision Letter issued on 4th November 2021, declined to order his release or to recommend to the Secretary of State for Justice 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 485 pages including the decision letter (DL) under review; and
   b. Representations dated 19th November 2021 submitted on behalf of the Applicant.

Background

4. The Applicant was born in 1958 and is now 63. In October 1995, he was sentenced to life imprisonment with a tariff period of 25 years, less time spent on remand.

Request for Reconsideration

5. The application for reconsideration was received on 19th November 2021.

6. The grounds for seeking a reconsideration are, in summary, as follows:

   a. The panel's decision was irrational in that:
      i. The psychiatrist called to give evidence was not qualified to give an opinion on the possibility that the Applicant is suffering from Autism Spectrum Disorder (ASD). The absence of this knowledge had been the reason why the hearing had been adjourned from June 2021.
      ii. The Community Offender Manager (COM) admitted in the course of her evidence that she had not read the whole of the dossier and wavered in her evidence between recommending a progressive move and making no recommendation. The panel should have adjourned or deferred the hearing in order to take

evidence from the COM when she was fully prepared, and able to give a definite recommendation one way or the other.

b. The panel's decision was also procedurally unfair because
   i. The panel refused an application on behalf of the Applicant for a psychiatrist, who had given some evidence at a previous hearing in June 2020 (based on a report prepared in December 2019) which had been adjourned/deferred for the panel to receive evidence on the question of whether the Applicant is or is not within the Autistic Spectrum. This refusal resulted in the panel being deprived of potentially relevant evidence and made the hearing procedurally unfair.

7. The Applicant's submission contains a request that I listen to the hearing as it was recorded. I have done so.

Current parole review

8. Following referral by the Secretary of State for Justice (SOSJ) to the Parole Board in March 2019 a hearing was fixed for 23rd June 2020. The case was adjourned on that day after some evidence had been given.

9. The case was heard on 15th October 2021, with the agreement of the Applicant's legal representative, by video link. The panel heard oral evidence from the Applicant's Prison Offender Manager and Community Offender Manager as well as from a psychiatrist and a psychologist. The Applicant declined the opportunity to give evidence. The Applicant's legal representative submitted that the panel should direct release, or in the alternative make a recommendation to the SoSJ for a transfer to open conditions.

The Relevant Law

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.

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 representations were received from the SoSJ.

Discussion

20. The Decision Letter correctly set out the tests to be applied.

Irrationality

21. The "ASD" question. Having listened to the evidence given by the prison psychiatrist and the submissions made about it, it is clear that he had considerable relevant knowledge of Autism Spectrum Disorders although he is not a specialist. He was however eminently qualified to make the recommendation he made that the Applicant be considered for his suitability for a transfer under the Mental Health Act 1987 to a particular Unit which caters for persons with the admitted mental issues suffered by the Applicant before, at the time of, and since the index offences of murder, and thus that a direction for release would be inappropriate. As the hearing progressed it became clear that not a single witness – the Applicant having declined to give evidence – supported such a direction. The grounds submitted do not claim that a direction for release was the only rational finding open to the panel and listening to the closing submissions of the Applicant's legal representative, it is clear that although the application for release was still maintained, the principal focus was on the question of a recommendation for transfer to open conditions.

22. The COM's 'lack of preparedness'. The evidence she gave was clear and unequivocal on the question of a direction for release. The potential difficulty surrounding her having not read the whole of the dossier revolved around the question of the possible recommendation for transfer to open conditions or no such recommendation. No submission was made at the hearing for the case to be further adjourned or deferred for the COM to "get up to speed". I note too from the recording that the Applicant had the opportunity to consult with his legal representative before during and after the hearing.

Procedural unfairness

23. I have listened to the whole of the recording made of the hearing. I noted that the first recording started while the first witness (the POM) was giving her evidence. I have caused inquiries to be made and it seems although the Chair had started to record something had gone wrong. As soon as the error was discovered a fresh recording was started. Notes had been taken of the earlier evidence and the Applicant's legal representative raised no objection to the hearing continuing.

24. The question of the calling of the forensic psychologist in training. Her report of 16th October 2019 was before the panel at pp 281-309 of the dossier. Its conclusions were clear. Her view was that the risk of serious harm to the public was not imminent and that there would likely be signs of an increase in that risk well before the risk became a reality thus enabling the COM or others to initiate recall or a variation of licence conditions, or, in the alternative, that the same would apply in the event that he had been transferred to open conditions. Because her report was now out of date a new report was produced by a different psychologist, who gave evidence at the hearing. He did not support release but supported a recommendation for open conditions. I have not heard anything on the recording to suggest that an application was made to adjourn the hearing for the author of the October 2019 report to be called and there is no reference to such an application in the Decision Letter.

25. In reality the legal representative, although maintaining her submission for release, understandably focused most of her attention in her closing address on the possibility of a recommendation to the SoSJ for transfer to open conditions. As already stated, this topic falls outside the remit of the reconsideration procedure.

Decision

26. It will be clear from paragraphs 19-25 above that I do not find the grounds put forward, together or singly, justify an order for reconsideration.

Sir David Calvert-Smith

13th December 2021