[2021] PBRA 181

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Application for Reconsideration by Stocker

Application

1. This is an application by Mr Stocker (the Applicant) for reconsideration of a decision of the Parole Board dated the 27 October 2021 made following an Oral Hearing held on 21 October 2021 which decided not to direct 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 the dossier, the decision letter dated 27 October 2021 and the application for reconsideration itself dated 16 November 2021 from solicitors acting on behalf of the Applicant. I have also listened to the recording of the evidence given by the Applicant at his oral hearing.

Background

4. The Applicant is serving an indeterminate sentence of imprisonment for offences of rape and 5 offences of indecent assault on a male under 16, imposed on 30 March 2012. The indecent assault offences took place between 1984 and 1992 when the Applicant was aged between 21 – 29. The victims were three boys under the age of 16. The Applicant was aged 43 at the time of this last offence. The Applicant is now 58. His minimum tariff of 6 years expired on 30 March 2018.

5. In November 2013 the Court of Appeal dismissed the Applicant's appeal against conviction. It allowed a limited appeal against sentence by quashing the Sexual Offences Prevention Order which the trial Judge had imposed in April 2012. The court considered **R v Smith & Ors [2011] EWCA Crim 1772** and determined that it was not an exceptional case and in the light of the indeterminate sentence of imprisonment it had been unnecessary to make the order.

Request for Reconsideration

6. The application for reconsideration is dated 16 November 2021 and was made on the published form CPD 2.

7. The grounds for seeking a reconsideration are as follows:

   The decision was irrational on the basis that:

(a) The evidence of the Applicant was misconstrued in the decision letter and contains a direct quotation of his evidence which he did not say at all. To the extent that the decision was based on this evidence it is irrational.

8. Additional comments within the application set out *"We respectfully submit that this could be rectified by listening to the recording particulary (sic) in respect of the comment and his evidence."*

Current parole review

9. The case was referred to the Parole Board in August 2020. The referral was for the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release. If after considering the case, the Board decided to direct the Applicant's release on licence, the referral invited the Board to make a recommendation in relation to any condition which it considered should be included in the licence.

10. If the Board did not decide to direct release on licence, the referral invited the Board to make a recommendation whether the Applicant was ready to be moved to open conditions, commenting on the degree of risk involved if this recommendation were to be followed.

11. The referral was considered by a Member Case Assessment panel on 3 February 2021 and directed to oral hearing. The oral hearing scheduled for 17 August 2021 was adjourned on the day due to ill-health of a panel member. The oral hearing was heard by video link on 21 October 2021 by a three member panel, which included a specialist psychologist member. Oral evidence was heard from the Community Offender Manager (COM), Prison Offender Manager (POM), a prison psychologist and the Applicant. The Applicant was legally represented during this hearing.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 27 October 2021 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019

13. 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)).

Irrationality

14. 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."

15. 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.

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

17. Whilst an application for reconsideration can be made on the basis of an unfairness resulting from "*misunderstanding or ignorance of an established and relevant fact*", as explained by Lord Slynn in the **Criminal Injuries Compensation Board [1999] 2 AC 330** and **Alconbury [2003] 2 AC 295**, the mistake of fact must be fundamental.

18. **E v Secretary of State for the Home Department [2004] QB 1044** set out the preconditions for such a conclusion:

> "*First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."*

The reply on behalf of the Secretary of State

19. The Secretary of State has indicated in an email dated 24 November 2021 that he does not wish to make representations in response to this application for reconsideration.

Discussion

20. The ground for reconsideration is that the decision was irrational in so far as it was based upon the evidence of the Applicant as recorded in the decision letter. The evidence is said to have been misconstrued in the decision letter and contains quotation of his evidence which he claims did not say at all. Only one example is given in the reconsideration grounds, which is that "*you told the panel that you*

have no sexual thoughts…on the infrequent occasions you do masturbate you do not ejaculate".

21. It is immediately apparent within the decision letter there are no direct quotations of the evidence of the Applicant. Where direct quotations are recorded from other witnesses these are clearly identified by speech marks and italicised text. I can therefore reject this aspect of the application immediately.

22. Furthermore, the generic description in this application that there are *'a number of inaccuracies/discrepancies recorded within the decision that would have been central to a risk assessment'* is not sufficiently specific to enable it to form a ground for reconsideration, as no details of the Applicant's case are set out. This decision deals therefore only with the specific example given in the grounds, set out above.

23. The relevant single sentence of the decision letter which has been identified reads:

> *"You told the panel that you have no sexual thoughts, do not attain an erection and on the infrequent occasions that you masturbate you do not ejaculate."*

24. Having listened to the recording of the Applicant's evidence, his evidence was that some of the medication he took for other health conditions affected his libido and that "*Even though I do have thoughts, I don't get an erection*." When asked about the frequency of masturbation he stated that "*Now … zero, absolute zero but if you're going back about a year or so ago, it was probably twice a month*".

25. It can be seen therefore that the Applicant did not tell the panel that he had no sexual thoughts, nor that on the infrequent occasions he masturbated he did not ejaculate. It is apparent therefore that the summary of this aspect of his evidence in the decision letter was not entirely accurate.

26. When the preconditions in **E v Secretary of State for the Home Department** are considered, it is right that there has been a mistake as to existing facts. The facts were only capable of being verified by the Applicant himself, but no counter-evidence was provided at the hearing. The Applicant and his advisers were not responsible for the mistake, which was that of the panel in the summary they produced of one section of the Applicant's evidence.

27. When the fourth factor is considered, it is plain from the decision as a whole that this mistake of fact was not the only evidential basis for the decision of the panel not to direct the release of the Applicant. Furthermore, the fact was not as to a matter which expressly or impliedly had to be taken into account when assessing his risk, but I am prepared to accept that the insertion of it in the decision letter implies that it was taken into account to some degree.

28. There is no evidence that this very minor part of the evidence played a material part in the panel reaching their decision. The evidence was mentioned within the section of the decision letter entitled *'Evidence of change since last review and/or circumstances leading to recall (where applicable) and progress in custody.'* It was not referred to again in the decision, notably not being mentioned in the sections for assessment of current risk, evaluation of effectiveness of plans to manage risk nor in the conclusion and decision section. The material factors in the decision are well set out in the decision letter and do not include any reference to this evidence. The factors were clearly outlined and were that there was no support for his release from professionals; that there was a limited understanding of his risk factors; and that there was little if any evidence that the work undertaken had addressed his risk factors. In addition, the Applicant had no familial or other personal support and it was considered that once the external controls in the risk management plan fell away his risk could not be safely managed in the community.

29. In my analysis of this ground, the fourth factor is not met, with the mistake of fact not being fundamental to the decision. I find therefore that there is nothing in this ground.

Decision

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

Angharad Davies
19th December 2021