

[2023] PBRA 186

Application for Reconsideration by Jones

Application

1. This is an application by Jones (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated the 28 September 2023 not to release the Applicant but recommending that he is transferred to open conditions following an oral hearing on 18 September 2023.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases on the basis (a) that there has been a mistake of law (b) that the decision is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are the decision, the application for reconsideration and the dossier consisting of 860 pages.

Background

4. The Applicant is serving a life sentence for murder imposed on 25 May 2005 with a minimum period to serve before any application for parole could be made of 13 years and 6 months. The Applicant attacked and killed a vulnerable victim in their own home who was offering to take him in as a lodger.

Request for Reconsideration

5. The application for reconsideration is dated 15 October 2023.
6. The grounds for seeking a reconsideration are as follows:
 - (a) It is argued the hearing was procedurally unfair in that the evidence of the independently instructed psychologist was misquoted; there was persistent incorrect reporting of the evidence in the decision letter and, if the panel had concerns about the risk management plan, they should have adjourned the case for further information to be obtained.
 - (b) Further or alternatively, it is argued that the panel made mistakes of fact and misinterpreted the evidence which has affected the panel's risk assessment in such a way as to render their decision irrational.

Current parole review

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7. The case was referred to the Parole Board on 5 August 2022 and is the fourth Parole Board review of the Applicant's case.
8. The panel heard evidence from the Prison Offender Manager (POM); the Community Offender Manager (COM); a prison psychologist and an independent psychologist instructed by the Applicant.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 28 September 2023 the test for release and the issues to be addressed in making a recommendation to the Secretary of State (the Respondent) for a progressive move to open conditions.

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. This decision of this panel was eligible for reconsideration.

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 paragraph. 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.

Procedural unfairness

13. 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.
14. 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.

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

Other

16. 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.

The Reply on behalf of the Respondent

17. The Respondent has made no submissions in response to this application.

Discussion

18. It is important that this application is considered within the framework of the issues that the panel had to decide. It was accepted that the Applicant had made progress since his last parole review and his condition was much better understood by the professionals who worked with him than it had been in the past. In the previous parole decision, the panel had flagged up that after further core treatment a future panel would then have to decide whether to release the Applicant or whether he would need a further spell in open conditions before he could be safely release.

19. At the hearing the POM, the COM and the prison psychologist all concluded that a further period in open conditions was required before the Applicant could be safely released. He had committed a very violent crime and had some difficulties in coping with the stresses of ordinary life. They were concerned that he would not be able to cope if he was released at the time of the hearing. This would increase the risk of re-offending.

20. An independent psychologist instructed by the Applicant reached a different conclusion. She decided that the Applicant could be safely released and that there was no need for there to be a period in open prison.

21. The panel summarised in clear terms the reasons for the different views and they decided that a further period in open conditions was necessary before they could be satisfied that it was no longer necessary for the Applicant to be confined.
22. The principal ground for reconsideration is that the panel got the evidence wrong in their decision letter. I accept as a matter of legal principle that that is capable in certain circumstances of giving grounds for reconsideration.
23. In this case the mistakes of fact in the decision letter are said to amount to procedural unfairness as well as rendering the decision irrational. In my judgment a mistake or mistakes of fact would not render a decision procedurally unfair unless the mistakes of fact were so extreme as to give rise to an inference that the panel was not impartial. In my judgment there is no proper basis from which any proper inference can be drawn in this case that the panel were not impartial. The decision letter seems to me to show a proper balance in the way that the evidence was considered.
24. I shall therefore have to decide whether the mistakes of fact, if there are any, render the decision irrational.
25. I shall first consider whether there were errors of fact and then consider whether they are sufficiently significant to have rendered the decision irrational. That means if the correct facts had been applied in reaching the decision there are reasonable prospects that the decision would have been different.
26. Complaint is made of what is said to be a misquotation from the psychologist instructed by the Applicant as saying that she believed that professionals now understood the Applicant's ASD (autism spectrum disorder) diagnosis and that "*he might ruffle feathers*". It is submitted that the psychologist did not use those words, but that they were used by the psychologist who was a panel member when questioning the psychologist instructed by the Applicant.
27. I have not checked the recording so I will assume that the Applicant's submission about this is accurate, and the psychologist instructed by the Applicant did not accept the phrase as correct when being asked questions. I have however considered it within the context of paragraph 2.27 as a whole where the evidence of the psychologist is recorded, and she is expressing and justifying her view that the Applicant's risk could be safely managed in the community. There can be in my view no complaint about the general effect of that paragraph and that it accurately reflects the psychologist's view. I do not agree that it makes the psychologist appear passive in her assessment of risk. The paragraph summarises her views adequately.
28. The Applicant also complains that the panel has exaggerated his behaviour during his last parole hearing in 2021. There is no doubt that there was an incident when there was an outburst by the Applicant during that hearing which did cause apprehension to some people and assistance was summoned. However, when recounting this incident in the 2023 decision it is said that the Applicant made threats and staff entered the hearing room.
29. This was discussed during the 2023 hearing, and I have not checked the hearing recording but will assume that in so far as the 2023 decision differs from what is

set out in the 2021 decision the 2021 is more accurate. On that basis it is possible to say that the gravity of the incident is exaggerated in the 2023 decision.

30. The Applicant's account of what happened and why it happened is set out in paragraph 2.4 of the 2023 decision. It is recorded as part of the history in the decision and does not seem to have played any part in the panel reaching their conclusion that the Applicant did not meet the test for release.
31. The Applicant further complains that in their decision the panel say incorrectly that the AP (approved premises) bed was not confirmed whereas the correct position was that the bed space was available at the time of the hearing from a particular date, but that the date might be subject to change. I do not consider this to be a justified criticism. The panel said at paragraph 3.3 *"the panel noted that a bed in an Approved premise in ... had been secured. He would be expected to stay at the AP for a period of 12 weeks. The dates of bed availability would be confirmed once release was directed"*. I do not consider that that is materially different from what the Applicant asserts was the evidence.
32. The Applicant goes on to complain that the panel incorrectly said that the risk management plan (RMP) had not been fully developed at the time of the hearing which the Applicant says was not accurate. Again, I do not think this criticism is justified. The panel said at paragraph 3.1 of the decision *"The risk management plan had not been fully developed at the time of the hearing. The panel was provided with an outline risk management plan; this and additional requested licence conditions were discussed in the hearing and future plans explored. The panel assesses that the proposed plan provide the intervention, controls and supports that are relevant to [the Applicant's] case."*
33. The panel took the view that the plan was not yet complete, and they were entitled to take that view, but in any event they did not regard it as unsuitable as is clear from the above quotation. That was not the reason why release was not directed.
34. The Applicant says that in the circumstances where the panel took the view that the RMP was incomplete that they should have adjourned for the gaps to be filled in. The Applicant argues that the failure to do so renders the decision procedurally unfair. While that may be arguable in a case where the lack of detail in the RMP is the reason for refusing release, that was not the case here. A proper reading of the decision is that the panel took the view that the Applicant did not meet the test for release as he required a further period of testing in open conditions before being released in accordance with the evidence of a number of witnesses at the hearing.
35. The panel went on to recommend a transfer to open conditions and the Applicant complains that it has ignored the evidence that he would not go for very good reason to the open prison where it was being suggested assistance from FOLS (Forensic Outreach Liaison Service) would be provided. While this might be a good reason for not directing a transfer to open conditions it was not relevant to the reason why the panel did not consider release to be appropriate.
36. At Ground 4 the Applicant complains about the contents of paragraph 2.22 (this is inaccurately referred to in the grounds as paragraph 2.2). In part of that paragraph the panel refer to the *"risk to the public is linked to the use of violence if he is trying*

to obtain money and goods". That is interpreted by the Applicant as talking about the risk of robbery and the Applicant correctly points out that he has no convictions for robbery. I am not satisfied that that is what the panel was talking about. They were talking about the risk of frustration arising when the Applicant is unable to get across to someone what he wants. While it would have helped if it had been better expressed in the decision, I do not consider that that was relevant in any way to the decision not to release the Applicant.

37. The panel were entitled to consider the Applicant's plans for the future and to express concern for lack of settled plans for move on accommodation after the end of the period at an AP. It is not always necessary but in certain cases, and this is certainly arguably one of them, a panel is entitled to be concerned at what would be the effect of not having that sorted out at an early stage. I do not consider that this criticism of the decision is made out.
38. Finally, at Ground 6 the Applicant complains about what the panel says at paragraph 4.14 about calls made by the Applicant to the Samaritans in that it is said it misrepresents the evidence. When that paragraph is read in conjunction with paragraph 2.13 it is clear that the panel fully understood that there were so many calls made by the Applicant because he could not get through.
39. I have considered all the complaints made in the application even if I have not referred to them all specifically in this decision. There is some justification for a number of them, but not all of them. I have considered their effect cumulatively and individually. In the end my conclusion is that even if the panel were labouring under a misapprehension about some of the facts that would not have affected the eventual decision and do not render the final decision irrational.
40. The panel considered that on the evidence they had heard the Applicant needed further help and testing in open conditions before he met the test for release.
41. On the evidence they heard, they were entitled to come to that conclusion.

Decision

42. 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.

Sir John Saunders
30 October 2023