

[2020] PBRA 117

Application for Reconsideration by Lyons

Application

1. This is an application by Lyons (the Applicant) for reconsideration of a decision of an oral hearing dated 25 June 2020 not to direct release and to recommend that he return 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 the dossier, an application dated 13 July 2020 and supplementary submissions of 20 July 2020, and a response from the Secretary of State dated 23 July 2020.

Background

4. The Applicant is serving an indeterminate sentence for public protection for an offence of rape. He was aged 21 at the time of the offence and conviction. His minimum tariff of five years and six months (less time on remand) expired on 1 September 2016.

Request for Reconsideration

5. The application for reconsideration is dated 13 July 2020 and was in the form of an email. On the 20 July 2020 further 'submissions' were received, which consisted of photographs of five pages of the decision letter, two of which were identical, with handwritten comments from the Applicant.
6. The application was not made on the published form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I, as the Reconsideration Assessment Panel, will look for evidence to sustain the complaints and, reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made.
7. The grounds for seeking a reconsideration are as follows:



- (i) That the decision was irrational in that the panel were under the mistaken belief that:
 - (a) the Applicant did not have any overnight temporary releases (when the Applicant had two between 24 June and 26 June 2019);
 - (b) the Applicant had a child;
 - (c) the Applicant received an adjudication for unidentified tablets after being returned to closed conditions;
 - (d) the Applicant received an adjudication in closed conditions; for being in possession of a gaming console which was not listed;
 - (e) the ten temporary releases undertaken by the Applicant had been overlooked.

Current parole review

- 8. The case was referred to the Parole Board in January 2019. 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.
- 9. The referral was considered by a Member Case Assessment panel on 4 August 2019 which deferred it so that the Applicant could undertake temporary releases. The referral was again considered by a Member Case Assessment panel on 6 February 2020 which referred it to oral hearing.
- 10. The oral hearing was heard remotely by remote video conference on 25 June 2020 by a three-member panel, which included a judicial chair and two independent members. It was not possible to hold the scheduled oral hearing face to face at the prison due to restrictions imposed by the COVID-19 pandemic. Oral evidence was heard from the Offender Manager (OM), Offender Supervisor (OS) and the Applicant. The Applicant was legally represented throughout and representations were made on his behalf. At the time of the oral hearing the Applicant was aged 30.

The Relevant Law

- 11. The panel correctly sets out in its decision letter dated 2 July 2020 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

- 12. 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)).



13. 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

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.

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The reply on behalf of the Secretary of State

17. The Secretary of State has replied to the application by way of a letter dated 23 July 2020. The letter states that: "*PPCS, on behalf of the Secretary of State, contacted the Offender Manager (OM) on the 20, 21 and 22 July in regards to this matter who confirmed that [the Applicant] has undertaken overnight [temporary release] from the 24 June 2019 to 26 June 2019, to [designated accommodation].*"

Discussion

18. The panel had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of hearing the Applicant as well as the OS and OM. The Applicant was also legally represented throughout.
19. 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 appellants (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.

Ground (a)

20. The application for reconsideration states that the panel "*were under the mistaken belief that the Applicant did not have any overnight [temporary releases] (when the Applicant had two ... between 24 June and 26 June 2019)*".
21. The dossier makes reference in a number of documents to the Applicant's overnight temporary release to designated accommodation from 24 June 2019, including the report from the OS, the Member Case Assessment decision directing to an oral hearing, and the letter from the Applicant. As set out, the representations from the Secretary of State confirm that the Applicant had an overnight temporary release from 24 to 26 June 2019. Although the reconsideration representations claim there were two, this is only one period of temporary release albeit over two nights.
22. The decision letter states: "*It appears that [the Applicant] did not undertake overnight [temporary release] although referrals and arrangements were made for [the Applicant] to leave the prison to go to [designated accommodation] in July. All ... passed without incident.*"
23. I consider that the Applicant has provided objectively verifiable evidence that he undertook overnight temporary release between 24 and 26 June 2019. The fact was one which was existing at the time of the oral hearing and was established, being set out within the dossier within a number of entries. There is no evidence that the Applicant or his legal adviser was responsible for the mistake. However, I do not consider that the mistake played a material part in the reasoning of the panel. The panel concluded that the Applicant "*must have been doing well in the open estate because [he] would not have been allowed out of the prison on [his] own.*" However, its concern was that "*in the summer of last year the picture changed*". This was after the overnight temporary release in June 2019.
24. The decision letter clearly sets out that it was the extensive periods of failure to comply, both in the open estate and to a lesser extent in closed conditions that led to the conclusion that it could not accede to the Applicant's request to be released. These periods of failure were after the overnight temporary release of 24 to 26 June 2019. It is my conclusion therefore that the mistaken apprehension of fact on this one issue did not play a material part in their reasoning. This ground does not, therefore, succeed.

Ground (b)

25. The decision letter refers to the Applicant having a child. This reference is within a section where the risk factors which were noted by the previous panel to deal with



the Applicant's case in 2018 had been adopted, and the adopted excerpt is set out into the decision. Within the dossier there is a reference in the pre-sentence report to the Applicant having been advised whilst on remand that his former partner had given birth to their child. The Applicant states in his reconsideration application that he does not however have a child and that probation were aware that his former partner had been claiming this when it was not true.

26. In respect of this ground, I consider that the Applicant has failed to provide objectively verifiable evidence that this fact was mistaken. If I am wrong on this, I also do not consider that if there was a mistaken fact about him being a parent that it played a material part in their reasoning. The reference was contained within the section dealing with risk factors, and it was the relationship with the former partner which was being identified as a risk factor not the child. There is nothing in this ground.

Grounds (c) and (d)

27. The dossier contains details of the adjudications that the Applicant has been subject to. In respect of the adjudication matters referred to in the reconsideration application, these are adjudications which date back to the summer of 2019 when the Applicant was first moved from open conditions to closed conditions.
28. The decision letter refers to the reasons why the Applicant was returned to closed prison and details both the failing of a mandatory drugs test and the finding of unidentified tablets in his cell. There is a reference then to an adjudication process in closed conditions for which he received seven days loss of association. It is not clear from the decision letter whether it was believed by the panel to be an adjudication for having unidentified tablets or for the failed mandatory drugs test.
29. The decision letter also refers to the Applicant having received an adjudication for being in possession of a gaming console which was not listed with his property. The Applicant claims in his reconsideration submissions that this was "*rescinded as they made a mistake*".
30. I do not consider that there is objectively verifiable evidence that these facts were mistaken, there is clearly a dispute of fact by the Applicant in respect of these adjudications, with there being evidence in the dossier that he has disputed these matters previously. There is nothing in these grounds.

Ground (e)

31. Within the decision letter there is reference to the Applicant having undertaken eight temporary releases. No explicit reference is made to the total of ten temporary releases the Applicant claims to have had. I do not consider that there was any finding of fact on the number of total temporary releases and therefore there can have been no mistake made. There is, therefore, nothing in this ground.

Decision

32. 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
1 September 2020