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[2020] PBRA 195

Application for Reconsideration by Robertson

Application

1. This is an application by Robertson (the Applicant) for reconsideration of a decision of a Parole Board panel dated the 14 October 2020 not to direct 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:

    i. The dossier of 417 pages including the Decision Letter (DL) under review.
    ii. The representations submitted by and on behalf of the Applicant.
    iii. A 29 page application from the Applicant himself.

Background

4. The Applicant received an extended sentence of 11 years imprisonment made up as 5 years 6 months in custody and 4 years 6 months extended licence in January 2015. He was released on licence in June 2019 and recalled/returned in December of the same year. He was 19 years old at the time of sentencing and is now 25 years old.

Request for Reconsideration

5. Two applications for reconsideration have been received. The first dated 21 November 2020 appears to be in the Applicant's handwriting. The second dated 24 November 2020 was submitted by his legal representative. They are lengthy and repetitive and what follows is an attempt to summarise them in a logical order. Following a request to the Applicant's legal representative it was confirmed that the Applicant wishes both applications to be considered.

6. Procedural irregularity.
    a. The Applicant should have been granted an oral hearing. The hearing was thus not a fair hearing. As a result, the panel deprived itself of the opportunity of hearing from, and questioning, the Applicant, and of resolving a number of issues which were in dispute, including, but not confined to, the lawfulness of his recall. The failure to grant an oral hearing:

i. breached the Applicant's rights under Article 5 and 6 of the European Convention on Human Rights.
ii. was in breach of the principles set down in the leading case of *Osborn, Booth and Reilly [2013] UKSC 61.*

b. To the extent that the decision not to hold an oral hearing was based upon the applicant's previous conduct at a parole hearing – nodding and shaking his head to closed questions and providing written answers to open questions, it resulted in procedural irregularity since in the event that the applicant wished to conduct an oral hearing in the same way again an intermediary could have been instructed to assist – as suggested in a Member Casework Assessment decision in the case of March 2020.
c. The Applicant was not given proper notice of the decision not to hold an oral hearing so that he could make representations. This was in contravention of the Listing Prioritisation Framework issued in the wake of the current Covid-19 pandemic concerning the possibility of resolving cases originally set down for oral hearing on paper.
d. Correspondence from the Applicant to the Parole Board was either not brought to the attention of the eventual decision-maker, or if it was it was ignored. The correspondence made it clear that the Applicant wished to make representations to the panel.
e. The failures alleged at a. and b. and d. above resulted in breaches of Rules 20-22 of the Parole Board Rules (PBR).
f. The Applicant was not provided with a complete dossier. In particular the Applicant was not provided with copies of certain reports – thus being deprived of the opportunity of responding to the contents of the reports - and his own representations to the Board were not included in the dossier. These failures represent breaches of Rules 6 and 11 of the PBR.
g. Requests and submissions addressed by the Applicant to the Board – some sent by registered post – were not acknowledged or answered. (See PBR Rule 12(3)).
h. The Applicant was not served with a form Stake Holder Response Form or the directions thereon made by the panel chair and thus had no opportunity to respond to them within 14 days. There have thus been breaches of Rules 6, 14 and 21 of the PBR.
i. The Applicant was not allowed 14 days to make representations concerning the decision whether or not to hold an oral hearing.
j. The panel failed to comply with Parole Board guidance concerning listing prioritisation.
k. The Applicant was unable, because of lack of funds and ineligibility for legal aid, to instruct a legal representative to represent him.
l. As the result of some or all of these deficiencies the Applicant was unable to put his case properly before the Board.

7. Irrationality.
   a. As a result of one or more of the procedural failings set out above the decision was irrational.
   b. In particular the failure of the panel to explore the circumstances surrounding the Applicant's recall made the decision irrational as well as procedurally irregular.
   c. The Decision Letter contains factual inaccuracies, in particular –

i. Certain alleged breaches of licence conditions were not made out or were based on a misunderstanding of the particular condition alleged to have been breached.
ii. The criteria used by the Probation Service to instigate the recall were not compliant with the terms set out for the benefit of the Service in deciding whether to instigate the recall.

d. The Decision Letter refers to previous convictions for offences of which the Applicant has never been convicted.
e. As well as the procedural failings alleged at paragraph 7 above the decision of the panel not to hold an oral hearing was irrational since
   i. The Applicant disputes the correctness of his recall. A number of the matters which prompted the decision by the Community Offender Manager to institute recall were factually inaccurate.
   ii. The licence condition concerning non-association with known sex offenders had no rational basis. The Applicant was required to reside at particular premises. There were known sex offenders at the premises so that "association" with such a person was unavoidable as the result of that condition. In addition, the guidance concerning the imposition of such conditions was not followed.
f. The decision not to hold an oral hearing made any decision in the case irrational since the panel deprived itself of the opportunity of hearing witnesses, including the applicant. (The grounds submitted by the legal representative submit that – contrary to the submissions made by the Applicant in person that he was not eligible for legal aid and could not afford to pay for legal representation – the Applicant would, had an oral hearing been directed and held, been able, as he now has, to instruct a solicitor.)
g. Within the Decision Letter (DL) there are several inaccuracies sufficient to render the decision irrational.
   i. The DL fails to record the fact that in respect of some of the offences the Applicant was not an adult when they were committed. Such offenders are considered to be more amenable to rehabilitation than older offenders.
   ii. The decision not to allow the applicant to challenge the circumstances alleged to have justified his recall to prison meant that any decision was irrational.
   iii. Mistakes were made in the DL concerning exact offences and the number of them of which the applicant had been convicted.
   iv. The framework which governs the decision by the Secretary of State to institute a recall to prison was not followed. In addition, a number of the matters alleged to have provided grounds for recall were erroneous.

Current parole review

8. The case was considered by a Parole Board member on 6 March 2020. An oral hearing was directed. On 21 May 2020, following the restrictions imposed in the wake of the Covid-19 pandemic, the case was considered by a single member to review the necessity of an oral hearing. The member deferred the case for directions to be complied with so that a decision could be made whether to proceed with a remote telephone oral hearing or to conclude the case on the papers. In July 2020 the deadlines originally set for compliance with the directions

set in May were extended. In August 2020 a further extension was agreed. Following compliance with those directions the panel member considered the case in the round and concluded that a decision could be made on the papers. Having come to that conclusion the member issued the decision now under review.

The Relevant Law

9. The panel correctly sets out in the decision letter dated the 14 October 2020 the conditions for release.

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 is therefore an eligible decision.

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 which resulted 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 focuses on the actual decision.

15. 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.

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

The reply on behalf of the Secretary of State (the Respondent)

16. Representations dated 3 December 2020 have been received from the Respondent. The representations concern the allegation by the applicant that in spite of frequent requests he was not supplied with a copy of his recall dossier. The respondent claims that the applicant's Offender Supervisor (OS) who is identified by name supplied the applicant with the dossier on 18 August 2020, and later, on 7 September 2020, with an updated version of it. In addition, the OS is unaware of any attempt made by the applicant to appeal his recall within the prison system.

17. It is clear from my review of the papers supplied that the first contention is correct (see paragraph 18 below) and I have seen nothing in the papers to cast doubt on the correctness of the implied second contention.

Discussion

18. Before embarking on a discussion of the grounds and my decision, it will be helpful to set out as much of the chronology as has been made available to me.

6.3.2020	Case Directed to oral hearing. Dossier by then contained 157 pages.
21.5.20.	Case reconsidered in the light of the Covid-19 restrictions. Dossier by then contained 240 pages. The directions contained the information that the Applicant, in addition to changing his name to [redacted], had in fact remained silent during his previous parole hearing in 2017, answering questions either in writing or – if a yes or no answer was possible - by nodding or shaking his head. The panel chair reasoned that if the Applicant maintained this stance that would rule out a telephone or video hearing. In addition, at that time there was no prospect of a face to face hearing being arranged due to the Covid-19 situation. The member indicated that when further directions, or earlier directions had been complied with it would be possible to decide whether the case could be dealt with on the papers. The applicant was given until 30 July 2020 to make any representations – presumably including the type of hearing he wished.
6.8.20.	The Applicant wrote a letter to the Board in which he: Complained about the late provision of the dossier to him following his recall in January 2020. Complained that since then he had tried to submit representations, including a Form SHRF. It concluded with the words, *"Please confirm you will not review my case again with no representations from me."* I have found no reference to this letter in the dossier and it is not referred to in the DL.

7.8.20.	The chair dealt with applications for extensions from a psychologist and the Offender Manager reports. These were granted.
18.8.20.	The Applicant's Offender Supervisor supplied a copy of his post-recall dossier to the Applicant.
19.8.20	The Applicant wrote another letter to the Board. In it he: a. Indicated that he had now received the post-recall dossier. b. Asked for an extension to the deadline set for him of 25 August to put in representations and asked for other documents – including the Board's decision of 2019 directing his release and representations from previous solicitors at a previous hearing in 2017 to be added in the dossier. It is clear from the terms of the letter that at the time of writing he was unrepresented and was intending to conduct the hearing unrepresented. The letter was silent on the question of whether he would take part in a hearing by asking and answering questions orally. Both letters were written in his previous name but with the correct prison and prison number for his new name, the name under which his case was registered within PPCS and the Parole Board. This may explain why this correspondence never reached the panel chair and was not included in the dossier.
20.8.20.	The Parole Board received the letter above dated 6 August 2020. I have not found an answer to the letter, or any evidence that it was seen by the panel chair before the DL was issued, in the papers supplied to me for the purposes of this reconsideration. (See above entry for 6 August 2020.)
7.9.20.	The Parole Board received the letter above dated 19 August 2020. Once again, I have seen no evidence that the letter was seen by the panel chair before the DL was issued. The same day an email was received from a legal representative indicating that he could assist with the case. A Parole Board caseworker replied giving him until 10 September 2020 to submit representations. The same day the applicant's OS supplied him with an updated version of the dossier.
11.9.20.	A request was received at the Board from the same legal representative asking for an extension of 2 weeks for the submission of representations. This was granted. However, no representations were received.
14.10.20.	The Decision Letter (correctly) referred to the topic by saying that legal representations had been invited but that none had been received.
21.11.20.	The Applicant submitted representations to the Board asking for reconsideration.
24.11.20.	A legal representative, from a different firm than the one who had communicated with the Board in September, submitted representations to the Board asking for reconsideration.

Ground A

19. I have focused on the central and, in my judgment, decisive ground. The Applicant maintains that he should have been granted an oral hearing. Indeed, until he was made aware of the decision there is no evidence that he had any knowledge that there was not going to be one, merely that the possibility of dealing with the case on the papers was being considered. It is clear that the relevant Covid-19 guidance, the requirements of the ordinary Parole Board Guidance, and the principles set out by the Supreme Court in ***Osborn*** require the offender to be given a chance to challenge a decision to decide his or her case on the papers. While the Applicant has not helped himself by apparently vacillating between representing himself and obtaining representation and then changing his representation – submissions were expected to be made on his behalf by a legal representative from one firm of solicitors before the decision and have been made by another from another since it was issued – in addition to the lengthy submissions which have been made since by the Applicant himself, the fact is that:
    - It is now clear – whether because of the Applicant's change of name or for some other reason - that some of the points now made by both the Applicant and his current legal representative on the merits of the case – in particular concerning the fact surrounding his recall - never found their way to the panel chair; and
    - I have found no indication within the papers that the Applicant was informed in advance of the panel chair's decision to decide the case on the papers so that he could make representations as to why the decision should be changed.

20. These represent a serious procedural irregularity. It is of course right to say – as the Decision Letter makes clear – that at a previous hearing the Applicant had elected to play a very limited part in the proceedings. However, there was every indication (from the correspondence he sent following the original decision to direct an oral hearing) by the time the decision was issued that either on his own or with the assistance of a legal representative he wished to play a full part in the hearing under review. As his current legal representative has submitted, even if he maintained the attitude he had adopted at his previous oral hearing steps could have been taken to appoint an intermediary to assist him and the panel.

21. The Applicant should be aware that the Parole Board has no power to overturn a decision to recall a prisoner. A recall decision is instigated by the Ministry of Justice and may be appealed within the prison framework or judicially reviewed in the High Court. However the panel must of course, as the DL makes clear it did, consider the circumstances of the recall and come to a conclusion as to whether, and if so to what extent, the circumstances of the recall which it finds to have existed affect its judgment as to the risk of serious harm to members of the public posed by the prisoner at the time of the hearing together with all the other current information relevant to risk which may be presented by witnesses, report-writers and the Applicant himself. The relevant portion of the DL reads: *"The panel has a duty to consider the appropriateness of your recall decision. On all the evidence available to it, the panel has found that the recall was appropriate. The panel concluded that you failed to evidence your ability or willingness to comply with those conditions that were put in place to manage your risk."*

22. This conclusion was reached without an explanation as to why the panel accepted the account given by the witnesses and without the benefit of the account of the Applicant.

Decision

23. Accordingly, it is clear that one of the matters which led to the panel's decision not to direct release was the factual situation surrounding the recall. The Applicant had in fact made it clear in correspondence that he wished to make representations but the panel was unaware of that correspondence. Accordingly, I find that this amounts to a serious procedural irregularity and direct that the case should be reconsidered by a fresh panel.

Sir David Calvert-Smith
15 December 2020