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[2020] PBRA 88

Application for Reconsideration by Reid

Application

1. This is an application by Reid (the Applicant) for reconsideration of a decision of a single member panel of the Board refusing a request for an oral hearing, following an earlier decision made by a differently constituted single member panel 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. This is an eligible case.

3. I have considered the application on the papers. These are the decision of 28 April 2020 which made no direction for release; the refusal to direct an oral hearing dated 5 June 2020; the dossier; representations on behalf of the Applicant and relevant emails.

Background

4. The Applicant who is now 43 years of age, was, in December 2008, sentenced to an indeterminate sentence for public protection in respect of an offence of sexual assault. The minimum term imposed was one of two years, the tariff expired in December 2010. In December 2008, the Applicant was produced from prison and made the subject of a sexual prevention order. At that hearing, he assaulted a security officer while escaping from the court building. He remained unlawfully at large until 17 March 2009. On 16 March 2009, he committed an offence of rape. He was convicted of that offence following a trial. During that trial which took place in August 2010, he attempted to escape from court but was restrained. In March 2011, in respect of the escape from custody in December 2008, two counts of rape and the attempted escape in August 2010, he was sentenced to a life sentence with a minimum term of six years and three months.

5. This is an application which arises in unusual circumstances. On 28 April 2020, a single member panel of the Board issued a paper decision making no direction for the Applicant's release. From enquiries I have made, as the Reconsideration Assessment Panel, I understand that the decision was received by the appropriate Case Manager on 28 April 2020 and despatched by email to the parties on 29 April 2020.

6. Following that decision, a written application, in the form of an email, dated 27 May 2020 was sent to the Board (receipt of which was acknowledged by them the same

day) by solicitors who had recently been instructed by the Applicant. The relevant part reads as follows:

> *"Please accept this email as a written request on behalf of [the Applicant] for an oral hearing simply to ensure that you receive the request by the deadline date. As previously advised I have a video link appointment with [the Applicant] scheduled for this afternoon and would hope to be in a position to provide further more detailed representations by no later than 1 June."*

7. The representations referred to in that email were sent to the Board by email dated 29 May 2020. They ran to six pages and following a submission that their client "*should not be disadvantaged by the failure of previous legal representatives to submit written representations on his behalf",* they go on to develop arguments as to why an oral hearing would be appropriate.

8. The solicitor's emails dated 27 and 29 May 2020 together with their written representations were sent by a Case Manager to a Duty Member (not the member who made the no release decision in April 2020). The Duty Member confirmed in an email dated 10 June 2020 that he never saw the solicitor's email of 27 May 2020 and only had sight of the representations of 29 May 2020 (which I accept). The reason for this administrative error has not been satisfactorily explained. It is clear that the Applicant's position was significantly undermined by the absence of the email of 27 May 2020 which is now accepted to amount to an in-time application pursuant to Rule 20(1).

9. On 5 June 2020 the Duty Member rejected the application to grant an oral hearing in the following terms:

> *"We refer to the provisional decision of your parole review recently issued by a single member panel. As set out in the decision, you were allowed 28 days in which to consider whether to accept the decision or request an oral hearing.*
>
> *We confirm that you have requested an oral hearing. The paper decision in this case was made on 28 April 2020. Legal representations seeking an oral hearing are dated 29 May 2020. It is indicated within those representations that the Parole Board advised that the deadline for making a request for an oral hearing would be 27 May 2020.Your representations detailing reasons as to why you seek an oral hearing have been made out of time. The request for an oral hearing is therefore refused."*

10. This decision was issued to all parties on 9 June 2020 by email. The following day the Applicant's solicitors acknowledged receipt of the decision and pointed out that the Duty Member had not referred to their email of 27 May 2020. The Board's Case Manager referred the matter back to the Duty Member who, as I have said, confirmed that he had not seen the 27 May 2020 email.

11. Where a panel makes a decision refusing to send an application for parole to an oral hearing, the decision remains provisional, subject only to reconsideration under Rule 20(6)(a). It is clear that the request for an oral hearing was made within time but was believed by the Duty Member to be out of time because he had not seen the solicitor's email of 27 May 2020. This was why the application was refused.

12. If a decision is made as a result of an administrative error leading to a mistake of fact, it is clearly desirable that the error is corrected as soon as possible as a matter of fairness to the parties.

13. The decision of 5 June 2020 having been made, it could not be re-made, subject only to a reconsideration under Rule 20(6)(a) of the Parole Board Rules. The Board's position was that it was *"functus officio"* in other words, it had "*performed its office*" and had no power do anything further. An analysis of the relevant email chains shows that at the point at which the Board became functus, the decision made by the Duty Member had been communicated to the relevant parties and the administrative error had been revealed.

14. There must come a time when a decision cannot be altered other than by way of an appeal process. Once the decision of 5 June 2020 had been communicated on 9 June 2020 then the error could not have been corrected and the Board was *"functus officio",* leaving only the appellate route available, namely, a reconsideration.

15. Given this background it is clear to me this application falls to be considered under the reconsideration provisions, the Applicant having indicated through his solicitors that he wishes the decision made to refuse him an oral hearing to be reconsidered on the basis that it was irrational or in the alternative procedurally unfair.

16. The question I must resolve therefore, is whether the decision of 5 June 2020 to refuse the application for an oral hearing was irrational and/or procedurally unfair.

The Relevant Law

Parole Board Rules 2019

17. 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

18. 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."*

19. 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.

20. 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

21. 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.

22. 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.

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

Oral Hearings

24. In the case of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed as the purpose of an oral hearing is not only to assist in decision making but also to reflect the prisoner's legitimate interest in being able to participate in a decision that has important implications for him.

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

25. On behalf of the Respondent it has been confirmed that he has no submissions to make in respect of this application.

Discussion

26. Given the unusual circumstances of this case it does not seem to me neither necessary nor appropriate to consider the decision of 28 April 2020. I have before me submissions on behalf of the Applicant in support of their application for an oral hearing. They point to the age of the last psychological report and the fact that issue is taken on *"much of the information"* outlined in that report dated October 2018 and address matters in support of their application for an oral hearing arising out of the Judgment of the Supreme Court in **Osborn**.

27. It is possible to argue that where a decision is made as a result of an administrative error leading to a mistake of fact the final decision may well be an irrational one. However, in approaching the question of a reconsideration of the decision in this case, it seems to me that the better approach is to focus not on irrationality but rather on the question of procedural unfairness.

28. There is in my judgment a very significant "*known unknown*" and that is what impact sight of the solicitor's email of 27 May 2020 would have had upon the Duty Member who rejected the application for an oral hearing without knowing about, let alone considering, the fact that an application had been properly made within time.

29. In my judgment had the Duty Member been aware;

    (a) that a timely request for an oral hearing had been made in compliance with Rule 20(1); and,

    (b) that all Rule 20(1) required was an application in writing; and,

    (c) that there was indeed in existence, and dated 27 May 2020, an email amounting to a written request for an oral hearing,

    a different result may well have followed. Indeed, I hope I may be permitted to go further and say that an experienced panel member aware of those matters would have, in applying the principles in the case of **Osborn**, been very likely to have granted the application.

30. Due to a serious and unexplained administrative error, the Applicant was deprived of the opportunity to have his application considered in full, and in the best possible light.

31. I remind myself that the overriding objective when considering procedural unfairness is to ensure that the Applicant's case was dealt with justly. I find that as a result of the circumstances surrounding it, the decision made on 5 June 2020 was fundamentally flawed due to the way in which the Rule 20 (application for an oral hearing) process was handled. Consequently, the decision dated 28 April 2020 made under Rule 19 is unsafe and should be reconsidered.

Decision

32. I find that the decision of 5 June 2020 to refuse to consider the application for an Oral Hearing and, as a result, the decision of 28 April 2020 to refuse the release of the Applicant to have been procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted on this ground and the matter should be reviewed by a fresh panel.

Michael Topolski QC
9 July 2020