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[2022] PBRA 144

Application for Reconsideration by Bruton

Application

1. This is an application by Bruton (the Applicant) for reconsideration of a decision made on the papers by a single member dated 3 August 2022 not to direct his release.

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 (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.

3. I have considered the application on the papers. These are the paper decision, the dossier, and two documents from the Applicant which form the application for reconsideration.

Background

4. The Applicant received a sentence of imprisonment for public protection (an **IPP sentence**) on 25 October 2011, following conviction after trial for damaging property with intent to endanger life. He received a concurrent sentence of imprisonment for six months following conviction after trial for dangerous driving. He was acquitted of attempted murder. His tariff expired on 12 September 2018. The Applicant was 42 years old at the time of sentencing and is now 53 years old.

Request for Reconsideration

5. The application for reconsideration is dated 20 August 2022 and has been drafted and submitted by the Applicant. It is accompanied by a copy of correspondence between the Applicant and Offender Management Unit (**OMU**) at his establishment dated 23 September 2022.

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 will look for evidence to sustain the complaints and reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration.

7. It submits that the decision was both irrational and unfair. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No submissions were made regarding error of law.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State in March 2022 to consider whether or not it would be appropriate to direct his release. If the Board did not consider it appropriate to direct release, it was invited to advise the Secretary of State whether the Applicant should be transferred to open conditions.

9. It was considered by a single-member Member Case Assessment (**MCA**) panel on 3 August 2022, by way of paper review. The panel did not direct the Applicant's release or recommend a transfer to open conditions.

The Relevant Law

10. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019

11. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

12. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

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.

Procedural unfairness

17. 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.

18. 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.

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

The reply on behalf of the Secretary of State

20. The Secretary of State has submitted no representations in response to this application.

Discussion

Eligibility

21. The panel's decision was made on 3 August 2022 under rule 19(1)(b). Rule 19(6) provides that any such decision is a provisional decision which then falls under rule 20. Rule 20(1) gives a prisoner the right to apply in writing for a panel at an oral hearing to determine the case. Any such application for an oral hearing must be served in accordance with rule 20(2) within 28 days of receipt of the decision.

22. Under Rule 28, the time allowed for an application is 21 days from either the date a rejected application for an oral hearing is sent to the parties, or if no application is made, the last date of the 28 days the prisoner can apply for an oral hearing.

23. The application for reconsideration was dated 20 August 2022. The Parole Board Case Manager asked the OMU to confirm whether the Applicant was requesting reconsideration or an oral hearing. In a document dated 23 September 2022 (which appears to be a response to a memo from OMU to the Applicant), the Applicant confirmed that he wished his submission of 20 August 2022 to be treated as an application for reconsideration rather than for an oral hearing. In this document, the

Applicant also made three further points which he wishes to be appended to his application.

24. Applying the rules as they stand, I am satisfied that the application dated 20 August 2022 is validly within the ambit of rule 28 and made in time. The additional points dated 23 September 2022 are out of time. However, in fairness to the Applicant, I am using the discretion afforded to me by rule 9 to admit them in the interests of justice.

25. The Applicant first argues that the panel made material mistakes of fact in coming to its decision, leading to unfairness and irrationality under the precedent established by **E v Secretary of State for the Home Department [2004] QB 1044.**

26. It is a well-established ground for judicial review that the tribunal has taken into account information which it is accepted is inaccurate. The grounds for reconsideration mirror those for judicial review and therefore it is also a ground for reconsideration. I accept that it is capable of being both irrational and procedurally unfair to take into account inaccurate factual information in making a decision. It is important that decisions are not only fair but are also seen to be made according to a fair procedure. If incorrect information is included in the decision letter, the fairness of the procedure is called into question.

27. However, it will not invariably follow that if there is an inaccurate fact or facts in the decision letter that an application for reconsideration will be granted. Reconsideration, like judicial review, is a discretionary remedy and, if I am satisfied that the incorrect fact did not affect the decision then the application is likely to be refused. The mistake of fact must be fundamental. **E v Secretary of State for the Home Department [2004] QB 1044** (as relied upon by the Applicant) sets out the preconditions for such a conclusion at (para. 66) as follows:

> "*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.*"

28. It is also argued that the decision raises serious concerns about the impartiality of the panel as it has "*simply copy and pasted data from other sources to knock-up a pre-decided negative outcome (again) without doing due diligence".*

29. The Applicant first raises three points relating to oral evidence given to the panel which considered his case at an oral hearing on April 2021. He contends that the Parole Board has a transcript of that hearing "*in hard copy*". No such transcript was disclosed in the dossier and the panel in the present review would not have seen or considered it. It is not open to the Applicant to raise oral evidence from a previous hearing in support of an application for a paper review. It cannot be unfair for the panel, in making the decision under review, to fail to take into account historic oral evidence that it had not heard for itself or seen transcribed.

30. Moreover, the lawfulness of the decision of the April 2021 panel was challenged by way of judicial review in **R(Bruton) v Parole Board [2022] EWHC 1692 (Admin)**. Mrs

Justice Foster noted (at para. 56) that the Applicant's essential submission was that "*the decision should go back to the Parole Board for them to amend the findings properly to reflect the evidence as it was at the hearing*". The application was refused, and the High Court held that no material errors of fact or misunderstanding were made by the panel (para. 71). The Applicant's submissions in favour of reconsideration now mirror those that were dismissed by the High Court and must fail.

31. It is next argued that the panel has an obligation to consider all evidence in a case both for and against the Applicant and to reflect this in its decision; a failure to do so would potentially give rise to unfairness in the risk assessment. In the abstract, I agree with the Applicant's position. It then falls to the Applicant to point out where any such failures have taken place.

32. The Applicant goes on to make a number of points.

33. He first refers to an independent psychological risk assessment (**PRA**) from December 2017 which supported release. This assessment is contained within the dossier and concludes (at para. 8.1.3) that "*…based on risk assessment, [the Applicant's risk] can now be safely managed in the community with robust support in place to manage his risks of relapse into alcohol misuse and re-offending*".

34. Paragraph 8.1.3 continues to say "*[the Applicant's] minimum tariff has not yet expired and does not do so until October 2018. Given that risk is dynamic, if this assessment is to contribute to any parole decision making around that time, I would need to provide an updated opinion on risk taking into account his behaviour and developments between now and then."*

35. The Applicant notes a further independent PRA from June 2020 which also supported release. This assessment is also contained within the dossier and concludes (at para. 7.1.1) that "*…the Applicant is manageable in the community, however this relies on a clear and robust risk management plan which has not yet been developed".* A September 2020 addendum reaches the same conclusion.

36. The December 2017 PRA contains little current evidential value as its author acknowledged that an addendum would be required before a parole decision. The June/September 2020 PRA makes release conditional on a robust risk management plan which did not exist at the time. In any event, these reports were considered by the April 2021 panel which did not direct the Applicant's release and it was not unreasonable, unfair, or irrational for the present panel to focus its enquiry on developments since the last parole hearing, particularly given the High Court effectively drew a line of lawfulness under the April 2021 hearing.

37. The Applicant next refers to his written representations of 2 July 2022 and notes the panel failed to mention the views of a member of the clergy who described him (within correspondence in the dossier) as "*a man of integrity"* and "*a very caring and loving person"*.

38. The decision is not a vehicle within which every piece of evidence must be recited. It would become unwieldy and unnecessarily lengthy if it was. The decision sets out a comprehensive summary of the evidence that it found important to weigh in making

its decision and, even if the panel had noted the positive character reference, it would not have played a material part in its reasoning, given the tenor of other evidence before it in the dossier.

39. The Applicant notes that no reference has been made to the intelligence he gives to prison staff and no credit has been given to the pro-social aspect of him doing so. The dossier contains an On/Post Tariff Custody Report written by his Prison Offender Manager (**POM**) dated 16 May 2022. This does not refer to the Applicant giving intelligence to prison staff. It is difficult to see how the panel would have been able to ascertain the Applicant's position as a prison informant other than security intelligence suggesting he is a "*grass"* and, as such, it is not surprising that it goes unremarked in its decision.

40. The Applicant next refers to para. 2.1 of the decision which states "*At the last review, [the Applicant] would be willing to undertake [an accredited offending behaviour programme for intimate partner violence]. However, this has not progressed…".* The Applicant explained this had not progressed because the course was recommended as something that could be done in the community but the last panel "*failed to release me".* The programme is one which could also be done in custody, and the Applicant points out that he was moved from a prison that offered the programme in 2019. The reasons why a programme has not been completed are irrelevant to risk assessment.

41. The Applicant next refers to a point raised by a panel in his March 2019 parole review regarding a different offending behaviour programme. I am only concerned with the lawfulness of the present review and the point raised by the Applicant could not have been in the mind of the panel when it made its decision.

42. The Applicant next argues that the panel has ignored the "*new law pertaining to factual information pertaining to risk and has allowed a COM's old comments to increase risk from low to medium based on a judgement rather than a matter of fact"*. This is not specifically pleaded as an error or law, but in fairness to the Applicant, given that error of law is now a ground for reconsideration, I will consider it as such.

43. It is not clear from the application to which 'new law' the Applicant is referring and, as such, it is impossible for me to determine whether the panel has ignored it. However, I note that the COM's report to which the Applicant refers is dated 20 May 2022. This predates the **Parole Board (Amendment) Rules 2022** coming into force which meant Community Offender Managers, Prison Offender Managers and prison Psychologists would no longer be providing recommendations or views on a prisoner's suitability for release or transfer to open conditions in the reports they provide to the Parole Board.

44. The COM report of 20 May 2022 was written before the rule change and contained a recommendation not to release the Applicant. The change in rules does not make that recommendation invalid as it was lawful for the COM to make it at the time. The panel was entitled to give that recommendation weight as part of its overall risk assessment.

45. The Applicant also takes issue with the COM increasing their assessment of risk from low to medium. Their report states as follows:

> *"Whilst the scores…indicate a low risk of re-offending, these scores are based on static factors alone. It is my professional judgement and taking account of the dynamic risk factors, the change in circumstances that he will be facing on release which is likely to be destabilising and the limited protective factors, that [the Applicant's] risk of re-offending is assessed as medium."*

46. While it is a matter of fact that a static risk score is low, it is always a matter for professionals undertaking a risk assessment to do so based on their clinical judgement. Although HMPPS report writers are no longer able to provide a recommendation/view, they must still provide a rigorous and comprehensive assessment of a prisoner's risks and needs, using accredited tools and applying their professional judgement, as well as a statement of outstanding risk factors and identifying protective factors.

47. The present panel was not at fault for agreeing with the COM's clinical assessment of risk.

48. The Applicant further takes issue with the panel's statement that:

> *"[Using a Probation Service tool, the Applicant] is assessed as a low likelihood of proven re-offending for an offence related to indecent images of children".*

49. It is argued that this is a material mistake of fact. It is not. The tool in question produced the rating referred to in the decision and the panel was not mistaken in its recording of that, even though the Applicant disagrees with it.

50. The Applicant next notes that the first version of the decision referred to him incorrectly in its final paragraph. He argues that the revised corrected decision should have had an updated revision number and extended the time for a reconsideration application to have been made. The use of the incorrect name is an unfortunate mistake by the panel, which was corrected via the slip rule (rule 30). A corrected decision does not restart the reconsideration clock. The error was not material to the panel's risk assessment (simply noting that a future panel may benefit from an update on any offence-related work). The Applicant submitted his reconsideration request in plenty of time. He was not disadvantaged and there was no procedural unfairness.

51. The Applicant next argues that it was irrational for a particular high-intensity offending behaviour programme, focussed on intimate partner violence, to have been suggested as a "*must do*" course. The panel simply noted that this course had been suggested to him and that he was not inclined to complete it. His submission here appears to reinforce the accuracy of the panel's point. He goes on to dispute the necessity of such a programme, but that is not material to my consideration of whether the present decision was made lawfully.

52. The remainder of the application, expressed in increasingly intemperate language, condemns the Parole Board for its decision-making in other cases (none of which are relevant to the current panel's decision), makes unfounded allegations of racism and corruption, questions the ability of female members of the Parole Board to assess male offenders, and reiterates his frustrations at his situation. His second set of written submissions continue in the same manner. There is nothing within these extensive statements which relates to procedural unfairness or irrationality within the current decision.

Decision

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

Stefan Fafinski
18 October 2022