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[2023] PBRA 168

Application for Reconsideration by Dziesinski

Application

1. This is an application by Dziesinski (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 15 August 2023 not to direct release.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended) (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:

   a) The Decision Letter dated the 15 August 2023;
   b) A request for reconsideration from the Applicant's legal representative dated the 4 September 2023; and
   c) The dossier, numbered to page 880, of which the last document is the Decision Letter.

Background

4. The Applicant is now 45 years old. In 2012, when the Applicant was 34 years old, they received an indeterminate sentence of imprisonment for public protection following a conviction for offences of the rape of a child under the age of 13, twenty one counts of taking/permitting to be taken or making, distributing or publishing indecent photographs of children, two counts of possession of indecent photographs of a child and an offence of the attempted rape of a female child under 13. The tariff was set at six years and expired in 2017.

5. The panel considered the Applicant's case at an oral hearing on the 3 August 2023. This was the third review of the case by the Parole Board and the panel heard evidence from the Applicant, the probation officer in the community, the official supervising the Applicant's case in custody and a prison psychologist.

6. The panel did not direct the Applicant's release and did not recommend progression to an open prison.

7. The panel noted that the Applicant had spent time in an open prison but had been returned to the closed estate. The panel determined that the Applicant continued to

present a significant risk to others and it was concerned by the reports of breaching rules in the open prison.

8. In its conclusion, the panel stated:

"[The Applicant] blames the prison for return[ing] to the closed estate rather than accepting that this arose as a result of [the Applicant's] own decisions. The panel considered that this is a clear example of poor decision making, entitlement thinking, poor responsibility taking and a lack of insight. These tendencies are further evident, along with rigid thinking, in [the Applicant's] refusal to complete any consolidation work in the closed estate. Had [the Applicant] taken the opportunity to engage with the offered sessions they would be in a much stronger position with regard to progression. The panel did not accept that the previous panel had directed that 12 sessions of consolidation work must be undertaken in the open estate.

In essence there has been no substantive positive change and progress since the last panel set out why [the Applicant] did not meet the test for release in November 2020. Indeed, following failure in open conditions, some of the risk related concerns identified by that panel have been increased. While [the Applicant] has demonstrated some good coping skills since return[ing] to the closed estate, the fact that [the Applicant] has not undertaken the consolidation work, deliberately chose not to comply with the [Enhanced Behaviour Monitoring conditions in the open prison], and has consistently displayed rigid thinking, all add weight to the outstanding risk factors set out by the previous panel."

Request for Reconsideration

9. The application for reconsideration is that the panel's decision was irrational and procedurally unfair, in that:

a) The Applicant clarified past comments made about the victim and was therefore surprised that this featured as a part of the panel's Decision Letter because the panel appeared accepting of this at the oral hearing;
b) The Applicant was concerned about the panel's comments of the Applicant's partner's understanding of the harm caused by the Applicant's offending. The Applicant states that as their partner and the victim did not give evidence at the oral hearing it was irrational to conclude that they would be vulnerable. The victim is no longer vulnerable, has forgiven the Applicant and wishes to move on;
c) The panel also raised concerns about the Applicant's partner's feelings towards personal matters in the Applicant's life and the partner could have attended the hearing if the Applicant had been aware of the panel's concerns. The panel's concerns meant that evidence from the partner and the victim were '*vital*';
d) The panel's view that the Applicant harbours control over the family is misconceived;
e) The Applicant gave evidence as to why they had not completed work in the closed prison and had believed that the last panel needed the work to be

completed in an open prison. The prison psychologist had said that it would be preferable for the work to be done in the open estate. Therefore criticism of the Applicant's '*rigid thinking'* was not justified and was irrational;

f) It was incorrect to conclude that the Applicant had not completed further work because they had completed three one hour sessions with a trained facilitator, and two one hour group sessions;
g) The panel made factual errors about adjudications in custody and the Applicant states that they did not continually flout any rules as had been suggested. The Applicant disputes the security information from the prison and it was procedurally unfair for the panel to rely on it;
h) There was no rationale in the Decision Letter to not allow the Applicant to return to an open prison, and her risk has not increased; and
i) A different panel would have directed release or a return to open conditions.

The Relevant Law

10. The panel correctly sets out in its decision letter 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.

11. 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 (as amended)

12. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A).

13. 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)).

14. 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**.

Illegality

15. An administrative decision is unlawful under the broad heading of illegality if the panel:

(a) misinterprets a legal instrument relevant to the function being performed;
(b) has no legal authority to make the decision;
(c) fails to fulfil a legal duty;
(d) exercises discretionary power for an extraneous purpose;
(e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
(f) improperly delegates decision-making power.

16. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Irrationality

17. 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."

18. 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.

19. 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

20. 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.

21. 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.

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

Other

23. 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.

24. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

25. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

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

26. The Respondent has not offered any representations.

Discussion

27. I will deal with ground *h* first of all. A panel's refusal to recommend open conditions is not eligible for reconsideration. I am only concerned with the panel's decision not to direct the Applicant's release and its approach to making that decision.

28. In ground *i*, the Applicant argues that another panel would have directed release or, at the very least, would have recommended a return to an open prison. That may be true, equally another panel may well have reached the same decision as this panel did. It is not a ground for reconsideration either as a result of irrationality or procedural unfairness.

29. Grounds *a – d* do not demonstrate procedural unfairness or irrationality. It could hardly have come as a surprise that the panel was interested in the welfare of the victim and wished to consider the dynamics of the Applicant's family relationships. It was a matter for the panel as to the witnesses it heard from, subject to any application for witness evidence from the Parties. The Applicant was legally represented in the Parole review and was afforded time, following the hearing, to produce detailed closing written submissions. The panel's approach was fair and it was entitled to reach the conclusions that it did. There were no unexplained evidential gaps or leaps in the panel's reasoning. The Applicant may disagree with the panel, but this is not a ground for reconsideration.

30. In terms of ground *e*, it may have been better for the Applicant to complete the proposed work in the open estate, however, the panel fairly reviewed what had taken place and reached its own conclusions, which it then explained in the Decision Letter. Again, it was entitled to do so.

31. Grounds *f – g* suggest errors made by the panel when it considered the evidence. It is clear from the detailed written representations within the dossier that the Applicant disputes much of the security information that has been written about them. Having reviewed the panel's Decision Letter it is clear to me that it dealt with the Applicant's case fairly. For example, it noted the '*mixed messages*' from professionals to the Applicant about their contact with the victim. There is nothing to demonstrate that the panel simply relied on all the security information without carefully considering what was being said by professionals and by the Applicant. The panel properly and fairly addressed security information about the Applicant and that it was entitled to reach the conclusions that it did, providing a detailed explanation for its findings. If there has been an error of fact, for example, in respect of completion of further work in custody, I am not persuaded that it was fundamental to the case or would have led the panel to an alternative view.

Decision

32. 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.

Robert McKeon
26 September 2023