

[2023] PBRA 84

Application for Reconsideration by Pulley

Application

1. This is an application by Pulley (the Applicant) for reconsideration of a decision dated the 4 April 2023 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 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 Panel's decision, submissions from the Secretary of State (dated 28 April 2023), the Applicant's parole dossier and the Applicant's Application for Reconsideration (dated 24 April 2023).

Background

4. The Applicant was sentenced to an indeterminate sentence for the protection of the public (IPP) on the 18 January 2006 following conviction for an offence of robbery. The Applicant's tariff expired on 21 May 2009.
5. The Applicant was released by a panel of the Parole Board in 2018, following an oral hearing, but recalled in January 2019 for poor compliance and further offending (multiple counts of acquisitive offending, including burglary and theft non-dwelling, shop theft and attempted burglary). The Applicant received a further 30 months imprisonment for these offences. This sentence is now spent.
6. The Applicant has previously been progressed to open conditions on two occasions (2012 and 2013), however, returned to closed conditions following substance misuse.
7. He has only ever been subject to one recall.

Request for Reconsideration

8. The application for reconsideration is dated 24 April 2023.

9. The grounds for seeking a reconsideration are as follows: It is argued that the decision not to release the Applicant is irrational. Those instructed state that the decision *'has been based on fundamental facts that are incorrect and this does not allow for a fair and accurate assessment of risk.'* It is further submitted that the panel have failed to take into account *'key evidence'* that the Applicant is suitable for release and misapplied the test for open conditions.

Current parole review

10. The Applicant's case was reviewed by a MCA member of the Parole Board and referred to an oral hearing on the 18 March 2022. The Applicant's case was listed for an oral hearing on the 6 December 2022. The hearing took place remotely over videolink.
11. Following the hearing the Applicant's case was adjourned until 3 February 2023 for an updated risk management plan to be provided, and confirmation about suitable release accommodation.
12. The case was further adjourned on the 15 February 2023 for further information about an approved premise (AP) placement. This information was duly provided and the decision issues on the 4 April 2023.
13. At the hearing on the 6 December 2022 evidence was heard from the Prison Offender Manager (POM, Community Offender Manager (COM) and the Prison Psychologist. The Applicant was represented throughout.

The Relevant Law

14. The panel correctly sets out in its decision letter dated 4 April 2023 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. This is set out at pages 1 and 2 of the decision.

Parole Board Rules 2019 (as amended)

15. 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)).
16. 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

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.
20. 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.

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

21. The Respondent provided submissions on the 28 April 2023. The Respondent submits that the Panel did record the correct test for release and open conditions in its decision. (At pages 1 and 2). They further submit that the likelihood of the recommendation being accepted does not form part of the open tests. The submissions are silent about the factual inaccuracies claimed by the Applicant.

Discussion

22. Turning now to the present application, I will deal firstly with the issue of the purported inaccuracies in the decision. Those representing the Applicant submit that the *'decision made in the Applicant's case, is irrational', 'having been based on fundamental facts that are incorrect and thus do not allow for a fair or accurate assessment of risk.'* In particular, the Applicant's legal representatives argue that the panel was mistaken in relation to the Applicant's recall status (specifically that the panel believed the Applicant to have been recalled on three occasions, instead of one).
23. In order to ascertain the accuracy of the legal representative's submissions I have

myself carefully reviewed the panel's decision. In so doing I have noted the following:

- a. At paragraph 1.4 the circumstances of the Applicant's recall are correctly set out by the panel. Also, it is confirmed that the Applicant has been back in prison since 10 January 2019.
- b. However, thereafter at paragraph 2.4 (Analysis of Evidence of Change) it is stated that *'There have been no issues on the last two occasions he's been on licence.'* This forms part of the COM's evidence. It is unclear if this refers to the current sentence or historic periods on licence. I find this statement to be ambiguous.
- c. At paragraph 2.4 (Analysis of Evidence of Change) it is stated that *'he has now had the benefit of 11 months back in prison'*. Again this forms part of the COM's evidence. I find this statement to be factually inaccurate.
- d. At paragraph 3.1 (Analysis of Manageability of Risk) the panel further states *'it has also to be acknowledged that the Applicant has now been recalled for a third time on this sentence for further failure to co-operate on licence which calls into question his ability to do so.'* I find this statement to be factually inaccurately.

24. When considering these inaccuracies, it seems to me that the panel may have conflated the terms *'recall'* with *'reclassification'* or *'back-staging'* when drafting, or simply recorded inaccurate evidence provided by witnesses in its decision letter. However, this is conjecture on my part.

25. Overall, after careful review of the decision, I find the decision to be inconsistent and uncertain in this regard and, in the absence of clarification or explanation elsewhere in the narrative, I find it justifiable to conclude that the decision does contain factual inaccuracies about the number of times on which the Applicant has been recalled for breach of his licence conditions (on the basis of the evidence before the Secretary of State at the time).

26. I turn now to the significance of these inaccuracies.

27. Applying relevant law to the facts of the Applicant's case, in order for the inaccuracies in the decision to render the decision irrational, I must be satisfied that *'the mistake in the finding of fact made by the decision maker is fundamental as set out in **E v Secretary of State for the Home Department [2004] QB 1044'***.

28. Having carefully reviewed all of the information before me, I am so satisfied.

29. At paragraph 3.1 the panel states *'It also has to be acknowledged that [the Applicant] has now been recalled for a third time on this sentence for further failure to co-operate on licence which calls into question his ability to do so. The panel does not belittle or denigrate the evidence of good behaviour in prison and the eschewing of drugs and alcohol during sentence. It is the failure to carry these efforts through into good behaviour and co-operation on licence in the community which is seriously in question.'*

30. The above commentary forms a substantial part of the narrative provided in the panel's 'Analysis of Manageability of Risk' and in my assessment, in the absence of any further evidence to the contrary, upon any ordinary reading appears to be material to the panel's subsequent finding at paragraph 3.2 that *'it would be most helpful to [the Applicant] and society that his next release into the community should be as gradual an event as possible.'*
31. Unusually, the decision does not set out the proposed risk management plan in detail, nor is there an analysis of the effectiveness of the proposed plan. This is unfortunate because such analysis could have provided greater certainty/insight into the panel's decision-making.
32. Whilst I accept that the panel's mistaken belief may not have been the panel's only consideration in coming to its conclusion, an ordinary reading of the comments at paragraph 3.1 and 3.2, suggests that the mistaken belief was fundamental to the panel's decision making and did make a material difference to its risk assessment and determination.
33. For these reasons I must find the panel's decision to be irrational in that it materially relied on mistaken and inaccurate information, and that this information was fundamental to the panel's risk assessment.
34. Having found the decision to be irrational in this regard I need not address the other submissions made by those instructed on the Applicant's behalf. I note, however the submissions made by the Secretary of State that the test for release and open conditions is correctly set out in the decision letter at pages 1 and 2. Any discussion regarding open conditions would be outside the scope of rule 28 in any event.

Decision

35. Accordingly, I consider, applying the test as defined in case law, the decision of the 4 April 2023 to be irrational. I do so solely for the reasons set out above. The application for reconsideration is therefore granted.

Heidi Leavesley
15 May 2023