[2022] PBRA 75

the Parole Board
working with others to protect the public

Application for Reconsideration by Bedson

Application

1. This is an application by Bedson (the Applicant) for reconsideration of a decision of a Panel of the Parole Board dated 6 May 2022 following an oral hearing on 3 May 2022. The hearing was conducted remotely via video-link.

2. The Panel made no direction for release but recommended that he was suitable to remain in open conditions where he is currently located.

3. 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.

4. I have considered the application on the papers. These are the dossier of 388 pages (that includes the decision letter) and the application for reconsideration.

Background

5. The Applicant was aged 38 at the time of sentence and is now aged 57 years old.

6. He was sentenced to life imprisonment on 25 July 2003 for an offence of murder. The tariff was set at 12 years (with allowance for time on remand) and expired on 1 January 2015.

7. The Applicant was released in 2018, being recalled after 18 months. This was the second review since recall.

Request for Reconsideration

8. The application for reconsideration is dated 27 May 2022.

9. The grounds for seeking a reconsideration were not set out specifically but appear in a narrative form. In essence, it is said that the decision to not direct release was irrational.

10. It is said that the evidence 'very firmly' supported release, which was the recommendation of both the prison and community probation officers.

11. The argument put forward is that as the Applicant's risk to the public was not imminent, and it was accepted that he would comply with the regime in open conditions, it was irrational not to direct release.

12. The grounds identify three particular areas of the decision letter which, it is said, led to the application being dismissed:

    a) An argument between the Applicant and another prisoner
    b) The state of the relationship between the Applicant and his COM
    c) The lack of follow-on accommodation

13. Further submissions are made in relation to each point.

Current parole review

14. The Applicant's case was referred to the Parole Board in July 2021. An oral hearing was directed in December 2021.

15. The oral hearing was conducted remotely on 3 May 2022. The Panel heard evidence from the Applicant, as well as from the prison probation officer and the community probation officer.

The Relevant Law

16. The panel correctly sets out in its decision letter dated 23 February 2021 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for suitability to remain in open conditions.

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)).

18. 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

19. 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."

20. 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.

21. I remind myself of what was said in **Wells [2019] EWHC 2710 (Admin)** as to the heightened need for full reasons where the Panel is going against the recommendations of the witness.

22. 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

23. 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.

24. 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.

25. 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.

26. 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.*"

The reply on behalf of the Secretary of State

27. The Secretary of State has stated that he does not wish to make any representations.

Discussion

28. I will start with the three specific points that the Applicant relies on.

(1) – the 'argument'

29. This relates to an incident in March 2022 where it is said that the Applicant had had a 'verbal altercation' with another prisoner.

30. It is said that 'it was confirmed that there was no argument', although the grounds do not say where it is confirmed (there was no reference to any passage in the dossier or, if as appears to be the case, there is no statement from the advocate confirming this or copies of his notes).

31. The letter records the Applicant's explanation, including a verbatim comment (which the grounds do not challenge) that the Applicant states *"we'll shout at each other, that's what we're like. I've known him for a long time. Of course we'll argue … that's how we carry on".*

32. In any event, the Panel were aware of the points made. They specifically recognise that there had not been an adjudication and he kept his job. The point being relied on by the Panel was that the fact that the Applicant interacted in this way generally was a concern. That was a point open to them.

(2) The Applicant's relationship with his community probation officer

33. The Panel recognised that the Applicant had developed a working relationship with his community probation officer, but its view was that this was not sufficiently strong at that time.

34. It appears that a concern of the Panel was that the restrictions imposed by the Covid-19 pandemic meant that there had not been sufficient face to face meetings

between the Applicant and his Community Probation Officer to develop the relationship sufficiently.

35. That was a finding that was clearly open to them and was explained.

36. The grounds state that this is 'very unlikely to get any better' with the Applicant being in open. Whether or not that is correct (and there are good reasons to think that it is not given that there will be further time for remote and face to face contact), it does not change the test that the Panel must apply.

(3) Concerns about 'follow on accommodation'

37. The Panel were concerned that after the initial period in a Probation Hostel, there was no plan for where the Applicant would live. The Panel concluded that unless there was fixed accommodation in place the Applicant's risk of returning to substance misuse (with a consequential risk of serious harm) was too high to be managed in the community.

38. That conclusion is not challenged in the Application. Rather, it is said that as it is not possible for this to be determined prior to release it is unfair to not direct release as there is confidence that this can be done.

39. If that is the case, then it is unfortunate. However, it cannot change the test that the Panel must apply (if that is the policy in Liverpool then it would have to be challenged in a different forum).

40. The Panel concluded that the Applicant had an entrenched history of substance misuse (and dishonesty about his substance misuse) which was directly relevant to the risk of serious harm that he presents. Given the history of the case, that is a conclusion that they were clearly entitled to draw.

41. The Panel had to consider the risk over the entirety of the Applicant's licence. They did this and concluded that at this stage the lack of 'move on' plans meant that the Applicant did not meet the release test as the risk that he would relapse into substance misuse at that point was a conclusion open to them.

42. Although it does not change the result, the Applicant may well be unduly pessimistic to say that nothing will change in open conditions. If he moves to open, then the next Panel that considers his case will consider it afresh, and it will be a matter for that Panel to determine whether the release test is met.

43. For those reasons, I do not consider that any of the above points are of significance.

44. The Applicant relies on two cases; **Foley v Parole Board [2012] EWHC 2184 (Admin)** and **King v Parole Board [2014] EWHC 564 (Admin)**. It is said that these show that because *'the [Prison and Community Probation Officers], along with the rest of the written evidence, confirmed that any risk there may be to the public wasn't imminent and that [the Applicant] could be trusted to comply with licence'.*

45. No reasons are given for why that is the case, or what principals should be drawn from those two cases. It is unclear what impact **Foley** has on the issue. **King** confirms that the test to apply is the public protection test which the Panel set out and followed.

46. The fact that both witnesses were recommending release is an important factor in the Applicant's favour. The Panel were, however, not bound to follow those recommendations.

47. The Panel's job was to undertake their own assessment of the risk that the Applicant presents and assess whether that can be managed in the community. It is free to disagree with the assessment of the reasons, provided that sufficient reasons are given.

48. The Applicant does not raise a reasons challenge in this case, and I do not consider that one could succeed. The Panel set out the reasons for its conclusions which give sufficient explanation to the Applicant for him to understand the conclusion reached (even if he disagreed with it).

49. It may be that other Panels would have directed release, but whether that is the case is not the test to be applied. The conclusion reached by the Panel

Conclusion

50. It was for the Panel to assess the evidence that it heard and, bearing in mind the recommendations, to come to its own conclusions. That is what it did. I consider that it was a conclusion that was open to it.

51. The Panel has set out the reasons for the decision made. These are sufficient for the Applicant to understand why he was unsuccessful in obtaining a direction for release and contain no error of law.

Decision

52. For the reasons I have given, I do not consider that the decision was irrational. Accordingly, the application for reconsideration is refused.

Daniel Bunting
10 June 2021