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[2020] PBRA 106

Application for Reconsideration by the Secretary of State for Justice in the case of Dickins

Introduction

1. This is an application by the Secretary of State (the Applicant) for reconsideration of the decision made by a panel of the Parole Board (the Panel) on 11 May 2020 and issued on 18 June 2020 directing the release of Dickins (the Respondent).

2. In July 2002 the Respondent was sentenced to a mandatory life sentence for murder which was committed while he was on licence. The tariff, which was set at 18 years, expired in September 2019. At the same time, he received three concurrent determinate sentences for producing and supplying controlled drugs committed while on temporary release and while on licence.

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. This is an eligible application.

4. I have considered the application on the papers. These are the dossier, the Panel's decision and representations made on behalf of the Applicant and on behalf the Respondent.

Background

5. The Respondent had been transferred to open conditions in December 2017 and had resided at the same establishment throughout until the early part of May 2020.

6. The oral hearing which took place remotely by telephone due to the Covid-19 restrictions on 26 March 2020 was conducted by two independent members of the Parole Board. In light of the Applicant's first Ground for there to be a reconsideration in this case, it is relevant to note that directions made in July 2019 indicated that the risk assessment in this case was such that it was appropriate for there to be a third member of the Panel and for that member to be either a psychologist or a psychiatrist.

7. The oral hearing was adjourned at the conclusion of the evidence and a detailed Adjournment Notice was produced by the Panel and issued on 30 March 2020. Essentially, the adjournment was to enable a detailed risk management plan to be prepared.

8. On 9 May 2020 a significant incident occurred at the prison which involved the Respondent. It was reported that the Respondent was witnessed to have received a bag from the occupant of a vehicle which had stopped in a prison cark park. When searched by prison staff, the bag was found to contain alcohol and tablets. The Respondent was, as a consequence, immediately returned to closed conditions.

9. On 11 May 2020 the Panel concluded its review on the papers and directed the Respondent's release. The decision was emailed to the Parole Board Case Manager at 08.51am that day. At 10.24am the Case Manager emailed the Panel Chair advising him that the Respondent had been returned to closed conditions having been involved in the "*drop off*" of prohibited items.

10. On 12 May 2020 the Panel Chair issued directions requesting further detailed information regarding the events of 9 May 2020, indicating that "*it is necessary to receive further reports before this referral can be concluded on the papers as intended*".

11. On 17 June 2020 it was decided that because the Panel's decision letter had been sent to the Case Manager, its decision had been made and consequently the Panel was then "*functus officio*" meaning that it had no power to make any further substantive decisions in the case.

12. On 18 June 2020 the Panel's decision was issued to the parties. It made no reference at all to the events of 9 May 2020. On the same day, two of the professional witnesses provided their updated reports recommending that, in light of the events of 9 May 2020, the Respondent should not be released into the community.

Request for Reconsideration

13. The Applicant submits that the Panel's decision should be reconsidered on two grounds as follows:

    (a) That the make–up of the panel conflicted with what had been considered necessary and therefore was procedurally unfair and;

    (b) The decision was irrational and/or procedurally unfair because the Panel failed to consider the incident of 9 May 2020.

The Relevant Law

Parole Board Rules 2019

14. 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)).

15. 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

16. 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."*

17. 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.

18. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28. See for example, the case of **Preston [2019] PBRA 1 and others.**

Procedural unfairness

19. 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.

20. 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.

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

The reply on behalf of the prisoner

22. On behalf of the Respondent, in written submissions dated 21 July 2020, it is submitted in relation to Ground (a) that had the Applicant wished to make any representations regarding the composition of the panel they had ample opportunity to do so, but did not, and further they submit the Applicant has failed to demonstrate that the absence of a third member of the panel adversely impacted upon the proceedings in any way. As for Ground (b) it is submitted that as the Panel's decision had been made before formal notification of the fact of 9 May 2020 incident had been received and accordingly the application for reconsideration is fundamentally flawed and without merit. I have of course taken these submissions into account.

Discussion

23. It is in my judgment prudent to begin by highlighting five key findings made by the Panel:

    (a) Major risk factors in respect of the Respondent included acting on the spur of the moment without thinking adequately about the consequences, thinking that it was acceptable to commit crime, being influenced by antisocial friends who condone crime and have unhelpful beliefs, not following rules and showing high levels of dishonest behaviour.

    (b) There were no concerns over substance misuse or mental health.

    (c) There was no evidence of "*criminal associations*."

    (d) All three professional witnesses effectively supported release.

    (e) There were only two items of what it described as "*adverse intelligence*" neither of which were substantiated nor regarded as particularly significant.

24. On the face of it, the circumstances that led to the Respondent's return to closed conditions immediately following the events of 9 May 2020 could not be regarded as an insignificant piece of adverse intelligence. If nothing else, the events of that day were potentially highly relevant to at least some of his risk factors. As soon as the Panel learnt of the incident it initiated urgent and proper enquiries. A report written by the Offender Manager on 18 June 2020 contained the only account so far by the Respondent himself of the events of 9 May 2020. That account is and remains untested. Nonetheless, the events of 9 May 2020 formed the basis of a fundamental change in the recommendations of two of the professional witnesses. The views of the Prison Psychologist on the events of 9 May 2020 are unknown. However, it is noteworthy that she highlighted in her evidence to the Panel how important it would be for professionals to be attentive to the smallest item of information which might give rise to concerns about the Respondent's openness and motivation.

25. The most significant unknown however is that which forms the basis for the Applicant's second ground, namely, how it is that the events of 9 May 2020 are not

referred to nor addressed in the Decision Letter and how they might have impacted upon the Panel's release decision.

26. It is clear that fairness demands that the alleged conduct of the Respondent on 9 May 2020 required an explanation from him and, if he was prepared to give it, for that explanation to be properly tested and assessed by the Panel. Otherwise there would have been no real purpose behind the directions given by the Panel on 12 May 2020.

27. I had found it difficult to understand how the events of 9 May 2020 could have been overlooked. However, following the making of enquiries, I understand (as I have already mentioned), it was decided that the Panel's decision of 11 May 2020 was treated as final, and the Panel was obliged to regard itself as *functus officio* (that is, having performed its office) and therefore had no power to make any further substantive decisions on this case.

28. There can be no doubt that in discharging my independent judicial function in deciding this application I must apply what I regard to be the correct principles of law. In so doing I have concluded that it is essential that I should consider the question *"when should a panel of the Board regard itself as being functus officio"?* In my judgment, a panel of the Board should not be regarded as being *functus officio* until its decision has been reduced into writing and communicated to the parties.

29. In an Annex to this decision, I have attempted to set out my view of the law in order that it can be understood.

30. Returning to the application for reconsideration itself, had the events of 9 May 2020 been placed before the Panel so that they could be properly examined and addressed, they would have at least been capable of altering their decision, or prompted to take other steps such as putting the case off for a further oral hearing where the new information and its effect on any risk assessment could be fully and fairly examined.

31. If a panel does not take into account facts which are potentially relevant to its decision, then the obligation upon them is to explain to the parties why they did not do so. The Panel in this case did not do that. In my view the interests of public protection are paramount and the events of 9 May 2020 required careful examination by a panel of the Parole Board.

Decision

32. I have therefore reached the conclusion that the Panel should have taken into account the events of 9 May 2020. The fact they did not was, in my judgment, the result of a mistake of law which renders the decision to release irrational. The application for reconsideration is therefore granted.

33. My finding in relation to Ground (b) is of course sufficient to dispose of this application in favour of the Applicant and so it is unnecessary for me to make any finding in relation to Ground (a).

Michael Topolski QC
11 August 2020

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Annex to the Reconsideration Decision in the case of Dickins

When is a panel of the Parole Board *Functus Officio*?

Introduction

1. Rule 19(1) of the Parole Board Rules 2019 (the Rules) stipulate that where a panel is appointed under Rule 5(1) to consider release, the panel must decide either that the prisoner is suitable for release (Rule 19(1)(a)), unsuitable for release (Rule 19(1)(b)) or that the case should be directed to an oral hearing (Rule 19(1)(1)(c)).

2. Rule 20 of the Rules stipulates that where a decision has been made under Rule 19(1)(b), the prisoner may apply in writing for a panel at an oral hearing to determine the case. An application with reasons must be served on the Board and the Secretary of State within 28 days (Rule 20(2)) of the provision of the decision under Rule 19(8).

3. If no application has been served by the prisoner within that 28 day period, the decision under Rule 19(1)(b) remains provisional if it is eligible for reconsideration, and becomes final if no application for reconsideration is made within the time specified by Rule 28, or becomes final if it is not eligible for reconsideration under Rule 28.

4. As I understand it, the Board's approach is that a panel is *functus officio* once it has made its decision, even if that decision has not been communicated to the parties. Again, as I understand it, that approach is taken because as a creature of statute the Board regards itself as being reliant upon its Rules for the manner in which it carries out its functions. So, for example, when Rules 19(8), 21(12) and 25(6) provide that, and I paraphrase:

   > *"The decision … … must be recorded in writing with reasons for that decision … … and the written record provided to the parties within 14 days of the decision."*

   That, in the context of the Rules is I understand interpreted to mean that the decision is made and is final at the point at which the written reasons are agreed by the panel members and no later.

5. Clearly it was the application of this approach which led the Panel in the instant case to regard itself as *functus* once their Decision of 11 May 2020 had been written and sent to the Case Manager albeit that it had not been forwarded to the parties. I suggest that there is another view to be taken in answer to the question posed in the heading to this Annex, namely, when is the Parole Board *functus officio*? In my judgment, that position is not reached until the decision has been reduced into writing, agreed by the panel as a whole and promulgated, or if preferred, communicated, to the parties. That view I suggest takes proper account of the concept of "*the operative decision*" (see paragraph 9 below) and is also consistent with authority. If I may add, one of the difficulties here may be that the Rules do not provide sufficiently clear and firm guidance on when the Board is to regard itself as being *functus*.

6. This view that the Board is *functus* once a decision is made, rather than when it is made and communicated, appears to be founded upon an interpretation of the Rules and on the case of **R (Robinson) v Parole Board [1999] EWHC 764 (Admin)**. The Ministry of Justice in April 2018 laid a Command Paper before Parliament entitled **Reconsideration of Parole Board decisions: creating a new and open system (Cm 9612)**, which noted the following in relation to **Robinson**:

> *"The grounds for a Parole Board to reopen their decision were established in case law in the case of Robinson in 1999 and are as follows:*
>
> *(a) The decision was fundamentally flawed (e.g. based on significant incorrect information); or*
>
> *(b) There has been a supervening material change of circumstances (e.g. a prisoner's risk level substantially elevates, or an essential component of the release plan falls through)."*

The Authorities

7. It may be helpful to look at the position in other domestic jurisdictions. I do not suggest that what follows is exhaustive, but I hope it might provide a useful guide to how this issue is treated elsewhere.

8. In **R (on the application of Baker) v Police Appeals Tribunal [2013] EWHC 718 (Admin.)**, the claimant sought a quashing of the order made by the Police Appeals Tribunal ('PAT'). On 13 October 2010 the claimant was found guilty of gross misconduct and was dismissed without notice. He appealed to PAT who, by way of an order dated 24 March 2011, dismissed his appeal against the finding of misconduct but allowed his appeal in respect of the disciplinary action, substituting dismissal for a final written warning. The order was sent to the claimant by email on 28 March 2011. On 9 April 2011 reasons for the decision were issued. It transpired that there was an error in the order. PAT issued an amended order dated 30 June 2011. On the claim for judicial review the claimant contended that PAT was *functus officio* at the time when it made the amended order. Indeed, this was conceded by PAT, as noted by the court at paragraph 13-14 (emphasis added):

> *"After it has **given notice of its decision and issued a statement of its determination of the appeal and of the reasons for the decision** in accordance with these provisions, nothing in the Rules (nor anywhere else) gives the Tribunal power to take any further action. In particular, there is no express power, and it is accepted that none is to be implied, which would enable the Tribunal subsequently to change its decision.*
>
> *It is for this reason that the Tribunal has conceded in these proceedings that after issuing the Original Order and Statement of Determination of Appeal it became functus officio and accordingly had no power to make the Amended Order."*

9. In **R (on the application of SK, Sri Lanka) v Secretary of State for the Home Department [2008] EWCA Civ. 495**, the questions for the Court were:

(a) What is the effect of an oral announcement of a 'decision' by an Asylum and Immigration Tribunal?

(b) If an oral announcement is made that an appeal 'is allowed' or is 'to be allowed', what is the effect of a subsequent written determination to the effect that an error of law has been made but that a further reconsideration is required to dispose of the appeal?

The Court ruled that in the context of the Immigration Rules, the question of whether a Special Adjudicator was *functus officio* was answered by ascertaining the identity of **"the operative decision [emphasis added]"**. Once that operative decision had been taken the Special Adjudicator was *functus officio*.

10. The Court first noted the case of **R (on the application of Bashir) v Special Adjudicator [2002] Imm AR 1**, in which it was held that the Special Adjudicator was not *functus officio* until the written determination was **promulgated**. In relation to the Immigration Rules, as they were at the time of Bashir's case, the Court ruled that **the operative decision is the promulgation** of the written determination.

11. Echoing the decision in Bashir, in **Sanaz Farahbod v Secretary of State for the Home Department (HU/06091/2018)**, the Upper Tribunal held that the Tribunal Judge was not *functus officio* until his decision was **promulgated**.

12. In **Griffin v Wainwright [2017] EWHC 211 (Ch.)**, the claimant was dissatisfied with the manner in which a company was being run, in relation to which both he and the defendant were shareholders. An expert was an important witness. The Court held that the expert was *functus officio* once she sent her determination to the parties (at paras. 45, 46 and 48 [emphasis added]):

> *"The expert was entitled to change her mind up to the point in time at which she sent her determination to the parties. It was **only then** that she became functus officio and her determination (as sent) became binding on the parties."*

13. In **Aparau v Iceland Frozen Foods Plc [2000] ICR 341**, the question for the Court was when an industrial tribunal was *functus officio*. The Court held as follows (at paragraph 350 [emphasis added]):

> ***"... in my judgment an industrial tribunal, like any other tribunal, has exhausted its jurisdiction once it has delivered a final decision disposing of all the issues before it."***

14. In **Baxendale-Walker v The Law Society [2006] EWHC 643 (Admin.)**, the question was at what point in time did the Solicitors' Disciplinary Tribunal become *functus officio* in the context of announcing its decision to suspend a solicitor: was it when it announced the penalty, or when it handed down its reasons? The Court held that the statutory language in the **Solicitors Act 1974** made it clear that once the order was 'given' (seemingly in this context to be synonymous with 'made known'), the Tribunal was *functus officio*.

15. In the criminal jurisdiction, similar principles apply. In **R v Blackwood [2012] 2 Cr. App. R. 1**, the Applicant was convicted of rape and sentenced to seven years' imprisonment. The Court of Appeal (Criminal Division) allowed his appeal and quashed his conviction for rape. At the end of the hearing no applications were made and the Applicant was released. The Crown subsequently applied for a retrial. The Court held that it was *functus officio* once the acquittal had been recorded by the Court of trial pursuant to a final order of the Court of Appeal.

16. In ***Court of Appeal Criminal Division – A Practitioner's Guide*** **(Sweet & Maxwell, 2nd edn, 2018)**, it is made clear that the Court of Appeal has the power to amend its order up until it is recorded by the proper officer of the court of trial, with the Court of Appeal being *functus officio* thereafter **(R v Yasain [2015] EWCA Crim. 1277**).

17. Where a magistrates' court has discharged all its judicial functions, it is said to be *functus officio* **R (on the application of Brown) v Camberwell Green Magistrates' Court [1983] 4 FLR 767**; and **R (on the application of Thomson et al) v Midhurst Justices [1973] 3 All ER 1164]**, and this will generally be by making a final decision, that is to say by announcing it.

18. In **Seventh Earl of Malmesbury, William John Maltby, Kathleen Hobbs, Wilsco 283 Limited v Strutt & Parker (A partnership) [2007] EWHC 2199 (QB)** the Court, on the general rule of *functus officio* noted as follows (at paragraph 9 [emphasis added]):

> *"It is well-established by a number of recent cases as well as others of greater age that where a judgment has been delivered, either orally or by handing down, the judge may in appropriate circumstances alter it at* ***any time prior to an order giving effect to the judgment. Once there is such an order the judge is functus officio and the only way forward for a dissatisfied party is to appeal."***

Discussion

19. The real difficulty that arises when it is suggested that decisions do not need to be communicated (or promulgated) in order to be made, is that it is almost impossible thereafter to pinpoint with any certainty when a decision will in fact have been made.

20. Decisions made by courts and tribunals of every stripe appear it would seem to have a two stage process, that is to say, first the decision and then the communication of that decision.

21. The leading authority on this area of the law and the case upon which the court in **ex parte Robinson** relied is **Re:56 Denton Road Twickenham [1953] CH 51, [1952] 2 All ER 793** in which Vaisey J. said the following in accepting the submission of Mr Diplock QC (I paraphrase):

> *"Where Parliament confers upon a body…the duty of deciding or determining any question…which affects the rights of the subject, such decision* ***made and communicated*** (my emphasis) *in terms which are not expressly*

preliminary or provisional is final and conclusive…and cannot in the absence of express statutory power or consent of the person affected be altered or withdrawn by that body…"

22. Vaisey J. went on to comment that any contrary view would *"introduce a lamentable measure of uncertainty"*. I most respectfully agree.

Conclusion

23. In my judgment, a consideration of the authorities that I have referred to indicate clearly that whether it be a court, a tribunal, an adjudicator, or an expert, it is only when a decision is communicated, or promulgated, that triggers the proper application of the principle of *functus officio*.

24. The proposition that a body is *functus officio* only when it has made and communicated its decision has in my view the considerable benefit of introducing the all important elements of clarity and certainty which are frequently absent when reliance is placed upon attempting to ascertain the point at which the decision was made and nothing more.

Michael Topolski QC
11 August 2020