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[2021] PBRA 119

**Application for Reconsideration by Hussain**

**Application**

1. This is an application by Hussain (the Applicant) for reconsideration of a decision of a Parole Board panel which heard his case on 25 June 2021 and in its Decision Letter of 7 July 2021 declined to order his 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 is irrational and/or (b) that it is procedurally unfair.

3. I have considered the application on the papers. These are:

   a) The Dossier consisting of 315 pages;
   b) The Decision Letter (DL); and
   c) The grounds submitted by the Applicant's legal representative dated 28 July 2021.

**Background**

4. The Applicant is now 46. In January 2009 he was sentenced to an Indeterminate Sentence (IPP) for sexual activity with a child and failure to comply with notification requirements. The 'tariff' period of the sentence expired on 19 November 2013. The hearing now under review was the fifth since the expiry of the tariff period of the sentence.

**Request for Reconsideration**

5. The application for reconsideration is dated 28 July 2021.

6. The grounds for seeking a reconsideration submitted by his legal representative allege that the decision was irrational. In summary they are:

a) His relationship with his Prison Offender Supervisor was poor. This fact coloured her reports and the evidence she gave at the oral hearing. In spite of those difficulties the Applicant has complied with the prison regime. In addition, he has completed relevant courses and expressed remorse;

b) The panel's finding that he needed further 1-1 work with a psychologist before release was irrational. His inability to complete such work before the hearing was due to him having contracted the coronavirus and having suffered long-lasting health problems since. In addition, religious commitments (in particular Ramadan) made it difficult to comply with such requirements. It may have been possible for the necessary work to be carried out in the community and incorporated into licence conditions;

c) The Community Offender Manager, who in the report had recommended no direction for release was, when he gave evidence, inclined to recommend release but in the event 'stood by his colleagues' recommendations';

d) The panel's decision that the further work described at b) above was necessary was irrational;

e) The panel failed to place sufficient weight on his health problems as a factor reducing the risk he may pose to the public on release; and

f) The panel may not have paid sufficient heed to his rights under the European Convention on Human Rights and the need to scrutinise the necessity of continued detention (Article 5).

**Current parole review**

7. The Case was referred to the Parole Board (PB) on 21 April 2020. It was deferred in February 2021 because the Applicant was unwell.

8. A two-member panel of the PB comprising a judicial member and a psychiatrist member met on 23 March 2021 by video link to consider the case. It heard evidence from a psychologist (not the author of the report within the dossier), the Applicant's Prison and Community Offender Managers, and the Applicant himself.

**The Relevant Law**

9. The panel correctly set out in its decision letter (DL) dated 7 July 2021 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.

*Parole Board Rules 2019*

10. 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)).

11. 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 in a previous reconsideration application - **Barclay [2019] PBRA 6**.

*Irrationality*

12. 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."*

13. 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.

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

15. In a more recent judgment (of Saini J) in **Wells, R (On the Application of) v Parole Board [2019] EWHC 2710 (Admin)** said:

    *'A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the Panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied.*

    *I emphasise that this approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury (at 230: "no reasonable body could have come to [the decision]) but it is preferable in my view to approach the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion?"*

14. 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.

15. 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.*"

*Procedural unfairness*

16. There is no suggestion in the grounds of procedural unfairness.

**The reply on behalf of the Secretary of State**

17. No reply has been received from the Secretary of State.

**Discussion**

18. Grounds 6 a), b) and d). It was plain that the Applicant's relationship with the Offender Supervisor had been strained. This is an occurrence with which Parole Board panels are very familiar. The DL sets out the evidence in considerable detail and explains clearly how and why the panel came to its conclusion that the work suggested by both the Offender Supervisor and the psychologist was necessary before the Applicant's risk of serious harm to the public could be said to have reduced sufficiently for his release to be directed. Unfortunately, it is clear from the DL that the Applicant himself when giving evidence displayed some of the attitudes reported by the Offender Supervisor.

19. The current pandemic has of course placed obstacles in the way of the provision of courses designed to assist in the rehabilitation of prisoners. It is unfortunate that the Applicant has himself suffered from the coronavirus and that work which might otherwise have been completed has not been. Equally it is unfortunate, if this was the case, that the religious observance of Ramadan made it more difficult for the Applicant to take part in the work which had been recommended. However, the Parole Board's duty remains the same. It must not direct release unless it considers that the statutory test has been met. It is clear from the DL that the panel was persuaded after careful consideration that without it the Applicant's risk was still too great to allow it to direct his release.

20. Ground 6 c). The Offender Manager's evidence is clearly set out within the DL. His report did not support release. However, when giving evidence he said that he would now be inclined to support release but would stand by his colleagues' recommendations. It is common for the professional witnesses to come to different conclusions as to whether the risk posed by an offender can or cannot be managed by the imposition of licence conditions. It is less common for such a witness to "sit on the fence" as this witness appears to have done. In this case, at Paragraphs 5-7, the panel set out in considerable detail the evidence it had heard and the reasons why, in the end it decided not to direct the Applicant's release. The panel also had the benefit of a detailed DL from the previous hearing in 2019 in which many of the same obstacles to release were described.

21. Ground 6 e). While the medical problems described in the dossier were clearly significant and require suitable medication, there is no suggestion in the papers or in the helpful and lengthy submissions made to the panel in advance of the hearing that those problems had any significant role in reducing his risk of causing serious physical or mental harm to females.

22. Ground 6 f). The statutory test applied by the Parole Board has not been held by any court to offend the provision of the European Convention on Human Rights. The panel had clear regard to that test and applied it to the findings they had made.

**Decision**

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

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**Sir David Calvert-Smith**
**7 August 2021**