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[2023] PBRA 126

Application for Reconsideration by Chatterton

Application

1. This is an application by Chatterton (the Applicant) for reconsideration of the decision of a Parole Board panel dated the 28 April 2023 not to direct 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 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 dossier of 201 pages including the Decision Letter (DL), the subject of this application, and the Grounds of Appeal submitted on his behalf;
   b. The Applicant's application submitted by his legal representative; and
   c. A response from the Secretary of State for Justice (the Respondent) dated 26 June 2023.

Background

4. The Applicant's index offence and the subsequent sentence and parole history are accurately set out in the DL. In summary:

   a. He was convicted of rape, assault by penetration of a child under 13, sexual assault and two offences of causing a child to engage in sexual assault. He was sentenced to 12 years' imprisonment with an extension period of 1 year. A Sexual Harm Prevention Order (SHPO) was made at the same time.
   b. His parole eligibility date is in July 2023 and his conditional release date is in July 2029.

Request for Reconsideration

5. The application for reconsideration is dated 12 June 2023.

6. The grounds for seeking a reconsideration are in summary as follows:

   a. The panel acted irrationally in concluding that further interventions were necessary before his release could be directed since the risk scores currently obtained would mean that it is highly unlikely that he will be accepted on

relevant course or courses which might be available in prison. In addition, the documents within the dossier provided ample evidence of the Applicant's completion of the work available to him within the prison system based on his current risk scores.

b. The Parole Board's conduct was procedurally unfair in that the panel's paper decision was not served upon the Applicant (or his legal representative) in time for him to request an oral hearing under Rule 20 of the Parole Board Rules 2019. The dossier contains extensive representations (at pp161-7) from the author of the current application for reconsideration. The legal representative received the decision from the Applicant a day after the time had expired for an application for an oral hearing to be considered under Rule 20. The Respondent has been unable to specify the date on which the decision was served on the Applicant.

Current parole review

7. The case was referred to the Parole Board by the Respondent on 29 September 2022.

The Relevant Law

8. The panel correctly set out in its decision letter dated 28 April 2023 the test for release.

Parole Board Rules 2019 (as amended)

9. Under Rule 28(1) of the Parole Board Rules 2019 (as amended), 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)).

Irrationality

10. 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."

11. 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.

12. 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

13. 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.

14. 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.

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

Other

16. In the cases of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

17. 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 (The Respondent)

18. The Respondent, having researched the point, has been unable to state the date on which the DL was served on the Applicant or his legal representative.

Discussion

19. I have come to the conclusion that it was irrational to come to a decision in this case on the papers without exploring the possibilities that the Applicant, who has done everything required of him while in custody to a high standard, could not either – do further work in custody, which if completed satisfactorily would enable his release – or, if subject to suitably restrictive licence conditions following release.

20. This conclusion has been reinforced by my further conclusion that had the Applicant's legal representative received the decision in time to apply for an oral hearing that application would very likely have been granted. The Applicant's legal representative's identity and contact details were well known since she had submitted representations which are at p161 onwards of the dossier. The Respondent in a recent submission has been unable to state when the DL was served on the Applicant. This failure amounts to a serious procedural irregularity which would of itself justify an order for reconsideration.

Sir David Calvert-Smith
13 July 2023