[2019] PBRA 39

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Application for Reconsideration by Jesson

Application

1. This is an application by Jesson (the Applicant) for reconsideration of a decision made by a panel of the Parole Board not to direct his release, following an Oral Hearing on the 16th July 2019.

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 that the decision is irrational (a) or that it is procedurally unfair (b).

Background

3. The Applicant is now 50 years old. He has 46 previous convictions for 128 offences with no discernible gap in his offending since the 15th November 1984, when he was 15. He is serving a sentence of Imprisonment for Public Protection. The index offences concerned three offences of Robbery and two of Burglary which took place between March 2008 and March 2009.

4. On the 4th March 2010, following a trial, five concurrent sentences were imposed. The minimum specified term was set at 6 years based upon a determinate sentence of 12 years imprisonment. The tariff expiry date is said to have been the 4th March 2016. The Applicant has now served 10 and a half years.

5. The dossier states that on the 21st March 2017, after a recommendation had been made by a panel of the Parole Board in January 2017 that he should be transferred to the open estate the Applicant subsequently moved to an open estate and two months later, on the 20th May, he was returned to closed conditions. The Applicant is said to have quickly started to use "NPS" and cocaine. I note that the panel recommending that the Applicant transfer to the open estate on this occasion indicated that there were "risks" in any move to the open estate.

6. In March 2018 a panel of the Parole Board decided that the Applicant should remain in closed conditions. On the 18th September 2018 the Applicant transferred to another prison.

7. On the 16th July 2019 the panel met to consider the Applicant's case. It appears that the Applicant did not seek his release. He sought a transfer to open conditions. Nevertheless, the panel considered all the available options and adjourned the final decision.

8. The reason for the adjournment, as set out in the Adjournment Notice, was that an assessment had been arranged to take place on the 26th July. The Adjournment Notice states that the case will be "*concluded on the papers*" and the case would be "*reviewed on the 22nd August 2019*". In conclusion, the Adjournment Notice states:

> *"The panel considers that it is appropriate to adjourn your hearing in order to obtain the outcome of the assessment and when it is received the panel will decide whether it can safely and fairly conclude your case on the papers or whether it needs to reconvene".*

9. I note that there is no indication in the Adjournment Notice as to whether the panel was to receive further representations, whether orally or in writing. If there had been such a discussion it would have been at the end of the hearing and I would have expected the Adjournment Notice to reflect this. In the ordinary course of events a timetable would have been set on the application of the prisoner's representatives.

10. On the 5th August 2019 the prison unit wrote to state that the Applicant had been accepted and he would be admitted "*within the next 6 months*".

11. Following that letter the panel concluded its review of the Applicant's case. The provisional decision letter is dated the 9th September 2019. The panel repeated the content of the Adjournment Notice and added some concluding paragraphs.

Request for Reconsideration

12. The request for reconsideration of the decision is based upon the following submissions:

13. Firstly, it is contended that the Applicant's solicitors, having received a copy of the letter from the prison, wrote to the Board stating that it was their intention "*to submit representations*". The letter was acknowledged by a Case Manager, acting on behalf of the Board who, on the 2nd September, it is said, "*confirmed that they would let the panel know*". It is contended that before the Applicant had had the opportunity to lodge further representations the panel came to its decision.

14. It is submitted that the proceedings were procedurally unfair because the panel deprived the Applicant of the opportunity of making representations and that the Applicant was deprived of a fair hearing because the panel should have reconvened and heard further evidence from the Applicant and "*additional experts who participated in the hearing*" (sic).

15. Secondly, it is contended that the decision was irrational because the Applicant had not had "*the opportunity to participate at the last hurdle"* (sic) and, secondly, that the Applicant had made an application to be returned to the open estate when the panel heard evidence before adjourning the case.

16. In short, the Applicant contends that the panel should have reconvened to hear further evidence before concluding the case. It should not have been concluded on the papers without allowing the further proceedings.

17. I should point out that I do not know whether the panel received the communication from the Applicant's representatives which was sent in early September. The decision is silent on that point.

18. I have received written submissions from PPCS. They state, quite simply, that the categorization of a prisoner and the establishment they are held in is a matter for the prison service. There are no submissions on the points raised by the Applicant.

Current parole review

19. Following the previous decision of the Board, in April 2018, I note that the Applicant was told that his case would be reviewed in 15 months. In the event, in October 2018 the Applicant had his case referred to the Board pursuant to section 28 of the Crime Sentences Act 1997.

Discussion

20. I have considered the contents of the Adjournment Notice and the Provisional Decision. I note that, in July, the panel heard evidence from the Applicant, the Offender Manager and the Offender Supervisor. The Offender Supervisor had written a report earlier in the year in which he had taken the view that the Applicant should remain in the closed estate and that he should be assessed for another unit. I note that, contrary to this earlier opinion, at the hearing in July the Offender Supervisor was of the view that the Applicant's risk could be managed in the open estate. He was prepared to recommend that to the panel.

21. The Offender Manager, who has held the Applicant's case since 2015, held a contrary view. She was of the opinion that Applicant should remain in closed conditions and transfer to another Unit. She gave evidence to that effect.

22. The panel quite properly reviewed the evidence and considered the risk the Applicant presented.

23. In the concluding paragraphs of the Provisional Decision Letter, which, of course, followed the decision to conclude the case on the papers, having reviewed the evidence and having clearly preferred the view of the Offender Manager, the panel correctly applied the necessary tests in deciding whether to release the Applicant or recommend a transfer to the open estate, or, finally, whether he should remain in the closed estate. No complaint is made about this issue. I mention this because having reviewed the evidence the Decision Letter clearly considered all the available options.

24. The question I have to decide is whether there was a procedural irregularity because the Applicant's representatives ostensibly were denied the opportunity of seeking to persuade the panel that it should reconvene and, by reason of the

fact that the decision of the panel was arrived at before the representatives were able to lodge further submissions they were denied, it is implicitly suggested, the opportunity of influencing the outcome of the hearing, perhaps by the addition of fresh evidence.

25. I have considered whether either a) the failure to allow time for further submissions to be lodged or b) the consequence of not therefore hearing further evidence undermines the conclusion of the panel. There is an ancillary point, which is this. Can the decision be said to flawed if a) the Board failed to pass on the application from the Applicant's representatives and b) the panel failed to acknowledge receipt of the application and c) failed to give reasons for disallowing the application?

26. In coming to my decision, I have concluded that no further compelling evidence could have been called had the panel reconvened. In July the panel had received evidence from the professional witnesses. They had seen and heard the Applicant. They had considered the various options available to them. The issue of the prison unit had clearly been canvassed. If it were otherwise the panel would not have adjourned.

27. Thereafter, the additional evidence (the reason for the adjournment) had been provided to the panel, namely the letter stating that the Applicant would be admitted to the unit. Naturally it would have been possible to recall the Applicant and hear his views, but it is safe to assume that the issue would have been canvassed at the July hearing with the Applicant. The further evidence, such as it would have been, would have been of little or no value to the assessments made by the panel.

28. In coming to this conclusion, I must emphasise that my conclusions are based upon the specific facts of this case. A failure to pass on information to the panel cannot be condoned and a panel, if in receipt of such information and an application of this kind, should, in the ordinary course of events, set out the reasons for disallowing the application.

The Relevant Law

29. In **R (on the application of 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.

30. 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'.*

31. 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.

32. The Board, when considering whether to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'.
33. The fact that Rule 28 uses the same words as is used in judicial review demonstrates that the same test should be applied. This test for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.

Discussion

34. Procedural unfairness under the Parole Board Rules relates to the making of the decision by the Parole Board and an assessment is required as to whether the procedure followed by the Panel was unfair. It seems to me I must look at the proceedings and the conclusions of the panel in the round and ask myself whether it was likely that any further proceedings would have altered the view of the panel which had fairly arrived at a proper decision. I have concluded that nothing further of any substance could have been added.

35. I have had regard to all the facts in this case, in particular the totality of the contents of the Adjournment Notice and the Concluding Decision. If the application made by the Applicant's representatives was not passed to the panel this is a defect in the proceedings and should not be repeated.

36. If the application was made to the panel and the panel decided against the Applicant, the decision letter is defective and should have made mention of the application and the grounds for declining the opportunity to make further representations and/or calling further evidence. The appropriate remedy, if I concluded that there was merit in the application, would be to direct that the panel consider the application. However, having considered the final decision of the panel, even though the decision fails to mention any application to the Board the decision of the panel cannot be said to be irrational or procedurally irregular. Nor, having regard to the totality of the evidence can the decision be said to be unfair. The panel saw and heard the witnesses and took an appropriate decision in assessing the risk the Applicant currently presents.

37. It seems to me that it would be open to me to invite a fresh panel to review the evidence and consider the application made by the Applicant's representatives but having regard to the history of the Applicant, the evidence heard and the recommendations that were made it would be difficult to conclude that another panel would arrive at a different conclusion.

38. In the event, despite the procedural defects, namely either a) the failure to pass on the information to the panel or b) the failure of the panel to direct its mind to the application before reaching its decision, having regard to the procedure as a whole, on the evidence before me I am not prepared to accede to this application.

Decision

39. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is dismissed.

Nicholas Coleman
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3rd Floor, 10 South Colonnade, London E14 4PU
www.gov.uk/government/organisations/parole-board
info@paroleboard.gov.uk
@Parole_Board
0203 880 0885