

[2019] PBRA 4

Application for Reconsideration by Green

Decision of the Assessment Panel

Application

1. This is an application by Green (the Applicant) for reconsideration of the decision of a three-member panel not to direct his release, following an oral hearing which convened on 12 July 2019.
2. I have considered this application on the papers. These comprised the dossier, the written closing submissions of the Applicant's solicitor dated 23 July 2019, the provisional decision letter of the panel dated 27 July 2019, the application for reconsideration dated 15 August 2019 and the response of the Secretary of State dated 27 August 2019.

Background

3. The Applicant is serving an indeterminate sentence for public protection imposed in 2006 for causing grievous bodily harm with intent. The 22 month tariff set by the Court of Appeal expired in 2008.

Request for Reconsideration

4. The Applicant complains of procedural unfairness in relation to the manner in which the panel questioned him at the hearing. He also contends that the panel acted irrationally in recommending that he progress to open conditions rather than be released.

Current parole review

5. In May 2018 the Secretary of State referred the Applicant's case to the Parole Board for his sixth review.
6. The Applicant was in closed conditions when the panel convened on 12 July 2019. Its terms of reference (as amended) asked the panel first to consider whether it was appropriate to direct the Applicant's release. If not, the panel was invited to advise the Secretary of State on whether the Applicant should be transferred to open conditions.
7. The panel heard oral evidence from the Applicant, his Offender Supervisor, his Offender Manager and a prison psychologist. The provisional decision letter records that the panel questioned the Applicant closely about the allegation which



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ultimately led to his return to custody. He became agitated during the oral evidence of his Offender Manager and left the room. At the close of the hearing, he told the panel that he had been annoyed and upset, that he had done all and more that had been asked of him and was long over tariff.

8. The Secretary of State understands that the three report authors who gave evidence to the panel were made aware of the Applicant's grievances in relation to the conduct of the hearing. The Offender Supervisor and the psychologist advised him to speak to his solicitor should he have concerns about the conduct of the panel and the line of questioning it took.
9. The Applicant's solicitor lodged detailed written closing submissions in a five-page document, eleven days after the hearing. They were measured and well argued. They refer to the Applicant being examined extensively by the panel and that the 2014 allegation was a contentious issue at the hearing. No complaint was made that the panel's conduct rendered the hearing unfair.
10. The panel reasons made specific allowance for the Applicant probably being stressed due to him having to give evidence, but the panel was concerned that he could still express himself in very forceful language and concerned whether he could display restraint if released.
11. The panel stated that it made no finding of fact in relation to the disputed allegation. However, the panel was concerned that the Applicant had considered there was no alternative to his admitted behaviour, despite having completed a training course to help people recognise and deal with their problems.
12. The panel considered that the proposed risk management plan would not necessarily detect any negative issues that arise, particularly if the Applicant were to abscond. If a situation similar to that which arose on the night of the allegation happened again, it would be unlikely to be prevented by Probation. The panel therefore decided that the Applicant did not meet the test for release.
13. However, the panel went on to conclude that a further period of testing in open conditions was appropriate in order to test the Applicant's gradual re-integration into the community and to allow relationships to be established under the supervision of probation. The panel considered that the Applicant's risk should be tested and monitored in open conditions. Given all reporting witnesses were of the view that there remained no outstanding work to complete, the panel considered that the benefits to the Applicant of a progressive move outweighed the risks and concluded with a recommendation to the Secretary of State that he should be transferred to open conditions.

The Relevant Law

14. Rule 25 (decision by a panel at an oral hearing) and Rule 28 (reconsideration of decisions) of the Parole Board Rules 2019 apply to this case.
15. Rule 28(1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case.



16. 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. 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."

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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

Discussion

17. The Request for Reconsideration dated 15 August 2019 appears to be the first notice to the Board that the conduct of its panel members is said to have been unfair. It is said that all three reporting witnesses shared that view at the conclusion of the oral hearing on 12 July 2019 and encouraged the Applicant to make a complaint. It is said that a member of the panel used a tone of voice which was argumentative and aggressive and that the panel chair did not intervene to control the proceedings. It is said that the panel did not carry out its role impartially.
18. No support can be found for these strong criticisms within the previous written closing submissions of the Applicant's solicitor or the Secretary of State's enquiries with these witnesses. It also conflicts with the objective way in which the evidence has been narrated and analysed within the provisional decision letter, especially the panel's reasoning in relation to the 2014 allegation, which it did not find to have been made out. The panel made clear and sustainable findings of fact. The stress to the Applicant of having to deal with this matter was acknowledged, although I observe that he was familiar with the parole process and that questions in this private forum are often challenging; they may – and frequently must – explore sensitive areas relevant to risk that a prisoner finds uncomfortable to revisit and would prefer to leave alone. The fairness of proceedings is viewed in the round, having regard to the interests both of the prisoner and the general public.
19. The Request for Reconsideration highlights the consensus amongst the three report authors in favour of release. It goes on to say that none of them considered that a period in open conditions would be beneficial. The record of their evidence within the provisional decision letter shows a more nuanced variety of opinions when questioned.



20. The panel explained in its detailed reasons how it had weighed and balanced the competing views and facts. It was correctly focused on risk throughout. It was reasonably entitled to test the Applicant's evidence robustly and reach the conclusions it did on the facts as it found them to be. The legal test of irrationality is a very strict one. This case does not meet it.

Decision

21. The complaints of procedural unfairness and irrationality are not made out on the papers before me.

22. Accordingly, this application is dismissed.

Anthony Bate
4 September 2019