

[2019] PBRA 63

Application for Reconsideration by Jones

Application

1. This is an application by Jones (the Applicant) for reconsideration of an oral hearing decision dated 22 September 2019 not to direct his re-release.

Background

2. On 7 June 2007 the Applicant was sentenced to an indeterminate sentence for an offence of arson being reckless as to whether life was endangered. The Judge fixed a minimum term of one year, five months and three days and the Tariff Expiry Date was 7 November 2008.

Request for Reconsideration

3. The application for reconsideration is dated 11 October 2019. There has been a slight delay in dealing with this reconsideration application, arising from confusion as to receipt of the application.

Current parole review

4. In May 2018 the Secretary of State referred the Applicant's case to the Parole Board as a result of revocation of his licence. The licence is dated 16 March 2017. It was revoked on 10 May 2018.

The Relevant Law

5. 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.
6. 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.
7. 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

8. A panel convened at the prison where the Applicant resides on 3 May 2019 to hear the Applicant's case. The Applicant sought a direction that he be released but declined to enter the hearing room. With the agreement of his legal representative, the panel adjourned the hearing to 9 September 2019 in order to obtain a psychological assessment. The Applicant subsequently applied to the panel chair that the direction for a psychological assessment should be revoked, on the broad grounds that any input from a psychologist would be valueless; therefore, the direction was pointless, all the more so if he declined to co-operate with the assessment. The application was refused, and the remit of the psychologist amended to take account of the likelihood of the Applicant not co-operating.
9. The panel reconvened on 9 September 2019. By a decision letter dated 22 September 2019, the panel found that the recall(s) were justified and that it appeared that the Applicant was still not co-operating with any core risk reduction work and that his risks could not be managed in the community. In those circumstances, the panel made no direction for release nor for a progressive move to open conditions.
10. The Applicant challenges this decision on the bases that the process was procedurally unfair and that the decision was irrational. The challenge is supported by brief grounds submitted by the legal representative and by a lengthy manuscript document running to 22 pages, written by the Applicant and annexed to the legal representative's grounds.
11. The submission made by the legal representative is that *"the evidence given by [the Applicant] is not referred to [in the decision letter] and it is consequently submitted that this was not taken into account by the Panel when reaching their decision. It is clear that this renders the decision procedurally unfair as [the Applicant], during his evidence submitted an account ...which fundamentally differed to the account put forward in the dossier and no weight or due consideration of this evidence has taken place."*
12. This submission appears to conflate two distinct bases of challenge.



13. First, the failure to make any reference to the Applicant's evidence leads to the inference that the panel failed to take it into account at all. Thus, the process was procedurally unfair.
14. Secondly, the failure to make sufficient reference to his evidence leads to the inference that the panel failed to give adequate consideration to it so that the decision was unbalanced and thus irrational.
15. The first basis is ill-founded. The decision letter records the fact that the Applicant had given evidence and states that the panel had considered the case on the oral evidence and on the papers listed in the dossier. The letter contains specific references to the Applicant's evidence and the dossier includes a number of documents written by the Applicant, including (but not restricted to) a 14 page document in which the Applicant set out clearly the factual matters which he regards as important together with explanations for his behaviour and beliefs. In those circumstances, there is no factual basis for the assertion that no reference was made in the letter to the Applicant's evidence and no sustainable inference that the panel wholly failed to take his evidence into account. The challenge on the basis of procedural unfairness accordingly fails. It is, in any event, not altogether clear why the failure complained of can be capable of amounting to a procedural irregularity rather than a challenge to the rationality of the decision.
16. As to the second basis, there is some force in the complaint that the letter does not make substantial reference to the Applicant's account. A failure to make an extensive record of the Applicant's account, however, cannot of itself render the decision irrational although it may be capable of supporting an inference that his evidence was not taken sufficiently into account in reaching the decision. This will depend on the overall circumstances of the case, including the extent to which the Applicant's account contradicted other evidence and the extent to which such contradictions were relevant to the proper determination of the case. Ultimately, it rests on whether the protection of the public required the continued confinement of the Applicant and/or whether the risk he presented could be adequately managed by a transfer to open conditions.
17. The document submitted by the Applicant in support of this application, referred to above, sets out in some detail the evidence which it is to be assumed he gave to the panel. It is thus possible to have some understanding of the matters which the Applicant wished to bring to the attention of the panel, the extent to which he disputed other material before the panel and the extent to which his evidence and other observations were relevant to the ultimate question of risk. This provides a helpful guide to the question of irrationality in the decision.
18. The document makes it wholly clear that the Applicant does not have a good opinion of offending behaviour interventions nor of the value of psychological assessments or treatments. Reference is made in the decision letter to his failure to engage in these respects, including his refusal to meet with the psychologist tasked with providing the panel with an up-to-date assessment. None of these matters was in any significant dispute. A failure to record the fact that the Applicant did not dispute these matters (or if he did dispute them, that the area of



dispute was immaterial to the decision) cannot give rise to a conclusion that the panel's assessment of risk factors was in any way irrational.

19. The Applicant appears to feel aggrieved at the absence from the hearing of the Probation Officer who completed the Recall Report. Given that the Applicant agreed in his written response, contained in the dossier and referred to above, that his recall was justified for the reasons set out in the Recall Report, it is difficult to understand how the absence of this potential witness made any difference to the determination of the appropriateness of the recall and of the reasons for it. His account, set out in his document in support of this application, appears to put this in issue but does so on a basis that is difficult to understand and lacks coherence.
20. There are references to a number of matters in the decision letter on the topics of evidence of change and progress in custody. There can be no proper complaint that these matters were irrelevant to these topics nor that the panel's opinion on them was unsupported by the evidence they had considered. Whilst it is true that not every aspect of the Applicant's account on these topics is recited in the letter, it is equally clear that he had no significant dispute with any of them. By way of example, the letter contains reference to an incident when the Applicant was unhappy not to be removed from a vocational course. As to this, the Applicant disputes becoming angry but does not take issue with any other aspect of it. Whether or not he was angry was of no real significance; there were other aspects of this which were of relevance and were not in dispute, such as his propensity to assert discrimination against those who made decisions affecting him with which he disagreed.
21. A critical aspect of the panel's assessment of risk as set out in the decision letter is his refusal to accept professional opinions, leading to a lack of interventions which would help him to progress. The letter did not go on to say that the Applicant's position on this was that he did indeed decline to accept professional opinions and that despite that, he was fully able to progress without interventions. The omission of this from the letter cannot amount to evidence of irrationality in the decision; the inclusion of it would only have supported the panel's finding.
22. The panel's conclusion and decision (based, as the decision letter expressly states, on all of the documentary and oral evidence) made reference to the concerns of all of the professionals, none of whom supported release or a progressive move, as to the Applicant's attitude to the professionals and his failure to co-operate with the psychological risk assessment. The evidence of the Applicant can only have served to reinforce this conclusion. It cannot be characterised as irrational by reason only of an omission from the letter of an express mention of the Applicant's evidence on this topic and in any event, in the light of all of the evidence before the panel, the conclusion was manifestly one which was reasonably available to them.
23. The view that the decision was not irrational is not one held exclusively by this Reconsideration Assessment Panel. It is expressly shared by the Applicant himself in a passage on the obverse of page 10 of his submissions in support of this application: "*...I accept that the decision concluded by the panel can*



understandably be reported to be a rational one, especially when considering the evidence which was offered to the panel."

24. He goes on to complain that he does not consider that the evidence was thoroughly investigated. This complaint finds no mention in his legal representative's grounds nor is it supported by examination of the decision letter or the other case materials. It amounts, in reality, to an assertion that he is dissatisfied with the decision and wants a second opportunity to have his case heard. It certainly does not amount to sufficient basis for a finding of irrationality.

Decision

25. 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 refused.

Alistair McCreath
20 November 2019