

[2019] PBRA 64

Application for Reconsideration by Moorcroft**Application**

1. This is an application by Moorcroft (the Applicant) for reconsideration of a decision by a Panel of the Parole Board not to direct his release on the basis that the decision was both procedurally unfair and irrational.
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 (a) irrational and/or (b) procedurally unfair.

Background

3. The Applicant is 54 years of age. He is currently serving a sentence of life imprisonment imposed on 7 December 1994 following his conviction for murder. The minimum custodial term was set at 11 years and his tariff expired on 5 November 2004.
4. The index offence was committed when the Applicant stabbed his former partner to death after she ended their three-year relationship. The Applicant did not dispute that he had killed her but pleaded not guilty to murder on the basis of diminished responsibility. He was convicted by a unanimous jury verdict after trial.
5. The Applicant had a previous conviction for unlawful wounding at the age of 18 in respect of which a Community Service Order was imposed and another 5 years later for theft from his employer which resulted in a short suspended sentence of imprisonment.
6. The Secretary of State referred the Applicant's case to the Parole Board by Notice dated 30 October 2017 to consider whether or not to direct his release and if not, to advise whether he should be transferred to open prison conditions.
7. This was the Applicant's 8th review and it was due to be considered by a panel of the Board comprising two independent members and one psychologist member at an Oral Hearing on 9 October 2019. That hearing did not take place as the Panel



Chair decided in advance not to direct the Applicant's release. The Chair's reasons are set out in the decision letter dated 1 October 2019 (the Decision Letter).

Request for Reconsideration

8. The Application for Reconsideration is dated 4 October 2019 and is made on the basis that the Decision not to release him was both procedurally unfair and irrational. It is an eligible case.
9. The Applicant submits that: (i) the Decision Letter refers to written representations not having been received when they had in fact been sent; (ii) a major reason for requesting an Oral Hearing was the fact that his decision to decline one-to-one psychology work, which was due to many associated issues, left no treatment plan in place; (iii) the Decision Letter contains false and misleading information about the index offence, violence by him as a child, and his reasons for joining the prison PIPE Unit .
10. The Applicant states that not only did his solicitor send legal representations to the Board, but that these were also sent on by his Offender Supervisor. They are not in the dossier and I am unable to conclude that they were considered by the Panel Chair.
11. In an additional document, the Applicant refers to issues about motivation for the index offence including whether or not it was sexually motivated, issues about the existence of any personality disorder, and a failure by the prison to provide documents relevant to such matters. He submits that there was a need to question witnesses on these issues.
12. By email dated 30 October 2019, the Public Protection Casework Section, on behalf of the Secretary of State, confirmed that no representations were offered in response to the Reconsideration Application.

Current Parole Review

13. The current review was concluded on the papers by the Panel Chair alone. It had been beset by delay. MCA Directions made on 19 March 2018 set out the reports required and directed that the case proceed to an Oral Hearing. This was scheduled for 1 November 2018 and it was attended by the Applicant and his solicitor. However, on that day it was discovered that the case had been listed before the wrong panel who declined to hear it. Following the inevitable deferral, further directions were made on 12 November 2018, 4 January 2019, 15 February 2019, and 28 February 2019 when a hearing date of 27 March 2019 was confirmed.

14. After a further deferral, in respect of which no details appear in the dossier, the case was relisted for an Oral Hearing on 9 October 2019. The 15 July 2019 Panel Chair Directions confirmed that this Oral Hearing was to proceed and specifically directed the provision of a Psychological Report giving details of one-to-one work undertaken with prison psychology, progress made and an up-to-date recommendation. Offender Supervisor and Offender Manager reports were also directed.
15. According to the Offender Supervisor's Report dated 27 September 2019, the Applicant met with the appointed Psychologist on 12 September 2019 and was due to see him again during the week commencing 30 September 2019.
16. The Parole Board panel conducting the Applicant's Oral Hearing review on 22 June 2016 concluded that, whilst the index offence was not sexually motivated, it did contain a sexual element, and that the victim was likely to have been pressured and controlled by the Applicant on that occasion. The letter confirming the decision neither to direct release nor to recommend a transfer to open conditions referred to concerns raised by the Applicant's attitude towards female staff and other professionals. It concluded that further exploration was needed to establish the reasons and whether there might be an emerging trait of sexualised behaviour/preoccupation.
17. The 7 June 2019 Programme Needs Assessment by a Psychologist identified a progression pathway involving one-to-one work with a member of the psychology team. The Offender Manager stated in her Report dated 12 June 2019 that it was very positive that the Applicant had ended his resistance to a face to face meeting, and that it had been possible to engage him in a constructive meeting with professionals. She suggested that his motivation should be encouraged.

The Relevant Law

18. 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 Board in making decisions relating to parole. When considering whether or not to direct a reconsideration, the Board will adopt the same high standard for establishing "irrationality". The fact that Rule 28 uses the same word 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.

19. In the cases of **Osborn and Booth -v- the 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 in paragraph 2 of the judgment. I shall not refer in detail to their reasons but only so as is necessary to determine the Application. The Supreme Court did not decide that there should always be an oral hearing but that there ought to be one if the Board were in any doubt. It should be ordered where there is 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.
20. At para 2 (vi) Lord Reed said, "*when dealing with cases concerning post tariff prisoners, it should scrutinise ever more anxiously whether the level of risk is acceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff.*" That is the position in the Applicant's case, although it has never been easy to understand exactly what is meant in practice by Lord Reed's statement. The test which the Board must apply when deciding on release, remains the same however long over tariff the prisoner is. Once the tariff has expired the Board will always examine with as much care as possible whether or not the test for release is met. An oral hearing is an important element in the process.

Discussion

21. The Applicant had a legitimate and reasonable expectation that the issues identified by the previous panel and in updated reports would be explored at the directed Oral Hearing by the three member panel. He had not been given advance notification that the Panel Chair might decide to conclude the review alone on the papers.
22. The Decision Letter stated, "*As long ago as July your solicitor was informed that the Panel Chair considered the timescales involved precluded a deferral and that he was minded to conclude the case on the papers*". I have found nothing in the dossier to suggest this assertion is accurate. Indeed, having carefully considered the Chair's 15 July 2019 Directions I consider there was an unequivocal direction that the Oral Hearing was to proceed on 9 October 2019. There is reference to the fact that the one-to-one work with psychology which the Applicant was about to start could have implications for the hearing but, in my judgment, this does not equate to a warning that there were circumstances in which the hearing might not proceed at all. Nor

do the 15 July Directions give any indication that the case might be decided by the Panel Chair alone.

23. There were issues raised by professional witnesses, which could and should have been explored at the hearing, including motivation, developing insight, and progress in the one-to-one work, however short that might be. There were also matters identified by the Applicant upon which he clearly wished to address the Panel. These include issues about his suitability for open conditions and concerns raised by the Probation Officer of what he claims are new risk factors.

Decision

24. In this case, the Parole Board will have applied the principles in **Booth** on each occasion that a decision was made either to direct or to confirm an Oral Hearing. There were at least 5 instances of this. It was not until 1 October 2019, only 8 days before the hearing date, that the Panel Chair decided not only that the case should be concluded on the papers but also that it should be the Chair alone rather than the existing three member Panel who would do so. I can see no evidence in the dossier that the Applicant was given advance notice of this.
25. In my judgment, the Applicant had a legitimate expectation that the Oral Hearing would proceed before the full Panel so that he could question witnesses about their reports and recommendations, give evidence himself, answer any concerns raised by the Panel Members and make submissions after the evidence was concluded. That opportunity was denied him.
26. Accordingly, I do consider, applying the test as defined in case law, that the decision to conclude the current review on the papers by the Panel Chair alone was both irrational and procedurally unfair. Applying Osborn principles, an oral hearing was required. To decide the case in a manner contrary to the legitimate expectation of the Applicant without prior notice to him was unfair. The Application for Reconsideration is therefore granted, and the case should be heard by a fresh panel by way of an Oral Hearing to be listed to be listed on the first available date after 1 January 2019.
27. I make the following Directions which may be varied in due course by the new Panel Chair:

HH Judge Graham White
20 November 2019