

[2019] PBRA 73

Application for Reconsideration by Pope

Application

1. This is an application by Pope (the Applicant) for reconsideration of a decision at an Oral Hearing on 30th October 2019 and set out in a Decision Letter of 13th November 2019 not to direct his release.

Background

2. The Applicant is serving a sentence of life imprisonment. His tariff expired in June 2010.

Request for Reconsideration

3. The application for reconsideration is dated 27th November 2019.

Current parole review

4. In December 2017 the Secretary of State referred the Applicant's case to the Parole Board for his fifth review. Hearings scheduled for 12th December 2018 and 8th May 2015 were deferred, first, to allow the Applicant to complete periods of temporary release and, second, because he had recently been transferred back to closed conditions

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. Reconsideration Assessment Panels are empowered to reconsider decisions as to whether a prisoner is suitable or unsuitable for release. A recommendation that a prisoner is or is not suitable for a move to open conditions is final and not within the scope of the reconsideration process (see Parole Rules 2019 rules 19 (1) (a) and (b), 21 (7), 25 (1) and (5) and 28).
9. In the present case, the Applicant's representative invited the Oral Hearing Panel (OHP) to recommend to the Secretary of State that the Applicant be transferred to open conditions but made no application for his release. Nonetheless the OHP had to fulfil its duty to consider release and not restrict itself to a decision as to whether a recommendation for a progressive move was appropriate. The OHP, however, were entitled in approaching their decision as to release to have regard to the fact that none of the professionals supported release and that this was not an outcome sought by the Applicant. It is also something which this Reconsideration Assessment Panel (RAP) can take into account in determining whether the decision not to release is shown to be irrational, the only decision which is within the remit of this RAP.
10. The representations in support of this application set out a number of complaints.
11. It is submitted that the unavailability of the Applicant's Offender Supervisor, which occurred late in the day preceding the Oral Hearing, put the Applicant at a disadvantage and amounted to a procedural irregularity. The alleged disadvantage is particularised as an inability on the part of the substitute to deal with a particular topic, namely whether the Applicant when last in open conditions had worked in a particular place of work for 10 days (as suggested by the Offender Supervisor in reports included in the dossier) or for 70 days as suggested by the Applicant. It is also submitted that the failure on the part of the OHP to invite submissions on the topic of substitution amounted to or compounded the procedural irregularity.
12. Whilst the attendance at the hearing of those who have had direct and immediate contact with the prisoner is desirable, it sometimes happens that this is not possible, and the absent witness is covered by a substitute. It is not in itself procedurally unfair for the OHP to proceed with a hearing in such circumstances. The OHP is entitled to weigh up the competing factors, including but not limited to the desirability of finalising the parole review within a reasonable time, whether the substitute is adequately briefed and/or has other direct knowledge of the



prisoner, the overall importance of any gaps in the knowledge of the substitute and any representations on the topic of adjournment made by or on behalf of the prisoner. Having carried out that exercise, the OHP must then make a fair determination as to whether to proceed.

13. This case had already been deferred twice so that hearings scheduled for the 12th December 2018 and the 8th May 2019 did not take place. The OHP were satisfied that the substitute (a) was sufficiently briefed and (b) had direct knowledge of the Applicant, having been his Offender Supervisor in a previous establishment. The OHP had a number of reports from the Offender Supervisor, the last of which was about 4 weeks old. In the overall context of the case, the question of the number of days worked by the Applicant, however important this might appear to him, was of minor significance.
14. The submission that the OHP should not have proceeded without inviting the Applicant's representative to express a view on the matter is without merit. It is the duty of a representative to speak out, whether invited to or not, against any procedural unfairness. The fact, as it appears to be, that there was no intervention by the representative, either before the hearing began or at any stage during the evidence given by the substitute, tells its own story.
15. In those circumstances, this RAP is unable to accept that the decision to proceed in the absence of the Offender Supervisor amounted to procedural unfairness.
16. It is submitted that the OHP overlooked the activities carried out by the Applicant when on temporary release during his previous period in open conditions. This submission arises from the way in which this topic was dealt with in the Decision Letter where the full extent of these activities was not set out, thus, it is submitted, leading to an inference that the OHP did not take them into account and that the decision is therefore irrational.
17. The Decision Letter makes it plain that the OHP had read and considered the contents of the dossier, within which there was considerable reference to these outside activities. It cannot, therefore, be realistically argued that the OHP were unaware of them. In those circumstances, the submission made on behalf of the Applicant must be that their failure to make full reference to this topic means that they gave it insufficient weight rather than that they wholly disregarded it. A fair reading of the Decision Letter as a whole, demonstrates that the OHP did not leave these (or other) positive factors out of account but balanced them against the extent and manageability of the Applicant's risk, the question central to their decision as to release.
18. A particular complaint is made about a sentence in the Decision Letter which noted that at one point the Applicant's engagement in open conditions had been limited to having counselling. This sentence refers to a report written in March 2017 and appears in the Decision Letter as a comment on the Applicant's evidence that he had been at that time "a model prisoner". It does not reflect the OHP's view of his subsequent engagement. This RAP has not been assisted by the citation of a random sentence taken out of context.



19. It is submitted that the OHP ought to not have found that the Applicant's own release plans were limited nor that the proposed Risk Management Plan lacked long term and intensive support to address relevant risk issues. Complaint is made that the OHP paid too much regard to drug issues and to recorded incidents of verbally aggressive behaviour. These were all matters on which the OHP was fully entitled to reach its own view. There was a proper evidential basis for doing so and it is plain from the Decision Letter that they evaluated the evidence, focussing on that which was relevant and avoiding that which was not. By so doing, they reached a decision on a basis that cannot be characterised as irrational.
20. It is further submitted that the hearing ought to have been further delayed, whether by deferral or adjournment, so that the Applicant could complete an offending behaviour course. It seems that this suggestion was not made to the OHP but has been raised for the first time in the representations made to this RAP. It is a suggestion without merit. It has already been observed that this review ought to have taken place about a year ago and had been deferred twice already. Further delay would have been highly undesirable. In any event, it is not clear to this RAP that this asserted failure to adjourn the hearing is within its remit as set out in the Rules, above.
21. The Decision Letter sets out in careful detail and in a balanced way, the Applicant's risk factors and his progress since the last review, giving fair consideration to the positives but also setting out the negatives. There is an accurate assessment of risk (not challenged before this RAP) and an evaluation of the effectiveness of plans to manage risk. The conclusions of the OHP as to this, based on the evidence before them, were conclusions to which they were fully entitled to come. The complaints now made amount to no more than an assertion that the OHP ought to have given more (or less) weight to particular aspects of the evidence. They do not constitute any possible basis for a finding of irrationality. As has been observed, in declining to direct release, the OHP were not only in agreement with the Offender Manager and the Offender Supervisor but also in step with the position of the Applicant's representative who accepted at the outset that release would not have been a realistic outcome.

Decision

22. 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
6th December 2019