[2020] PBRA 101

Application for Reconsideration by Davies

Application

1. This is an application by Davies (the Applicant) for reconsideration of a decision of the Parole Board dated the 1 July 2020 made following an Oral Hearing held on 25 June 2020 which decided not to direct his release and not to recommend a progressive move to open conditions.

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

3. I have considered the application on the papers. These are the dossier, the Decision Letter dated 1 July 2020 and the application for reconsideration itself dated 6 July 2020 from solicitors acting on behalf of the Applicant.

Background

4. The Applicant is serving a sentence of life imprisonment for specimen offences of buggery and anal rape, committed against a child. He was convicted at the same time of offences of indecent assault and gross indecency against the same child. The offences involved the use of force and threats.

5. In June 1998 the Applicant received a seven year sentence for offences of rape committed over a 5 year period. He was also convicted of indecent assaults on two other children. In August 2007 the Applicant received an indeterminate sentence for public protection, with a minimum tariff of 54 months, for offences of rape, committed against a child. He was also convicted of attempted rape against the same child. The Applicant was aged 48 at the time of the conviction, with the offences taking place over a 5 year period when he was aged between 31 – 36.

6. The minimum tariff on the life sentence expired on 3 April 2017. The oral hearing on 25 June 2020 was his second review. The Applicant was aged 60 at the time of this review.

Request for Reconsideration

7. The application for reconsideration is dated 6 July 2020.

8. The grounds for seeking a reconsideration are as follows:

   (i) That the process was procedurally unfair, on the basis that:

   (a) The prison psychologist had not spoken to the Applicant since his prison move; that the prison psychologist had read logs from an accredited programme which were not included in the dossier;
   (b) That the assessment of risk of reoffending and outstanding needs (Sexual Offending) was over 18 months old and that the prison psychologist had confirmed that a more up to date risk assessment "may very well be helpful" and confirmed that further work was needed. That the Applicant made an adjournment request in order for an up to date risk assessment to be made which was refused;
   (c) That the panel interjected during the Applicant's legal representative's questioning and a line of questioning could not be further pursued by the representative; and
   (d) That the Applicant was unable to hear a lot of what was said during the hearing due to a poor quality telephone link between all the parties.

   (ii) That the decision not to adjourn the hearing to enable an up to date risk assessment was irrational.

Current parole review

9. The case was referred to the Parole Board in April 2018. The referral was for the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release. If after considering the case, the Board decided to direct the Applicant's release on licence, the referral invited the Board to make a recommendation in relation to any condition which it considered should be included in the licence.

10. The referral was considered by a Member Case Assessment panel on 13 September 2018 which referred it to oral hearing. The oral hearing was originally listed for February 2019, with this hearing being deferred after a request from the Applicant's legal representative, to enable an independent psychologist to provide a report. The oral hearing was relisted for October 2019, but again deferred

following a request from the Applicant's legal representative, with the instructed independent Psychologist not being available for the date of the hearing.

11. The oral hearing was heard remotely by Skype telephone conference on 25 June 2020 by a three member panel, which included a psychologist member. It was not possible to hold the scheduled oral hearing face to face at the prison due to restrictions imposed by the COVID-19 pandemic. Oral evidence was heard from the Offender Manager (OM), Offender Supervisor (OS), prison psychologist, independent psychologist and the Applicant. The Applicant was legally represented throughout and representations were made on his behalf.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 1 July 2020 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019

13. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).

14. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Procedural unfairness

15. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.

16. In summary, an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:
    (a) express procedures laid down by law were not followed in the making of the relevant decision;
    (b) they were not given a fair hearing;
    (c) they were not properly informed of the case against them;
    (d) they were prevented from putting their case properly; and/or

(e) the panel was not impartial.

The overriding objective is to ensure that the Applicant's case was dealt with justly.

Irrationality

17. In **R (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."

18. 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.

19. The application of this test has been confirmed in previous decisions on applications for reconsideration under Rule 28: **Preston [2019] PBRA 1** and others.

The reply on behalf of the Secretary of State

20. The Secretary of State has not submitted any representations in response to the application for reconsideration.

Discussion

21. The panel had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of hearing the Applicant as well as the OS, OM and the two psychologists. The Applicant was also legally represented throughout.

22. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They

would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

23. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.

24. As Stanley Burnton J set out in **(Alvey) v Parole Board [2008] EWHC 311 (Admin)**, at [26]

> "*It is for the Parole Board, not for the court, to weigh the various considerations it must take into account in deciding whether or not early release is appropriate. The weight it gives to relevant considerations is a matter for the Board, as is, in particular, its assessment of risk, that is to say the risk of re-offending and the risk of harm to the public if an offender is released early, and the extent to which that risk outweighs benefits which otherwise may result from early release, such as a long period of support in the community, and in some cases damages and pressures caused by a custodial environment.*"

25. It is my task to determine whether the panel have provided clear and justifiable reasons based on their analysis of all of the evidence before them. I should not substitute my view of any facts as found by the panel and should not direct that a decision be reconsidered in such circumstances unless it is manifestly obvious there was an error of fact which was taken into account in making their decision.

26. With those matters in mind I turn to address the grounds of procedural unfairness and then to the separate claim that there was an irrational decision not to adjourn for a risk assessment.

<u>Ground (a)</u>

27. The prison psychologist was the author of the assessment of risk of reoffending and outstanding needs report dated 21 January 2019 which was prepared following the completion by the Applicant of an intervention addressing sex offending.

28. The assessment of risk of reoffending and outstanding needs report considered that the Applicant had exhibited offence paralleling behaviours and that his engagement with a regime designed and supported by psychologists to help

people recognise and deal with their problems, was necessary to consolidate what had been learnt during interventions.

29. The assessment of risk of reoffending and outstanding needs report set out at appendix A that the progress logs from the intervention addressing sex offending had been considered by the prison Psychologist as part of the assessment and there were extracts from the logs included in appendix B in the risk and success factors analysis grid.

30. The prison psychologist had not spoken to the Applicant since his prison move in May 2019. They were however able to hear the Applicant give his evidence to the panel during the oral hearing and they then gave their evidence, as did the independent psychologist. This order of evidence enabled the prison psychologist to give a current assessment of the Applicant as they appeared at the oral hearing. I consider therefore that there is no substance in this aspect of ground (a).

31. It is further submitted that the dossier did not include the intervention addressing sex offending logs and that they were not available to be used to put questions to the prison psychologist.

32. In my judgement there is nothing in this second aspect of ground (a). The panel had the detailed assessment of risk of reoffending and outstanding needs report, the independent psychology report of May 2019 and oral evidence from both psychologists. As the decision letter records near the mid-point of the hearing and again at the end of the proceedings the Applicant's legal representative made submissions that seeing the programme logs would better inform the panel. The letter records the assessment of the panel that they did not consider it necessary to view the logs as they had the assessment from January 2019 which contained 64 pages of detailed 'Risk and Success Factors Analysis' based upon the completion of the intervention addressing sex offending. Following **Williams [2019] PBRA 7** the omission of the logs is not a ground for procedural unfairness.

33. In any event, it is my view that the panel properly considered the evidence that was before them to reach their decision and concluded that the logs were unnecessary information given what they already had.

34. Furthermore, it is apparent that from the point of delivery of the January 2019 assessment that the prison psychologist had considered the programme logs as part of their assessment. The Applicant did not take the opportunity in advance of the hearing to remedy the absence of these logs from the dossier by asking for their inclusion, making this late submission unattractive in its presentation as well as lacking in substance.

Ground (b)

35. The decision letter records that two applications were made for an adjournment for a further psychological risk assessment to take place (interchangeably described in the application as both a deferral and an adjournment). The applications were summarised in the decision letter, with the necessity for them being said by the Applicant's legal representative in the hearing to be because (i) the 2002 recall of the Applicant required further examination, (ii) the intervention addressing sex offending logs were not in the dossier and seeing them would better inform the panel and (iii) that a revised risk assessment would identify a clear pathway to address any outstanding risks.

36. In my view there is nothing in this ground. The decision of the panel was that they were able to understand the outstanding areas of risk and the means by which they were able to be addressed without needing a more up to date risk assessment. The panel set out clearly in the decision letter that they had (i) two psychological reports which had been produced in the 18 months before the oral hearing; (ii) the benefit of hearing oral evidence from both psychologists after they had heard the Applicant's evidence; (iii) that both psychologists agreed that the Applicant poses a very high risk of serious harm to children; (iv) that there had been no significant changes since the completion of the January 2019 assessment of risk of reoffending and outstanding needs report; (v) that the recall to custody 18 years previously was a peripheral issue which it was not necessary to explore; (vi) that it was not necessary to view the intervention addressing sex offending logs due to the detail already within the assessment of risk of reoffending and outstanding needs report. The clear conclusion was that the panel were satisfied on the written and oral evidence given to them that the Applicant's outstanding areas of risk and the means by which they could be addressed had been identified. They set these matters out in detail within the comprehensive 13 page decision letter. The panel ultimately reached a decision which was open to them, considering all the evidence before them to make their decision and concluding that a more up to date risk assessment was not required at present to enable them to make this decision.

Ground (c)

37. The application submits that the prison psychologist had stated that she thought the Applicant needed to undertake further work, and that the panel had failed to ask what work could/would be available. The submission is made that the legal representative then attempted to ask the prison psychologist what potential work might be available to the Applicant and this line of questioning was prevented by the panel. There is no reference in the decision letter to the Applicant's legal representative having been prevented from being able to pursue a line of questioning.

38. As Lord Edmund-Davies has pointed out in **Bushell v Secretary of State for the Environment [1981] AC 75** at 116 *"there is a massive body of accepted*

decisions establishing that procedural unfairness requires that a party be given an opportunity of challenging by cross-examination witnesses called by other parties on relevant issues". The real question here is whether the absence of cross-examination on this point renders the decision unfair in all the circumstances.

39. The application explains that the prison psychologist had given evidence prior to this point that she could not say what work was outstanding and needed to be completed as she had not completed a risk assessment and would need to complete one to say whether the work was core risk reduction work or consolidation work. A risk assessment could not take place during the oral hearing.

40. In the circumstances where the witness was unable to give an opinion on what further work was outstanding without completing a further formal assessment, in my view the panel was entitled to reach the view that it would not be aided in its decision making by further exploration through questioning of what work might be available. Therefore, the decision to limit cross-examination in this instance, was one which was well within the discretion of the panel and did not amount to procedural unfairness.

Ground (d)

41. There is no reference within the decision letter of any difficulties which were encountered with the quality of the telephone audio link during the oral hearing. The submissions are that the telephone link was poor / terrible between all parties on the day of the hearing and that the Applicant was unable to hear a lot of what was said during the hearing. There are no representations that any other parties had difficulties during the hearing. The Applicant does not have any hearing loss that is detailed in the dossier.

42. The application makes reference to a very brief telephone discussion having taken place between the Applicant and his legal representative during the course of the hearing, following which the first application for a deferral was made in order to obtain an up to date risk assessment.

43. It is apparent from the decision letter that the Applicant also gave evidence by telephone and was questioned.

44. In my judgment there is not sufficient evidence to demonstrate that the Applicant was unable to hear a lot of what was said during the oral hearing and this ground is not made out. Relevant detail of the oral evidence given by the parties is set out within the decision letter and no reference is made to any problems around communication. The Applicant was represented throughout the hearing and was able to communicate directly with his legal representative during the hearing and to answer the questions of the panel during the course of his evidence. He had

ample opportunity at the oral hearing to raise any hearing difficulties himself either directly or through his legal representative and he did not do so.

45. In addition to it being said to be procedurally unfair not to have adjourned the hearing to enable a risk assessment to take place, it is submitted that it was also irrational not to do so.

46. The panel has a broad discretion whether or not to adjourn a hearing. This was a review that had commenced in April 2018 and had twice been deferred at the request of the Applicant in order that psychological evidence presented by an independent psychologist could be placed before the panel. The panel had psychological evidence from the independent and the prison psychologist, both of whom considered the Applicant to be a very high risk to children and noted that there had been no significant changes since the completion of the assessment of risk of reoffending and outstanding needs report in January 2019. Given the wealth of information that the panel did have to enable it to assess risk, and the clear determinations made from that evidence within the decision letter, it was not irrational for it to conclude that it would not adjourn for an additional risk assessment.

Decision

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

Angharad Davies
31 July 2020