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[2020] PBRA 127

Application for Reconsideration by Boyle

Application

1. This is an application by Boyle (the Applicant) for reconsideration of a decision of a three-member panel, dated the 20 July 2020, not to direct his release on licence following an oral hearing.

2. I have considered the application on the papers. These consisted of the dossier running to 348 pages, the decision letter, and a nine page letter from the Applicant that sets out his application for reconsideration.

3. 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.

Background

4. The Applicant was sentenced to Imprisonment for Public Protection on 15 September 2008 for Section 18 wounding. The tariff was set at two and a half years (with allowance for time on remand) and expired on 11 October 2010. The Applicant was aged 24 at the time of the sentencing and aged 36 at the time of this review.

Request for Reconsideration

5. The application for reconsideration is dated 26 July 2020. Although he was legally represented at his hearing, the application is drafted by the Applicant himself.

6. There are a number of complaints set out by the Applicant, which can be summarised as follows:

   (a) The recall was not justified as the Applicant had not breached his licence (irrationality);
   (b) The decision letter did not accurately reflect the Applicant's evidence, and contained factual inaccuracies (irrationality/procedural unfairness); and
   (c) The panel failed to take account of the fact that although there were further criminal proceedings they did not result in a further custodial sentence (irrationality/procedural unfairness).

Current parole review

7. The Secretary of State referred the Applicant's case to the Parole Board after he was recalled to consider whether he should be re-released on licence.

8. The Applicant's case was considered by a single member panel in August 2019 and an oral hearing directed.

9. The matter was listed for an oral hearing on 2 June 2020 where the panel convened (remotely) at the prison. Although the hearing was conducted in a Scottish prison, the Applicant was a restricted transfer prisoner. In those circumstances there is no suggestion that the Parole Board of England and Wales does not have jurisdiction over the case, or that the Parole Board Rules 2019 do not apply.

10. In the decision letter the Panel set out the history of the case. It concluded that in light of the Applicant's conviction for further offences (even though these had been committed before the release) and the failure to disclose a relationship, the decision to recall was justified, not least because it changed the Applicant's risk profile.

11. When considering the question of release, the Panel concluded that there was not a sufficient understanding of his risk factors to conclude that the proposed plan would be sufficiently robust to manage his risk in the community.

12. In light of that, no direction for release was made.

The Relevant Law

13. The panel correctly sets out in its decision letter dated 20 July 2020 the test for release.

Parole Board Rules 2019

14. 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. This is such a case.

15. Such a decision is eligible for reconsideration on the basis that (a) the decision is irrational and/or (b) that the decision is procedurally unfair.

Irrationality

16. 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."*

17. 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.

18. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28 (see **Preston [2019] PBRA 1** and others).

Procedural unfairness

19. 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.

20. 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.

The reply on behalf of the Secretary of State

21. The Secretary of State has submitted two pages of representations dated 2 September 2020.

22. He does not oppose or support the application or make submissions on the merits of the decision not to release, but raises two factual issues that go to the question of the correctness of the decision to recall.

23. On both occasions what is put forward is information obtained subsequent to the decision letter being issued (following a conversation with the community probation officer).

24. The Reconsideration Mechanism is a review of the decision based on the material before the Panel. There is no provision in rule 28 Parole Board Rules 2019 for fresh evidence to be admitted.

25. This was confirmed in **Nightingale [2019] PBRA 40** at least in the context of an application by an Applicant who wishes to put forward new evidence.

26. It may be that an exception to the general rules would be required in circumstances such as this, but I do not need to consider that question as it would not make a material difference to the outcome.

27. On that basis, whilst the efforts of the Secretary of State are appreciated, I decline to consider any of the factual matters raised in the response.

Discussion

28. I shall consider the various grounds raised, before returning to the central question of whether the Panel fell into error.

29. The first issue is in relation to the decision to recall. The Parole Board has a duty to consider the decision to recall (**Calder [2015] EWCA Civ 1050**), and the Panel's decision on this point can be considered as part of the reconsideration (**Wright [2019] PBRA 81**).

30. Although the Panel did not explicitly refer to the case of **Calder**, the necessity to consider the recall and the principles were referred to in the decision letter.

31. It is an interesting question whether the fact of a conviction itself, in circumstances where the alleged offending was known prior to release, is sufficient to trigger the condition to 'not commit any offence'.

32. In this case however, the Panel did not determine the case solely on the basis of the conviction, but by considering the failure to disclose a relationship and the change in understanding of the Applicant's risk that the conviction shows.

33. It must be remembered that the Panel were not determining themselves whether they would have recalled the Applicant, but whether the *"Secretary of State was reasonably entitled to conclude that the appellant was in breach of the condition".*

34. The Applicant sets out a critique of the Panel's reasoning for the finding that there was a relationship that was not disclosed.

35. In relation to that, the Panel had the benefit of hearing the Applicant give evidence at a hearing where he had the opportunity to put forward any relevant evidence that he wished to. In addition, he was legally represented at that hearing.

36. In those circumstances, it is open to me to overturn a finding of fact only if there was a clear error. No such error is suggested or can be seen.

37. To the extent that the Applicant seeks to put forward fresh evidence (rather than fresh arguments on the evidence) it is not open to me to take this into account for the same reasons as set out above. In any event, I do not consider that this could have made any difference to the Panel's conclusion.

38. On the question of the lawfulness of the recall, I do not consider that the Panel fell into error.

39. The Applicant's submissions raise various issues with different parts of the letter. I will not set these out individually as they are effectively points of commentary, disagreement or interpretation, rather than suggestions of an error.

40. I shall set out one example. The Panel notes (during its summary of the oral evidence) that the Applicant's evidence was that he had not met the complainants for the offences that led to recall. The Applicant comments that this was supported by the police documents. However, the Panel did not make any finding to the contrary and there is no obligation on it to 'annotate' the Applicant's evidence with reference back to other material.

41. As the Applicant was unrepresented in his application I have gone through the decision letter to see if there is any error of fact that could amount to an error of law, but cannot see any.

42. The Applicant is concerned that the Panel did not direct his release notwithstanding that this was the recommendation of both professionals. It is a basic principle that the Parole Board must reach their own assessment of the evidence before them, and are not bound by the views of witnesses. This is provided that they give proper reasons for their conclusion.

43. In this case I consider that the Panel did so. Section 8 of the decision letter sets out clear reasons for the Panel's reasons for concluding that the Applicant's risk was not manageable in the community.

44. Lastly, the Applicant complains that the decision letter did not accurately reflect his account in his written representations to the Panel after the end of the hearing, his analysis of the new offences, or properly take account of the fact that the 'new' offences were not as serious as they might appear.

45. It is clear from the decision letter that the Panel were aware that the new allegation was being tried before a Sheriff rather than on indictment, and that a non-custodial disposal was a distinct possibility. The view taken by the Court of the seriousness of the offence was clear but, as the Panel noted, the role of the Parole Board is different to that of the Sheriff.

46. In relation to the other parts of the decision letter that the Applicant complains of, I consider that the Applicant's concerns are a disagreement with the Panel's conclusion. The decision that the Panel reached was one that was open to them and for which they gave proper reasons. In those circumstances, it is not open to me to interfere with them.

47. For the above reasons I do not consider that any of the complaints, whether considered through the prism of irrationality or procedural unfairness, or whether taken individually or together, amount to an error of law.

Decision

48. For the reasons I have given, I do not consider that the decision was irrational, nor was it procedurally unfair.

49. Accordingly the application for reconsideration is refused.

Daniel Bunting
10 September 2020