[2020] PBRA 154

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Application for Reconsideration by Cekic

Application

1. This is an application by Cekic (the Applicant) for reconsideration of a decision of an oral hearing dated 15 September 2020 not to direct release.

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 and the application dated 6 October 2020.

Background and Current Parole Review

4. The Applicant is serving an extended determinate sentence comprising a custodial term of 10 years and a 5-year extended licence period, imposed in May 2013 for offences of Wounding with Intent and False Imprisonment, which he committed whilst he was on licence. He pleaded guilty and was sentenced on the basis of the plea that he put forward. The victim was an adult male who was known to the Applicant. The Applicant was 23 when he committed the offences and 24 when sentenced.

5. The Applicant is now 31 years old. He became eligible for release in January 2020. This is his first review.

6. The Applicant's case was referred to the Parole Board by the Secretary of State in February 2019 to consider whether it would be appropriate to direct his release.

7. An Oral Hearing listed on 22 April 2020 was adjourned prior to the hearing in order to obtain some further information regarding allegations made against the Applicant.

8. The Applicant's case proceeded to an Oral Hearing heard by a three member panel on 7 September 2020. The hearing was conducted remotely via telephone link, due to the Covid-19 restrictions in place at the time. The panel heard evidence from the Applicant, his Prison Offender Manager and his Community Offender Manager. The Applicant was legally represented at the hearing. He made an application for release.

Request for Reconsideration

9. The application for reconsideration is dated 6 October 2020 and was submitted on the Applicant's behalf by his Solicitors. The application was not made on the published form CPD 2.

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

Irrationality

(a) That the decision is contrary to professional recommendations and made without a psychological report.

(b) That the Applicant had by no fault of his own, been progressed to an establishment where core risk reduction programmes were not facilitated.

Procedural Unfairness

(c) The procedure was unfair as there is reference contained within the decision to a period spanning a year in a specialist unit at [a particular prison] on a regime designed and supported by psychologists to help people recognise and deal with their problems, for which there is no report at all. A report ought to have been obtained given there are different reasons given as to why he left, and there is no assessment/information regarding risk reduction whilst at the unit.

(d) In the interests of procedural fairness, this is clearly a case where a psychological assessment ought to have been directed.

The Relevant Law

11. The panel correctly sets out the test for release in its decision letter.

Irrationality

12. 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."

13. 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.

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

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.

Other

17. If a panel makes a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board 2019 EWHC 2710**.

18. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before it. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

The Reply on behalf of the Secretary of State

19. The Secretary of State did not submit any representations in response to the application.

Discussion

20. The panel had the advantage of an extensive dossier of reports and other material. It had the advantage, too, of seeing and hearing the Applicant as well as the witnesses. The Applicant was also legally represented throughout the review and Oral Hearing. Cases in which a party has been represented by a lawyer are highly unlikely to generate a successful appeal if there had been no challenge made to the alleged irregularity by the Applicant.

21. 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.

Grounds (a) and (d)

22. I will deal with grounds (a) and (d) together as both rely on the absence of a psychological risk assessment to argue that the decision was either irrational or procedurally unfair.

23. The dossier contains written representations from the Solicitors firm representing the Applicant throughout the review dated 16 August 2019 and 7 November 2019. It was never submitted that a psychological risk assessment from a prison psychologist was necessary. The Applicant may of course seek his own independent psychological risk assessment. He did not rely on such a report at the hearing if he ever sought one.

24. The Applicant's legal representative made closing submissions to the panel. She did not submit that a psychological risk assessment or any further information was necessary in order for the panel to reach a decision on this case.

25. It is not a mandatory requirement for a panel to direct a psychological risk assessment. As was observed by the Divisional Court in **DSD**, panels of the Parole Board have the expertise to make their own risk assessment.

26. The panel in this case has provided a logical, detailed and clear conclusion as to its assessment of the Applicant and his risk having heard from him and the other witnesses. The panel noted the recommendations for release and addressed them and the reasons for disagreeing with them within the letter, as required to do so in accordance with **R (Wells) v Parole Board 2019 EWHC 2710**.

27. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that it saw and 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. In addition, omitting to request or instruct a psychological risk assessment is not a ground for procedural unfairness.

28. Accordingly, these grounds both fail.

Ground (b)

29. The Applicant submits that he had by no fault of his own, been progressed to an establishment where core risk reduction programmes were not facilitated. The Applicant states within his application that he was deemed unsuitable to do a particular high intensity offending behaviour programme and the panel made a 'clear conclusion' that he should have completed it, which was irrational and procedurally unfair.

30. The panel stated within its letter that the particular programme of high intensity seemed appropriate given the Applicant's 'significant history of violent offending'. The panel stated that it was not clear why a medium intensity training course to address the tendency to use violence was completed in its place. The panel further noted that, within the decision to progress the Applicant to a different establishment, the particular programme was described as 'ongoing' which was incorrect. The decision to progress the Applicant was not one in which the Parole Board had been involved.

31. The panel, as it is required to do under the terms of its referral, applied a strict test. The panel formed the view, having heard from the Applicant, that he did not have sufficient insight into his risk and the necessary internal strategies to self-manage. The panel did not specify that a particular programme must be completed, it simply assessed that the offending behaviour work that had been completed did not appear to the panel to have been sufficient. I cannot see any reason to conclude that the panel's assessment was unreasonable or irrational.

32. Accordingly, this ground fails.

Ground (c)

33. The Applicant submits that the procedure was unfair as there is reference contained within the decision to a period spanning a year in the specialist prison unit at a particular prison for which there is no report at all. A report ought to have been obtained given there are different reasons given as to why he left, and there is no assessment/information regarding risk reduction whilst at this prison.

34. Within the Prison Offender Manager's report from July 2020, which is in the dossier, it is clearly stated that a report from that specialist prison unit could not be found. There is however a summary of the Applicant's time there detailed within that report. Furthermore, reports within the dossier assess the Applicant's learning from all the progress he had made during his sentence, including a period of time on that particular unit. The panel made it clear that all of the written evidence in the dossier was considered carefully before making its decision. In addition, the panel heard from the Applicant himself about his learning and how he considered he had changed. It is clear from the wording in the conclusion section of the decision letter that the Applicant's evidence was also considered when making its assessment, as it ought to have been.

35. Whilst there are different reasons given for the Applicant leaving that regime, there is evidence within the dossier that entries on the system refer to security concerns. The panel made reference to those as well as other concerns raised at different establishments. The Panel is entitled to do so. It cannot be said to be illogical to form conclusions that are based on evidence and the panel's assessment of the same. From the conclusion, it is apparent that the panel placed more weight on recent behaviour concerns and did not accept the explanations given by the Applicant in his evidence, which again it is entitled to do.

36. The Applicant submits that he may have already completed one to one work or other offending behaviour work whilst at the specialist prison unit, but this would not be known without obtaining a report regarding his time there. The Applicant gave evidence to the panel at his hearing. It would perhaps be expected (or at least reasonable to expect) that if he had completed work to address his risk that was not detailed within the dossier, then he might have mentioned this in his own evidence and/or it would have been mentioned within the many opportunities for written and oral submissions from his legal representative.

37. Again, it is important to note that at no point did the Applicant's legal representative suggest that the panel ought to adjourn to obtain information or an assessment from that period of time. As explained above, procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before it. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

38. Accordingly, this ground also fails.

Decision

39. 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.

Cassie Williams
22 October 2020