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[2020] PBRA 160

Application for Reconsideration by Duffus

Application

1. This is an application by Duffus (the Applicant) for reconsideration of a decision of a three-member panel, dated 18 August 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 506 pages (including the decision letter) and six pages of written submissions from the Applicant' representative that sets out his application for reconsideration. Given the matters raised in the application it was necessary to consider some further material that was generated in advance of the oral hearing.

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 a number of sexual offences. The tariff was set at 4½ years (with allowance for time on remand) and expired on 15 September 2011.

Request for Reconsideration

5. The application for reconsideration is dated 7 September 2020.

6. The Applicant submits that the decision was unlawful for the following reasons:

   a) the panel erred by placing weight on a psychological assessment that was more than 12 months old, and where the author had not spoken to The Applicant prior to the hearing (irrationality)

   b) there were two psychological reports, one recommending a move to open conditions, the other that he remain in closed. The complaint is that the panel did not provide reasons for preferring one over the other (irrationality)

c) in considering whether The Applicant could move to another prison establishment (Prison **A**), the panel failed to consider that the Applicant has not been diagnosed with a Personality Disorder (irrationality)

d) due to The Applicant' learning disorder, a telephone hearing was unfair (procedural unfairness)

e) the Panel did not properly consider the benefits to the Applicant of a move to open conditions.

Current parole review

7. The Secretary of State referred the Applicant's case to the Parole Board as long ago as November 2017, three months after the Applicant had transferred to an open prison pursuant to a recommendation from a previous panel of the Parole Board.

8. After an adjournment, the Applicant's case was considered by a single member on 5 October 2018 and an oral hearing directed. It was stipulated that this should be a face to face hearing.

9. Unbeknown to that single member, the Applicant had been transferred back to closed conditions in August 2018 before he had undertaken any temporary releases (which is often considered to be one of the purposes of a stay in open conditions).

10. The matter was listed for an oral hearing on 4 March 2019, but was deferred in January 2019 in order to obtain a psychological report.

11. The case was re-listed on 16 September 2019. However, that was deferred the month before at the Applicant's request in order to allow him to instruct his own psychologist to prepare a report.

12. The adjournment directions stated that, due to (in part) a previous psychological assessment identifying personality traits a '*video-link hearing ... [is] inappropriate'*.

13. The background to this is that the prison psychologist had flagged up possible personality traits. This was investigated by a different prison psychologist who, in a report from October 2019, concluded that the Applicant did not meet the criteria for a personality disorder.

14. The case was then re-listed on 30 January 2020. However, that was adjourned as the independent psychologist was unavailable due to illness.

15. The same panel convened on 4 August 2020 where the hearing progressed by telephone link.

16. It heard evidence from the prison probation officer, the community probation officer, a prison psychologist and an independent psychologist. Both probation

officers recommended a move to open whilst the prison psychologist recommended that the Applicant remain in closed. The independent psychologist was supportive of a possible release, but her recommendation at the hearing was for a move to open positions in light of the disruption of services and support in light of the Covid-19 pandemic.

17. In the decision letter the Panel sets out the history of the case and the evidence heard in some detail.

18. The Panel also noted the recommendation, and that none of the professionals were recommending that the Applicant be released. The Panel then set out reasons why the Applicant's risk was not manageable in the community.

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

The Relevant Law

20. The Panel correctly sets out in its decision letter dated 4 August 2020 the test for release.

Parole Board Rules 2019

21. 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.

22. 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

23. 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."*

24. 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.

25. 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).

The duty to give reasons

26. The decision as to the assessment of risk is one for the Parole Board, who are not bound by the views of the professionals.

27. However, where the Panel makes a decision contrary to the recommendations of the professionals, it is incumbent on it to give clear reasons for this, and sufficiently justify its conclusion (**R (Wells) v the Parole Board [2019] EWHC 2710 (Admin)**).

28. In considering an application for reconsideration, I should remember that the question is to do with the liberty of the subject. In those circumstances, I should adopt an anxious scrutiny of the Panel's decision.

Procedural unfairness

29. 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.

30. 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.

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

The reply on behalf of the Secretary of State

32. The Secretary of State has stated that he does not wish to make any representations in response to this application.

Discussion

33. It is important to remember the scope of the reconsideration mechanism. Specifically that it only applies to the decision as to whether or not to direct release, and not to whether a recommendation for a move to open conditions is or not made.

34. That is sufficient to dispose of ground (e). Even if a decision to not recommend a move to open was plainly irrational or procedurally unfair, I would not have jurisdiction to consider it.

35. The referral of the Secretary of State, which is the basis of the Parole Board's jurisdiction under **s28(6) Crime (Sentences) Act 1997**, requires the panel to consider the question of release first and, if and only if release is not directed, to then consider whether a recommendation for open conditions should be made.

36. In assessing the rationality of the decision, this must be borne in mind. In this case none of the professionals at the hearing recommended release. Although I will consider the individual complaints (a)-(d) below, against that backdrop the Applicant faces an uphill struggle in showing that an outcome (no direction for release) that at the hearing all the professionals ultimately recommended was an irrational one.

(a) The prison psychological assessment

37. The complaint is that the prison psychologist's report was dated October 2019 and there had been no contact between her and the Applicant between then and the hearing.

38. It is important to note that there is no suggestion in the application for reconsideration or the decision letter that that this was an issue that the Applicant had raised at (or preferably before) the hearing itself. In those circumstances, the Panel cannot be criticised for not engaging with this argument.

39. Although different considerations apply with unrepresented prisoners, where an Applicant is represented it is usually incumbent on the representative to raise arguments such as this one at the time (see, by analogy, **Nightingale [2019] PBRA 40**). This is to allow the relevant psychologist to deal with the issue and to allow the Panel to have the benefit of arguments in relation to it.

40. In certain cases, if the argument is a good one, it would allow for an adjournment to resolve the matters raised.

41. In any event, it is not unusual for a psychologist to give evidence a long time after they have written their report. It must be remembered that the psychologist did not give evidence in isolation; she had the benefit of having the full dossier with up to date reports, and was able to hear the evidence of the other witnesses (including the Applicant himself).

42. For those reasons I do not consider that the Panel erred in placing reliance on her evidence.

(b) Resolution of the differing recommendations

43. The Panel noted that the analysis of the two psychologists were similar, although there were differences. In those circumstances, it fell to the Panel to decide between the two.

44. It is fair to say that the Panel did not give explicit reasons for preferring one witness over the other, but they did give clear reasons for its decision. I do not consider that it was necessary to give more detail than was given. A reader of the decision letter would know why it was that the Panel came to the conclusion that it did.

45. Again, it has to be remembered that in relation to the question of release, there was little difference between the psychologists at the hearing.

46. For that reason, even if there was an error, reconsideration is a discretionary remedy (**Defpotakis [2019] PBRA 80**) and it would not be appropriate to direct reconsideration on this ground.

(c) The Panel's assessment of a move to a different prison

47. It is said that the prison psychologist's opinion was that the Applicant should transfer to a different prison to '*engage with work in respect of Personality Disorder'*.

48. Against that backdrop, the complaint under this ground is that the Panel failed to apply any weight to the fact that the latest assessment was that the Applicant had '*previously been assessed as not having a personality disorder'*.

49. In the summary of the oral evidence (which was not challenged) there is no mention of a personality disorder, or that the Applicant would benefit for a move to Prison **A** for that reason.

50. It is my understanding that whilst Prison **A** does have two separate specialist units for people with a personality disorder, a personality disorder is not a pre-requisite for the progression regime (which was specifically referred to).

51. It appears that it was not suggested by any of the witnesses, or by the Applicant, that Prison **A** would not be a suitable placement. I note that in her written report (prepared after a full assessment of personality) the independent psychologist recommended a move to the Progression Regime at Prison **A** if the Applicant was not released.

52. In those circumstances there is no inconsistency between the Applicant not having a diagnosis of personality disorder, and him going to Prison **A**.

53. For those reasons, this ground is not made out.

(d) The fairness of a telephone hearing

54. As I have set out above, on several occasions the case was directed to a face to face hearing. This was, in part, due to the Applicant's learning difficulties. Prior to March 2020, it is clear that this is the sort of case where a face to face hearing would have been directed.

55. However, as is widely known, is March 2020 the whole of the United Kingdom entered 'lockdown' due to the Covid-19 pandemic. This led to all face to face parole hearings being cancelled (the background is set out in **Baker [2020] PBRA 73**).

56. There is no rule that a Parole Board hearing for someone with learning difficulties must be face to face. It is a question of fact in each case. It is important to consider how the hearing on 4 August 2020 came to proceed by telephone.

57. The case had been adjourned to 4 August 2020. No decision was made as to how the hearing should be conducted until July 2020 due the fact that, as late as June 2020 it was hoped that a face to face hearing may be possible.

58. On 9 July 2020 The Applicant' lawyer enquired of the Parole Board whether there was any update, including whether it would be a video or telephone hearing. He was asked as to whether he had any objections to a remote hearing and replied that he had no objections. There was no suggestion that a remote hearing, or specifically a telephone hearing, would be unfair.

59. I have been provided with a copy of Panel Chair Directions dated 27 July 2020 that state that the case is suitable for a remote hearing.

60. In the circumstances that was faced on 4 August 2020 there were still no face to face hearings being conducted. Although it was hoped that some may proceed in the months after, there was no guarantee that this would happen. It is clear that an adjournment would mean a delay of some months for a case that already had had a lengthy delay.

61. There is nothing in the decision letter or the papers before me to suggest that the Applicant had opposed having a hearing by telephone. Further, the representations do not suggest that the Applicant at any time raised the question of whether a telephone hearing would be unfair, whether at the hearing or before. This appears to have only been raised after the decision letter was issued.

62. That is not determinative; a hearing that is unfair cannot be made fair by the lack of objection, but generally the time for objections to the logistics to be raised is before, or at, the hearing.

63. Further, an Applicant's representative is in many ways best placed to consider whether their client would be prejudiced by a telephone hearing and a Panel is entitled to assume that the lack of objection is the best evidence that there is no unfairness.

64. Another factor to take account is that there were two psychologists present at the hearing, both with a professional duty to the Parole Board and one who was

instructed on the Applicant's behalf. It appears that neither of them raised the question that the hearing may be unfair, which would be surprising if there was prejudice to the Applicant.

65. The decision letter makes reference to the Applicant's learning difficulties on several occasions, and it is clear that they were aware of this.

66. In the circumstances that the Panel found itself on 4 August 2020, I do not consider that it was unfair to proceed, or that it can be said that proceeding by telephone made the hearing unfair or the decision unlawful.

Decision

67. For the reasons I have given, I do not consider that the decision was irrational.

68. Accordingly the application for reconsideration is refused.

Daniel Bunting
19 October 2020