[2020] PBRA 167

the Parole Board
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Application for Reconsideration by Collis

Application

1. This is an application by Collis (the Applicant) for reconsideration of a decision of the Parole Board made under rule 25(1) of the Parole Board Rules 2019 (the 2019 Rules) that the Applicant was unsuitable for release (the Decision).

2. Rule 28(1) of the 2019 Rules 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, comprising a dossier of 562 numbered pages, and written submissions for the Applicant by his solicitors dated 19 October 2020, requesting reconsideration. The dossier included written submissions for the Secretary of State for Justice dated 14 September 2020, written submissions by the Applicant's solicitors dated 23 September 2020, the letter dated 28 September 2020 by which the Decision was communicated with reasons, and a copy of the judgment by Judge Allen, sitting as a Deputy Judge of the High Court, in **R (Omar Stephens) v Parole Board [2020] EWHC 1486 (Admin)**.

Background

4. The Applicant is serving indeterminate sentences for public protection that he received in October 2009 and in March 2012 after pleading guilty to a number of counts of sexual assaults on children and taking indecent images of children, with a number of other offences against children taken into consideration, at the Applicant's request. The minimum tariff for each of those sentences was set at five years, and the latter tariff expired in March 2017. The Applicant was aged 24 when he received the sentence in October 2009 and he is now aged 35.

Request for Reconsideration

5. The application for reconsideration is said to have been received by the Board on 19 October 2020. In the written submissions, the Applicant seeks reconsideration on the basis that the Decision is both irrational and procedurally unfair.

Current parole review

6. The Decision was made on the Secretary of State's referral of the Applicant's case to the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release, and if not, and if relevant, to advise on suitability for open conditions. That was said to be the second such referral of the Applicant's case by the Secretary of State's during the sentence received by the Applicant in March 2012.

7. The Decision was made by a panel of the Board that considered the Applicant's case at an oral hearing on 23 September 2020 (the Panel). The Panel was chaired by a Judicial Member of the Board and additionally included two Psychologist Members and an Independent Member. The hearing was conducted remotely, by video link, due to restrictions on social contact during the COVID-19 pandemic.

Relevant Law

8. Rule 28 of the Parole Board Rules 2019 provides that a party may apply to the Board for the case of a prisoner who is serving a sentence of a type that is specified by the rule to be reconsidered on the grounds that a decision on the prisoner's suitability for release is irrational or procedurally unfair.

Irrationality

9. In **R (DSD and others) v Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial review 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."*

10. 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.

11. The application of this test in applications for reconsideration under rule 28 has been confirmed in previous decisions, such as **Preston [2019] PBRA 1**.

Procedural Unfairness

12. 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.

The reply on behalf of the Secretary of State

13. On 29 October 2020, the Board was informed by the Public Protection Casework Section, on behalf of the Secretary of State, that no representations were offered in response to the Applicant's reconsideration application.

Discussion

14. Ground 1 in the Applicant's written submissions is focused on the Board's approach to the consideration of his suitability for open conditions. The judgment in the **Omar Stephens** case provides guidance on that approach. However, reconsideration under rule 28 of the 2019 Rules applies only to decisions made by the Board under rule 19(1)(a) or (b), 21(7) or 25(1) of those Rules, which are decisions on suitability for release. Recommendations as to suitability for a move to open conditions are outside of the scope of rule 28, so reconsideration could not be directed on the grounds that the Board has erred in its consideration of a request by the Secretary of State to advise on that matter. See also **Barclay [2019] PBRA 6**. I therefore decline to direct reconsideration on Ground 1 of the Applicant's submissions.

15. The referral by the Secretary of State was for the Board to decide whether to direct the Applicant's release, as a primary matter, and I shall proceed to consider Grounds 2 and 3 of the Applicant's submissions in relation to that matter only.

16. It is asserted within Ground 2 of the Applicant's submissions that the Decision is marred by procedural unfairness because the Board has failed to have due regard to the Applicant's situation as a post-tariff indeterminate sentence prisoner of some three and a half years. The submissions refer to Parole Board Guidance, issued after the Supreme Court's judgment in the case of **Osborn & others v Parole Board [2013] UKSC 61**, titled '*Practical Guidance for referral of cases to an Oral Hearing 2013'* that is said to highlight the a need to scrutinize ever more anxiously whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff.

17. It is asserted within Ground 2 of the Applicant's submissions that the Decision is marred by procedural unfairness because the Board should have, but did not, apply the following principle, or that the Board has not given sufficient reasons as to why the application of the principle was not in the Applicant's favour:

> *'As a post-tariff IPP prisoner, [the Applicant's] continued detention depends upon whether he poses a risk of committing offences that may occasion serious harm. That is, offences of serious violence like his index offence:* ***R***

***(Sturnham) v Parole Board [2013] 2 A.C. 254 (5)**, per Lord Carnwath at para. 45. The question being:*

> *'is there a risk to life and limb from which the public needs protection by way of [the Applicant's] continued detention?'*

18. I do not quite accept that formulation of the principle described by Lord Mance (with whom Lord Neuberger, Lord Sumption, Lord Reed and Lord Carnwath agreed) at paragraph 45 of the speech in **Sturnham**. The principle thus described, with reference to paragraph 23 of his Lordship's speech, is that the test that the Board must apply when considering whether to direct release from imprisonment for public protection is whether the prisoner presents a continuing risk to life or limb, including a non-violent rape, from which the public needs protection by way of his continuing detention.

19. Ground 2 of the Applicant's submissions does not, I consider, allege procedural unfairness rather than irrationality. There is however an absence of particularisation in Ground 2 as to the basis of the broad assertions of failure to apply the appropriate anxious scrutiny, of failure to apply the principle as to the nature or level of risk that the Applicant would need to pose to the public in order to justify his continued confinement, or of failure to provide sufficient reasons.

20. There is a greater degree of particularisation within the Applicant's Ground 3, which alleges irrationality within Ground 3 of the Applicant's submissions, in relation to the Board's decision to conclude the Applicant's review without deferring for a further assessment of the Applicant. It is convenient to consider the assertions raised in Ground 3 before considering the broader assertions contained in Ground 2.

21. The Applicant asserts within Ground 3 that the Board could, and should, have deferred the consideration of the Applicant's case for medication to manage sexual arousal. The Applicant also asserts within that Ground that there was unfairness in an alleged failure by the Panel to express concerns and reservations expressed in the decision letter as to the appropriateness of recommendations made by the Applicant's Prison Offender Manager and by his Community Offender Manager that the Applicant should move to a Psychologically Informed and Planned Environment location within the closed prison estate at this point in his sentence. The Applicant asserts that, had such concerns been expressed during the hearing, the Applicant would have requested a deferral for an assessment to treat and manage intimate urges.

22. The Applicant acknowledges in his submissions that assessment to treat and manage intimate arousal had been identified as a need by the Applicant's responsible clinician at the psychiatric hospital where he was detained prior to his transfer back to the closed prison, since when such an assessment had remained a part of the Applicant's sentence plan, as is also recorded in the decision letter. It was open to the Applicant

to request a deferral for that assessment to be undertaken prior to the hearing of his review. However, it is not for the Board to engage with sentence planning or the timing of referrals by the Secretary of State, in individual cases at least.

23. It is apparent from the decision letter that the Panel had explored the basis on which the prison service Psychologist in training witness had reached the conclusion that it was unnecessary for the Applicant to undergo assessment to treat and manage intimate urges. It is moreover apparent that the Panel considered that that conclusion had been made on the basis assumptions that had no adequate basis in evidence or the witness's expertise about the Applicant's compliance with a medication that he had been prescribed in prison, the efficacy of the medication in reducing sexual arousal, the Applicant's level of sexual preoccupation, and the likely availability of the medication to the Applicant if he was released into the community. The Panel's consideration of those issues is not marred be irrationality or procedural unfairness. I therefore decline to direct reconsideration on Ground 3 of the Applicant's submissions.

24. I now turn back to consider the broader assertions in the Applicant's Ground 2, of failure to apply the appropriate anxious scrutiny, or nature of risk, or of failure to provide sufficient reasons when doing so.

25. The decision letter correctly describes the test that the Board needed to apply when deciding whether to direct the Applicant's release, and the letter correctly identifies the date of expiry of the Applicant's tariff.

26. The decision letter reveals that the Panel was in no doubt that the Applicant had completed a great deal of behavioural work whilst in custody through which he had developed a lot of insight into his offending behaviour and personality traits, as well as strategies to deal with them. The Panel considered that the Applicant's prison behaviour had largely been satisfactory and it is noted that, while there had been several occasions on which he had self-harmed, he had not done so recently.

27. The decision letter also however reveals that the Panel considered that the Applicant continued *'to have trust issues'* with the professionals working with him, which had implications for his management in the community. An example is given of his reticence in completing one-to-one work with his Prison Offender Manager.

28. The reasons stated in the decision letter account for the uncertainty as the whether an assessment to treat and manage intimate urges and medication to manage this remained necessary, or whether that risk factor could be adequately managed without such medication.

29. The decision letter also reveals that the Panel was concerned with the consideration of whether the Applicant had been adequately tested in terms of the transferral to the community of the identified insight into his offending behaviour and personality traits,

his strategies to deal with those, and his willingness and ability to trust and therefore to work effectively with professionals.

30. The decision letter notes the trainee psychologist witness's opinion that the Applicant had been sufficiently tested by the times he had spent in the community when in hospital, but the Panel again considered that the evidential basis for that opinion was inadequate, as the witness had apparently failed to take into account the limited number of occasions (seven) when the Applicant had spent time in the community, or that he had been escorted by hospital staff on all of those occasions.

31. The Panel noted that the other two professional witnesses did not support the Applicant's release, on the basis that a period of testing in a Psychologically Informed and Planned Environment location within the closed prison estate was necessary prior to release or transfer to open conditions.

32. The decision letter then records the Panel's assessment that there was a clear need for testing in the Applicant's case, although the question was left open as to whether that testing needed to occur in open conditions or by the further period of location in the closed prison estate as would be the consequence of the Decision.

33. The reasoning displayed in the decision letter, thus described, is revealing of a fair and rational consideration of the correct test of the necessity for the protection of the public that the Applicant should remain in confinement, on the assessment of the evidence referred to by the panel and with the appropriate anxious scrutiny required by the length of time since the expiry of the Applicant's tariff.

34. Therefore, I also decline to direct reconsideration on Ground 2 of the Applicant's submissions.

Decision

35. I have declined to direct reconsideration of the Decision on all the grounds raised by the Applicant.

36. The application for reconsideration is accordingly refused.

Timothy Lawrence
11 November 2020