

[2020] PBRA 17

Application for Reconsideration by McKellar

Application

1. This is an application by McKellar (the Applicant) for reconsideration of a decision dated the 19 November 2019 not to direct his release. The decision was made by a single member panel on the papers.

Background

2. On the 30 October 2015, the Applicant was sentenced to an 8-year Extended Determinate Sentence for three offences of attempted robbery. The custodial part of the sentence is 5 years and the extended licence period is 3 years. The Applicant's parole eligibility date is the 5 March 2020.

Request for Reconsideration

3. The application for reconsideration was received on the 10 January 2010. The Applicant gives his reason in support of the allegations of irrationality and (possibly) procedural unfairness as

"I wish to have this decision reconsidered as I believe I have been treated unfairly. I am serving a E.D.S sentence. I have been in a number of years. I believe I am [being] judged by something written on paper when it could be lies."

4. The Secretary of State has not made any written representations.

Current parole review

5. In August 2019, the case was referred to the Parole Board by the Secretary of State to consider if it would be appropriate to direct the Applicant's release.
6. The panel member considered the contents of the dossier which ran to 143 pages. The significant documents were the pre-sentence report, the sentencing remarks of the trial judge, the Applicant's record of previous offences, the record of his movements between prisons, the list of proved adjudications of misconduct as a prisoner, a risk assessment and the reports of the Offender Supervisor and the Offender Manager.



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7. The Applicant is aged 25, has no legal representation and this is his first parole review. The last sentence of his application, *I believe I am [being] judged by something written on paper when it could be lies*, makes me wonder whether he has conflated an application for an oral hearing with one for reconsideration. In those circumstances, I shall deal with his application in slightly more detail than otherwise might have been the case.

The Relevant Law

8. 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.
9. The test for irrationality within the meaning of Rule 28 (1) (a) "*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*". Moreover, in considering the assessment of the decision, due deference is to be given to the expertise of the Parole Board in making decisions relating to parole: see **R (on the application of DSD and others) v the Parole Board [2018] EWHC 694 (Admin), CCSU v Minister for the Civil Service [1985] AC 374**.
10. "Procedural unfairness" has a similar meaning as procedural irregularity does in Judicial Review.
11. In the cases of **Osborne and Booth v the Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgement. The Supreme Court did not decide that there should always be an oral hearing but said there should be if the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to put his case properly. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.
12. The procedure after a provisional decision has been made on the papers (as in this case) is governed by rule 20 of the Parole Board Rules 2019 which came in to force on the 22 July 2019. The relevant part of the rule states (1) *Where a panel appointed under rule 5 (1) has made a decision that a prisoner is unsuitable for release under rule 19 (1) (b), the prisoner may apply in writing for a panel at an oral hearing to determine the case. (2) A prisoner making an application under paragraph (1) must serve the application, together with reasons for making an application, on the Board and the Secretary of State, within 28 days of the provision of the written record under rule 19 (8).*

Discussion

13. The decision letter revealed that the panel considered a number of important negative features in the Applicant's case. In summary, these were a history of acquisitive offending, accompanied by a willingness to carry weapons and to intimidate victims, if necessary, by using force. The Applicant's speed of reoffending; his misuse of alcohol and drugs and his poor emotional management. The professional dynamic assessment of risk showed that the Applicant posed a high risk of causing serious harm to the public and prisoners together with a high static risk of violent reoffending. The Applicant's poor behaviour in prison included seven moves between prisons for reasons of security and over 90 adjudications for bad behaviour. Largely because of the Applicant's poor behaviour, he had not been able to start a programme addressing violent offending which was regarded as essential in order to try to reduce his risk to manageable levels. Neither the Offender Supervisor nor the Offender Manager supported release.
14. The provisional decision letter shows that the panel clearly understood the case; nothing of note was missed. The panel made clear and sustainable findings of fact and its conclusion was a balanced and fair analysis of the relevant matters. The panel stated and applied the right test. It was correctly focused on risk throughout and was reasonably entitled to adopt the risk assessments and the recommendations of the Offender Manager and Offender Supervisor.
15. There is simply no basis to even suspect that the risk assessment or the reports of the Offender Manager or the Offender Supervisor contained lies and, the experienced panel member would bear in mind he had not had access to the primary facts which had led to the moves between prisons or the adverse adjudications.
16. The legal test of irrationality is a very strict one. This case does not meet it.
17. I have given anxious consideration to whether the Applicant in fact intended to make an application for an oral hearing. I have decided that there is insufficient evidence to persuade me that was his intention. The decision letter made it pellucidly clear (in bold type) that any request for an oral hearing would be considered by the Board. The letter made it clear he could apply for a full oral hearing but that he had to make the application within 28 days from the date of the letter. The Applicant did not make that request.
18. The letter dated the 23 December 2019 from the Parole Board informed him that the Board had not heard from him within the 28 days and so the paper decision now became provisional for 21 days. It is at the bottom of that letter that the Applicant made his application to have the decision reconsidered. He gave no specific reason for wanting either a reconsideration or an oral hearing. He used the word "reconsidered" and did not refer to an oral hearing. Additionally, I cannot see how any of the criteria in **Osborne and Booth** apply to the facts of this case. In those circumstances, I find there was no procedural irregularity and no unfairness to the Applicant.

Decision

19. 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.

James Orrell
21 January 2020