

[2020] PBRA 173

Application for Reconsideration by Hogan

Application

1. This is an application by Hogan (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 227 numbered pages that includes the letter dated 7 October 2020 by which the Decision was communicated with reasons, and written submissions for the Applicant by his solicitors dated 28 October 2020, requesting reconsideration.

Background

4. The Applicant is serving an extended determinate sentence that he received in April 2018 for five offences of assault occasioning actual bodily harm on his former partner. The Parole Eligibility Date passed in June 2020 and the Conditional Release Date is in October 2021. The Sentence Expiry Date is in October 2022. The Applicant was aged 40 when he received the sentence in April 2018, and he is now aged 43.

Request for Reconsideration

5. The application for reconsideration is said to have been received by the Board on 28 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. That was said to be the first such referral of the Applicant's case by the Secretary of State's during the sentence received by the Applicant in April 2018.

7. The Decision was made by a panel of the Board that considered the Applicant's case at an oral hearing on 2 October 2020 (the Panel). 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 10 November 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. The first ground in the Applicant's written submissions is the assertion that the Decision involved two material errors of fact.
15. The first of the asserted errors of fact is said to relate to the period of time over which the Applicant's risk to the public fell to be considered by the Board. It is said that the Decision makes several references to a period of twelve months, which does reflect the period until the Applicant's Conditional Release Date. However, the Applicant asserts that the period to be considered by the Panel ought to have been nine to ten months because the proposed risk management plan provided for a placement in National Probation Service designated accommodation that would not be available to the Applicant for a period of eight to twelve weeks. It is asserted that that alleged misdirection is particularly significant and material given the Panel's conclusion that risk of serious harm was not imminent and that the Applicant was not in a relationship.
16. The 7 October 2020 letter records that the Panel was informed in oral evidence that the Applicant had been accepted for a place at designated accommodation but there would be a wait of between eight and twelve weeks before a bed was likely to become available. There was, therefore, the possibility, albeit apparently unlikely, that a bed in the designated accommodation would be available sooner than that, and it was appropriate that the Panel allowed for that possibility when considering the imminence of the Applicant's risk.
17. It is also correct that the Panel did not consider that the Applicant's risk of serious harm to the public would be imminent upon release, on the basis that his risk is predominantly against female partners and that he was not currently in a relationship. However, the panel also considered that that risk could escalate quickly if the Applicant was to enter into a relationship.
18. Therefore, I do not accept that there was any such error or material misdirection in the Decision as asserted by the Applicant.
19. The second of the asserted errors of fact is difficult to discern; the submissions are as follows:

'(ii) The Panel also recorded that the Offender Manager indicated that:

"cohabitation would not be agreed until you had undertaken work to address your outstanding risks."

It is submitted the response was that there would be no agreement to cohabitation during the period of [the Applicant]'s licence. It is submitted that this is both



significant and material given that the risk assessment refers to that risk being within relationships and a domestic setting.'

20. The assertion appears to be that the 7 October 2020 letter inaccurately records the Offender Manager's evidence, but no evidence has been provided in support of that assertion; no statement of truth or representative's written record of the hearing are provided. In any event, it would not, in my consideration, be lawful for the Applicant to be prevented from cohabiting with a partner after leaving designated accommodation for the duration of a licence, so any such inaccuracy would be immaterial.
21. The second ground in the Applicant's written submissions is the assertion that the Decision involved a failure to have regard to certain aspects of the Applicant's oral evidence. The submissions refer to a section of the Applicant's evidence under questioning by his representative in relation to the skills he had and methods he employed to deal with confrontation in order to avoid escalation and negative behaviour. The submissions assert that that evidence is not referred to anywhere in the 7 October 2020 letter and that that omission is significant because the Decision places weight on the Applicant's "*lack of internal controls to prevent future similar behaviour in a relationship*" and the identification as risk factors of poor emotional management and poor conflict resolution and perspective taking.
22. No evidence has been provided in support of the assertion that the Applicant's evidence under questioning by his representative was indicative of skills he had and methods he employed to deal with confrontation in order to avoid escalation and negative behaviour. There is, moreover, an absence of any adequate detail that would enable consideration as to whether any such evidence was inconsistent with the description given of the evidence that is referred to in the context of the assessment of the Applicant's insight and ability to maintain self-control in the 7 October 2020 letter, and therefore potentially requiring explanation as to why such evidence was not considered persuasive. The 7 October 2020 letter provides cogent reasons why the Panel shared concerns that are said to have been held by the two professional witnesses regarding the Applicant's lack of insight into his offending and lack of internal controls to prevent future similar behaviour in a relationship. Those reasons refer to the Applicant's oral evidence before the Panel which is described as showing little progress in his understanding of his offending since a pre-sentence report, and that the Applicant was unwilling or unable to discuss his offending in any detail.
23. I am satisfied that the reasoning displayed in the decision letter is revealing of a fair and rational consideration 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.

Decision



24. The application for reconsideration is accordingly refused.

Timothy Lawrence
13 November 2020