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[2020] PBRA 22

Application for Reconsideration by Bridon

Application

1. This is an application by Bridon (the Applicant) for reconsideration of a decision of the Parole Board dated 13 January 2020 made following an Oral Hearing held on the 19 December 2019 which decided not to direct his release on licence and not to recommend a move to open conditions.

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. The Applicant's case was referred to the Parole Board to consider whether it would be appropriate to direct release or to recommend progress to open prison conditions. The reconsideration mechanism, recently introduced, does not apply to decisions to recommend or not to recommend a move to open conditions. Otherwise this is an eligible application.

4. I have considered the application on the papers. These are the dossier (which contains the outcome of an earlier parole review held in 2018), the Decision Letter dated 13 January 2020 and the application for reconsideration itself dated 30 January 2020 from solicitors acting on behalf of the Applicant. The Secretary of State has made very brief representations dated 3 February (see below).

Background

5. The Applicant is serving an indeterminate sentence for the protection of the public for sexual activity with a female child under 13 (no penetration) and taking, permitting to be taken or making, distributing or publishing indecent photographs or pseudo photographs of children x10. The minimum tariff of two years, less time on remand, expired in 2013. The oral hearing in December 2019 was his fourth review.

6. The Applicant has a short but relevant history of offending. In August 1986 he was convicted of murder (outside of the UK). The victim was a fifteen year old girl whom he had met while travelling. At the time the Applicant was AWOL (absent without leave) from the Army. Sexual activity took place. Following an argument, the Applicant strangled her and concealed her body. He maintained that there had been no sexual element to the killing; there was a good deal of evidence to the contrary. In 2015 the Applicant received a sentence of imprisonment for 19 further offences of possessing indecent images of children.

Request for Reconsideration

7. The Applicant submits that the decision of the panel was irrational and/or procedurally unfair on the following five grounds:

   Ground (i) The panel was generally over reliant upon the earlier findings of the Parole Board panel which heard the Applicant's case in May 2018;

   Ground (ii) The panel's reliance on the earlier decision led them to attach too much weight to that earlier decision, and as a result they failed to carry out their own risk assessment;

   Ground (iii) The panel erred in asserting that the Applicant had "continued to maintain his innocence" because he had pleaded guilty to the Indictment;

   Ground (iv) The panel erred in finding that he was an abscond risk by placing reliance on the fact that he had been AWOL from the army when he committed the murder in 1986;

   Ground (v) The panel's focus on changes in circumstances since the 2018 hearing led it to apply the wrong test to the issues it had to decide.

The Relevant Law

Irrationality

8. 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,

   a. *"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."*

9. 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.

Procedural unfairness

10. 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.

11. 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 Test for transfer

12. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately with the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:
(1) the progress of the prisoner in addressing and reducing their risk;
(2) the likeliness of the prisoner to comply with conditions of temporary release
(3) the likeliness of the prisoner absconding; and
(4) the benefit the prisoner is likely to derive from open conditions.

Discussion

13. It has not been entirely easy to attach the appropriate description of irrationality or procedural unfairness to the complaints that have been made. There is necessarily overlap, particularly in relation to Grounds (i) and (ii). It is arguable that none of the complaints raised amount to examples of procedural unfairness. That said, fairness to the Applicant demands that I do not reject a Ground because it does not fit comfortably into one category or another. To be satisfied that any particular Ground amounts to procedural unfairness, I must be satisfied of at least one of the matters set out in (a) to (e) in Paragraph 11 above. I remind myself that the overriding objective is to ensure that the Applicant's case was dealt with justly.

14. One of the purposes of an Oral Hearing is to examine and challenge the assertions made. The fact that professionals agree or do not agree that the risk is or is not manageable does not mean that the panel is bound to agree with them. It is the panel's responsibility to make their own assessments and make up their own minds based on the totality of the evidence, including that of the Applicant. The panel 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. It is the panel who are independent and who are the experts and who have the expertise through training and experience to carry out the task of assessing risk.

15. In this case the panel did not agree with the professional witnesses. It is my task to decide whether the panel have provided clear and logically justifiable reasons based on a fair minded analysis of all the evidence before them. It is appropriate

to direct that a decision be reconsidered only if it is obvious that there are compelling reasons for interfering with the panel's decision.

16. I turn to deal with the five grounds put forward by the Applicant:

Grounds (i) and (ii)

(a) It is convenient to take these two grounds together. The evidence received by the 2019 panel from the professionals on the issue of risk was to the effect that nothing of any significance had changed since the previous hearing in 2018. The Applicant's evidence was that he was not, and never had been, sexually interested in children. So it was that the panel were required to consider in depth the earlier decision together with all the other evidence in order to reach a decision on the issue of future risk. It is the Applicant's submission that the panel gave far too much weight to the earlier decision without carrying out their own risk assessment. I do not agree.

(b) All the professionals agreed that the assessments they had made and the conclusions they had reached in 2018 remained valid until such time as there was a change in the Applicant's behaviour or circumstances. The panel therefore had to pay particular attention to the evidence given to them by the Applicant and any other evidence regarding his behaviour and circumstances since the decision of the previous panel. It is clear on a reading of the decision as a whole that the panel having considered the totality of the evidence found themselves unable to take a different course from the earlier panel and unable to follow the recommendations of the professional witnesses. In my judgment the panel clearly and fairly carried out their own independent risk assessment, taking proper and proportionate account of the earlier decision.

17. It follows that I am unable to agree that there is any merit in the suggestion that the panel were over reliant upon the earlier decision. I am unable to find fault in the approach taken by the panel. In my judgment their approach was both fair and balanced. Accordingly, both these grounds must fail.

Ground (iii)

18. The panel added the following short paragraph at the end of their brief introductory summary of the evidence they had considered:

"The panel recognises that you have, very largely, continued to maintain your innocence of your index offence, as is your right. However, you will recognise that the Parole Board must presume you have been properly convicted"

19. As I have said, an important issue for the panel was whether the Applicant had a sexual interest in children. The professional witnesses had all recognised that the question of any sexual interest in children had not yet been fully explored or addressed. This was of course relevant to the issue of risk and was carefully

explored by the panel who reached their own conclusions. The fact that the Applicant disputed the trial Judge's assessment of his motives was clear to the panel.

20. Lord Bingham in **Oyston [2000] PLR 45** referring to the drafting of Decision Letters said at paragraph 47 that:
.."it would be wrong to require elaborate or impeccable standards of draftsmanship"

21. I respectfully agree. The short paragraph that I have quoted from the Decision Letter perhaps could have been worded more precisely. That said, it is inconceivable that the panel did not appreciate that the Applicant had pleaded guilty, confirmed by the Secretary of State representative (PPCS) in their written representations dated 3 February 2020. It seems to me clear that the panel was seeking to convey in their decision that the Applicant was continuing to maintain not that he was not guilty of the counts on the indictment but rather that his offending was not and never had been motivated by a sexual interest in children.

22. The question I must resolve is whether this is anything more than a drafting issue amounting to evidence of irrationality in the panel's approach. In my judgment it is not and does not impact upon the panel's ultimate decision. This ground also fails.

Ground (iv)

23. The effect of the submission in support of this ground made on the Applicant's behalf is that the fact that the Applicant had absconded from the army is irrelevant to the issue of the risk of him absconding from an open prison.

24. This submission appears to ignore the fact that while absent without leave from the army, the Applicant, evaded arrest by the authorities, fled to a country outside of the UK and committed the offence of murder of a young girl.

25. In my judgment, if nothing else, this conduct by the Applicant, albeit several years earlier, is clearly relevant to the issue of compliance which itself has a significant bearing upon a prisoner's response to a potential move to open conditions. That is clearly what the panel had in mind and indeed they said so.

26. There is no merit in this ground.
Ground (v)

27. Having found against the Applicant on Grounds (i) and (ii) that is sufficient to dispose of this ground.

28. Again, I should emphasise that a reading of the Decision Letter as a whole indicates that very little of any significance had changed in the nineteen months that had passed since the earlier decision of the Parole Board. In those circumstances the panel were heavily reliant upon how the Applicant presented himself to them. They reached a conclusion on his evidence that they expressed in forthright terms as follows:

"You asked the panel not to judge you on your past. The panel struggled to perceive any real depth of analysis, but thought you presented, arguably, well rehearsed phrases, which presented a positive image, but which revealed little about your real thinking, and seemingly limited honesty about, or your insight into your risks, or offending."

29. I am unable to accept that in concentrating upon the circumstances since the previous hearing the panel fell into any error and applied the wrong test. They did not. This ground must also fail.

30. The panel explained in its detailed reasons how it had weighed and balanced the competing views and facts. It correctly focused on risk throughout. It applied and stated the correct tests for release and the issues to be addressed in making a recommendation for a progressive move to open conditions. It was in my judgment necessary and appropriate to refer in detail to the earlier decision given the absence of any significant developments in the intervening period. In so doing the panel was in a position to fully explain the decision it had reached. In my judgment that is precisely what they did.

31. The legal test of irrationality is a very strict one. This case does not meet it. In the light of that finding it is not necessary for me to decide whether any of the complaints made in the grounds amount in law or fact to a procedural unfairness. I am inclined to the view that none of them do, but if I am wrong about that, I make it clear I have reached my decision on the merits in respect of both limbs.

Decision

32. The complaints of irrationality and/or procedural unfairness are not made out on the papers before me.

33. Accordingly, this application is dismissed.

HH Michael Topolski QC
11 February 2020