[2020] PBRA 61

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Application for Reconsideration by Ekezie

Application

1. This is an application by Ekezie (the Applicant) for reconsideration of a decision of the Parole Board dated 23 March 2020 following an oral hearing dated 17 March 2020 not to direct his release.

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. This is an eligible case.

3. I have considered the application on the papers. These are the application for reconsideration prepared by the Applicant's legal representatives together with supporting documents, the Decision Letter dated 23 March 2020 and the contents of the dossier.

Background

4. The Applicant is serving a life sentence imposed in December 2002 following his conviction for four offences of rape. The minimum term set was one of nine years and one month, the tariff expiry date recorded in the dossier being 6 January 2012.

5. The Applicant is 54 years of age. He first offended at the age of 31 when, in May 1997 he raped a 13 year old girl. As with his subsequent victims (in 1998, 2001 and 2002) he met the young girl on the street and took her back to where he was living where the offence was committed. After committing the second offence of rape, he was convicted of an offence of causing actual bodily harm against his then partner, for which, in May 2000 he was sentenced to two years imprisonment. The last two offences of rape were committed whilst on licence in the community during completion of the sentence for assault.

6. The hearing of this case by the panel had been subject to a number of delays. The case was referred to the Parole Board by the Secretary of State on 8 November 2016. That referral was provisionally finalised for hearing in April 2017. Following representations from the Applicant and from his legal

representatives in May 2017, the case was directed to be dealt with at an oral hearing in June 2017. Unfortunately, it was then subject to a number of further delays which are documented in the dossier. It is important to observe that throughout, the Applicant's representatives have been assiduous on their client's behalf in pursuit of a large number of issues.

7. Indeed, on the day prior to the hearing in March the panel received substantial written submissions from the Applicant's solicitors to which I shall return.

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,

> *"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.

10. The application of this test has been confirmed in previous decisions on applications for reconsideration under Rule 28: **Preston [2019] PBRA 1** and others.

Procedural unfairness

11. 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.

12. In summary an applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:

(i) express procedures laid down by law were not followed in the making of the relevant decision;

(ii) they were not given a fair hearing;

(iii) they were not properly informed of the case against them;

(iv) they were prevented from putting their case properly; and/or

(v) the panel was not impartial.

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

The Solicitor's Representations

13. The grounds for seeking a reconsideration on the basis of irrationality and/or unfairness are as follows:

(i) The panel erred in finding that the Applicant had failed to comply with Directions made regarding disclosure requests; further, the panel acted irrationally and/or unfairly in finding that all reasonable enquiries had been made, thereby implying that document recovery was the Applicant's responsibility.

(ii) There was no legitimate basis open to the panel to prefer the psychologist's opinion as opposed to the results of a static risk assessment concluding the Applicant presented a low risk.

(iii) The panel failed to give any or sufficient weight to the fact that the Applicant had served a considerable period of time in prison, post tariff.

(iv) The panel acted irrationally and/or unfairly in making it effectively a condition of release that the Applicant should agree to a further psychological assessment.

(v) The panel mis-stated the position regarding a further psychological assessment and in consequence acted unfairly by not placing any or sufficient weight on the Applicant's willingness to engage with its preparation.

The reply on behalf of the Secretary of State

14. The Secretary of State's observations provided the full texts of emails I had requested to see regarding requests for documents as well as details of some of the actions taken in the search for documents requested by the Applicant's solicitors. In addition, on behalf of the Secretary of State, it is confirmed that in written submissions prior to the hearing no concerns were raised on behalf of the Applicant regarding procedural fairness.

Discussion

15. I turn to deal with the submissions made in support of each ground.

(i) Disclosure requests.

(a) I have referred in paragraph 7 above to the substantial written submissions received by the panel the day before the oral hearing. The Decision Letter sets out a detailed response to those submissions.

(b) In essence, the Applicant's submission in support of this ground relies on the proposition that neither the Applicant nor his representatives had in fact failed to comply with any directions and that the position taken by the panel effectively placed the burden of obtaining documents unfairly on the Applicant.

(c) There was in my judgment nothing irrational or unfair in the panel finding that all reasonable enquiries had been made for documents that only the Applicant's legal representatives asserted were relevant. I am entirely satisfied that the findings made, the conclusions reached and the reasons for those findings and conclusions were balanced, fair and in each case entirely appropriate. Ultimately, as the expert independent decision maker, it is for the panel to decide upon the evidence and the material that will best enable it to reach a fair decision. As the Decision Letter makes clear all the Parole Board can do is, in effect, pass on a disclosure request to the Secretary of State or other appropriate person or body and that is what happened in this case. I do not accept that at any stage the panel implied or intended to imply that there was any responsibility placed on the Applicant to obtain any documents.

(d) The panel made it clear that it was entirely satisfied that they were in possession of sufficient material and information to conduct a fair hearing. In my judgment that decision is beyond criticism.

(e) This ground has no merit.

(ii) Risk Assessment and (iii) Time served post tariff

(a) If I have correctly understood the submissions in support of these two grounds, which are conveniently taken together, it is suggested in Ground (ii) that the panel had no legitimate basis upon which to prefer the conclusion of a professional witness regarding risk over other evidence and in Ground (iii) that the panel failed to give any or enough weight to the fact that the Applicant was significantly over tariff, which, it was submitted,

indicated by itself a reduction in risk as a result of the length of time served.

(b) One of the purposes of an oral hearing is to examine assertions made. It is the panel's responsibility to make their own assessments and make up their own minds based on the totality of the evidence. 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.

(c) I will have to return to the issue of risk assessment in dealing with the remaining grounds, but in the meantime, it is important to mention that one of the difficulties the panel faced in this case was the position taken by the Applicant and the evidence given by the Applicant on the issue of risk assessment. He was, as the Decision Letter makes clear, adamant in asserting his innocence of any wrongdoing and categoric in his refusal to participate in a psychological risk assessment on the basis that as he had not committed any crime meaning that the question of risk did not arise.

(d) I am entirely satisfied reading the Decision Letter the panel very carefully considered the evidence on this issue and having provided a detailed analysis of it, reached fair conclusions upon it.

(e) As for the complaint that the panel failed to take any or sufficient account of the fact that the Applicant had served a considerable period of time in prison beyond his tariff, it is submitted that *"there is a total lack of any reference to this within the decision".* That is not correct, as it is referred to, in terms, in the second paragraph on the first page of the Decision Letter. It is beyond doubt that the panel considered the impact of the fact that the Applicant was 8 years beyond his Tariff Expiry Date and took that into account.

(f) In my judgment there is no merit in either of these grounds.

(iv) A conditional release and (v) A further psychological assessment

(a) Again, it is convenient to take these two grounds together. It is submitted in Ground (iv) that the panel sought to impose what was effectively a pre-condition that the Applicant could not be considered for release until a further psychological assessment had taken place and in Ground (v) that the panel incorrectly stated the position with regard to the obtaining of a further psychological assessment and acted irrationally/unfairly in placing no weight upon the Applicant's apparent willingness to engage in its preparation.

(b) I have referred to the evidence that the Applicant himself gave to the panel that he was refusing to participate in any further psychological risk assessment. That evidence it must be noted is in stark contrast to the written submission in support of this application (paragraph 8) that he agreed to engage.

(c) It is submitted that the panel's approach is irrational and ignores the proposition that the Applicant's risk will have reduced due to the passage of an additional 8 years served post tariff (the oral submission made to the panel on behalf of the Applicant). It is correct to say that the psychologist did agree that it had been a long time since the last assessment and that if the Applicant remained unwilling to engage, the only measurable change to risk might be that it decreased marginally over time. Having heard the evidence the panel in effect concluded that without a risk assessment any change would remain hypothetical. As I read the Decision Letter that is as far as the panel went. In my judgment that was an entirely appropriate and fair comment and very far removed from any suggestion that release would be in some way conditional on another psychological assessment.

(d) Clearly it was a significant concern for the panel that the Applicant's lack of engagement in any form of future assessment would not provide up to date information on his attitudes and motivations. In the absence of evidence to the contrary the panel were driven to conclude that there was nothing to suggest that the Applicant would not reoffend upon release. There was no application before the panel for an adjournment to enable another assessment to take place. In reality of course there could not have been, given the history of these proceedings and given that the Applicant had told the panel very clearly that he would not participate in any such assessment.

(e) There is no merit in Ground (iv).

(f) As for Ground (v); in the Decision Letter the panel, as I have said, responded in detail to a submission made to it just before the hearing of the evidence began that the Applicant was (apparently) more than willing to undergo a psychological assessment. The panel were unable to accept that for the reasons they gave. There is nothing that I have had placed before me to even begin to suggest that the panel were not entitled to reach that conclusion. There is no merit in this Ground.

16. Standing back and considering the Decision Letter as a whole, in my judgment the panel explained clearly how, giving detailed reasons, it had carefully weighed and balanced the competing views and facts. It correctly focused on risk throughout and applied and stated the correct test for release.

17. Whether taken individually or together, the matters put forward on behalf of the Applicant in support of his application for a reconsideration of this decision have failed to satisfy me that this case meets the legal test for either irrationality and/ or unfairness.

Decision

18. This application for reconsideration is dismissed.

HH Michael Topolski QC
30 April 2020