the Parole Board
working with others to protect the public

[2020] PBRA 69

Application for Reconsideration by Islam

Application

1. This is an application by Islam (the Applicant) for reconsideration of a decision of an oral hearing dated 30 April 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.

3. I have considered the application on the papers. These are the decision letter, the dossier and the application for reconsideration.

Background

4. The Applicant was sentenced to imprisonment for public protection on 14 September 2009 following conviction after trial for three counts of rape, false imprisonment and assault occasioning actual bodily harm. A minimum term of nine years, less time spent on remand was imposed. His tariff expired on 9 August 2013.

Request for Reconsideration

5. The application for reconsideration is dated 5 May 2020 and has been submitted by solicitors acting for the Applicant.

6. The grounds for seeking a reconsideration are as follows:

   (a) The panel's conclusion that the proposed risk management plan did not fully address the Applicant's risks was irrational;

   (b) The panel's conclusion that the Applicant demonstrated a limited understanding of the seriousness of his offences and minimised his behaviour towards the victim was irrational; and

   (c) The panel's conclusion that the Applicant's plans for release are limited was irrational.

7. The grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below. The application also cites a failure to give adequate reasons is sufficient to render the decision irrational. Failure to give reasons is also a matter of procedural unfairness, and, although not raised as such in the submissions, I will also deal with that aspect of the application on that basis.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State in August 2018 to consider whether or not it would be appropriate to direct his release and, if release was not directed, to advise the Secretary of State on whether he was suitable to remain in open prison conditions. This is his fourth parole review.

9. An oral hearing took place on 20 November 2019 before a three-member panel, including a psychologist member. It took evidence from the Applicant's Offender Supervisor (OS) and Offender Manager (OM), before adjourning to enable the Applicant to have further opportunities for temporary release.

10. The hearing reconvened at the prison on 17 March 2020. Two of the three members of the previous panel were present. The psychologist member was self-isolating due to concerns over the COVID-19 pandemic.

11. Previously directed reports were not available in time for the reconvened hearing due to the Applicant withholding his consent. This consent was given, via his legal representative, following a meeting on 11 March 2020, less than a week before the reconvened hearing.

12. After taking full oral evidence from the Applicant, his OS and OM, the reconvened hearing was adjourned to 3 April 2020 for these reports to be provided, with a view to concluding the review on the papers.

13. The Applicant was legally represented at the first and the reconvened hearing. The adjournment directions of 17 March 2020 set out that the Applicant's legal representative was content to proceed with the reconvened hearing without the psychologist member present and without the directed reports. It is also noted that the panel chair confirmed the Applicant's position over the panel composition and missing reports before taking any further evidence at the reconvened hearing.

The Relevant Law

14. The panel correctly sets out in its decision letter dated 30 April 2020 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for remaining in open conditions.

Parole Board Rules 2019

15. Under rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is

made by a paper panel (rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (rule 25(1)) or by an oral hearing panel which makes the decision on the papers (rule 21(7)). This is an eligible decision.

Irrationality

16. 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."*

17. 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.

18. 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

19. 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.

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

The Reply on behalf of the Secretary of State

21. The Secretary of State has submitted no representations in response to this application.

Discussion

22. The three grounds put forward by the Applicant all, in some way, take issue with the rationality of aspects of the panel's decision-making based on the evidence before it: the first in relation to the risk management plan, the second in relation to the Applicant's understanding of the seriousness of his offending and the third concerning the panel's conclusion as to the Applicant's release plans. These will therefore be dealt with together (as indeed, they are summarised as such in the application).

23. The panel had the advantage of seeing and hearing the witnesses whose evidence is being raised in the application for reconsideration. It also had the advantage of submissions from the legal representative in respect of particular points favourable to the Applicant's case for release. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.

24. Moreover, panels of the Parole Board are not obliged to adopt the opinions and recommendations of any professional witnesses. It is their responsibility to make their own risk assessments. They must make up their own minds on the totality of the evidence that they hear and read in the dossier. They 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. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

25. In this case, the Applicant's OM was plainly supporting release. His OS was not supporting release in their report of 13 February 2020. The Applicant submits that the oral evidence of the OS on 17 March 2020 was such that they were unable to support release until the extent of any of the Applicant's mental health issues (and concomitant community support) were clarified. This has now been done. The decision letter carefully notes the panel's consideration of the healthcare report of 23 April 2020.

26. Where there is a conflict of opinion, it was plainly a matter for the panel to determine which opinion they preferred, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above.

27. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, following **R (Wells) v Parole Board [2019] EWHC 2710**.

28. The extensive decision letter sets out the panel's reasons for disagreeing with the OM's recommendation and its rebuttal of the robustness of the risk management plan. It considered its view of the Applicant's understanding of his offending and the risk-related implications of a lack of purposeful activity on release. As such, I am satisfied that the stated reasons are sufficient to justify the panel's conclusion and there is therefore no procedural unfairness on this point.

29. The panel was correctly focused on risk throughout. It was reasonably entitled to reach its own view on the evidence before it and its conclusion cannot be said to be outrageously defiant of logic or accepted moral standards. The legal test of irrationality is a very strict one. This case does not meet it.

30. It is finally submitted that the two member panel who dealt with the reconvened hearing should have considered whether the hearing should have been adjourned in the absence of the psychologist member, particularly given that the Applicant had not given evidence at the first hearing at which the psychologist member was present.

31. Cases in which the party to Parole Board cases have been legally represented are highly unlikely to generate a successful request for reconsideration if there had been no challenge made to the alleged irregularity by the Applicant, save in the event for instance of a failure by the other party.

32. In this case, it is clearly documented in the directions of 17 March 2020 that both the Applicant's legal representative and the Applicant themselves had the opportunity to seek an adjournment on the day of the reconvened hearing. It follows that the panel must have considered the panel composition and was content to proceed itself and then (rightly) gave the Applicant the opportunity to object. There is no procedural unfairness on this point.

Decision

33. 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.

Stefan Fafinski
25 May 2020