[2020] PBRA 70

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Application for Reconsideration by Reid

Application

1. This is an application by Reid (the Applicant) for reconsideration of a decision of a two-member Panel, dated 17 April 2020, not to direct his release following an oral hearing.

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 consisted of the dossier running to 303 pages, the decision letter and the representations for reconsideration.

Background

4. The Applicant is now aged 37 years old. He was sentenced to life imprisonment on 12 October 2006 for an offence of murder. The tariff was set at fourteen years (with allowance for time on remand) and expired on 31 January 2020.

5. The Applicant's case was considered at an oral hearing (on a 'pre-tariff sift') in December 2018 where it was recommended that he move to open conditions. This was accepted and, on 26 July 2019, he moved to an open prison.

6. However, he was returned to a closed prison on 30 July 2019 as there was said to be a deportation order in place against him and it was decided that he was not eligible for open conditions.

Request for Reconsideration

7. The application for reconsideration is dated 6 May 2020.

8. The grounds for seeking a reconsideration are that the Panel have reached a decision that is an irrational one, and that it was reached in a manner that was procedurally unfair.

9. There are a number of complaints that are raised, that can be summarised as follows:

(a) It was wrong to proceed in the absence of a properly formulated risk management plan (irrationality and procedural unfairness);

(b) The Panel were not aware of the consequences of the Applicant's immigration position (irrationality and procedural unfairness);

(c) The Panel failed to properly consider the current risk presented by the Applicant (irrationality); and

(d) It was irrational to recommend a move to open given that, as a Foreign National Prisoner, the Applicant would not be eligible to move (irrationality).

10. It can be seen that there is an element of overlap between the two separate strands.

11. The question of the recommendation for a move to open itself is outside the scope of the Reconsideration Mechanism (see **Barclay [2019] PBRA 6**).

Current parole review

12. The Secretary of State referred the Applicant's case to the Parole Board in May 2019 to consider whether he should be released. If not, then the Panel was invited to advise the Secretary of State on whether he should be transferred to open conditions.

13. The referral letter from the Secretary of State is in standard form, and specifically asks the Panel to advise as to whether the Applicant should be transferred to open conditions.

14. The Applicant's case was considered by a single member in December 2019 and an oral hearing directed.

15. This oral hearing was held on 06 April 2020. It was due to be an in-person hearing but, due to the COVID-19 Pandemic, was converted to a telephone hearing. There was no objection at the time to that course of action, and no complaint is made now.

16. The Panel concluded that the test for release was not met. Having concluded that, and after noting the various issues about the Applicant's immigration status, the Panel recommended that he was suitable for a move to open.

17. On that day, the Panel heard oral evidence from the Applicant, as well as from his Offender Supervisor and his Offender Manager.

18. The dossier contained evidence of risk reduction work completed.

19. At the hearing, neither the current Offender Supervisor nor Offender Manager recommended release.

20. In the decision letter, the Panel set out the history of the case and the respective recommendations. It was concluded that there was insufficient evidence of a reduction in risk from the index offence to show that the Applicant's risk was manageable in the community.

21. In light of that, no direction for release was made although the Panel did recommend that the Applicant was suitable for a move to open conditions.

The Relevant Law

22. The Panel correctly sets out in its decision letter dated 17 April 2020 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019

23. 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. This is such a case.

24. Such a decision is eligible for reconsideration on the basis that (a) the decision is irrational and/or (b) that the decision is procedurally unfair.

Irrationality

25. 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."*

26. 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.

27. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28 (see **Preston [2019] PBRA 1** and others).

Procedural unfairness

28. 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.

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29. 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 was dealt with justly.

The reply on behalf of the Secretary of State

30. The Secretary of State has confirmed that he has no representations to make in response to the application.

Discussion

31. I shall consider the grounds of reconsideration in turn before returning to the question of whether the decision contained a legal error.

Ground (a) – the absence of a satisfactory risk management plan

32. In considering this it is important to note that there is no indication in the dossier, the decision letter, or in the grounds for reconsideration itself that any application for an adjournment of the hearing was made in order to add to, or otherwise elaborate on, the risk management plan. Neither was an application made for further directions prior to the hearing to remedy any perceived defects.

33. As was said in **Nightingale [2019] PBRA 40** (para 37):

> *"As part of any judicial proceedings it is incumbent on all parties to ensure that all relevant information is before the tribunal before allowing the case to proceed. Accordingly, if a report is pending, or if relevant information is available to the parties which would assist the fact-finding and/or decision-making tribunal at first instance or, as in this case, on review, it is incumbent on the parties to ensure that the relevant information is lodged. If that is not possible because, as in this case, the final report or assessment is not available, it is incumbent on the party concerned to seek to have the matter adjourned. No such application was made in this case by the Applicant's legal representatives."*

34. To this I would add that if a party considers that the risk management plan is in some ways deficient then there is an obligation on them to raise it before (or at, the latest, on the day of) the hearing.

35. Although the Parole Board has more of an inquisitorial role than that of a traditional Court of Tribunal, it will be rare for a Panel to be properly criticised retrospectively for failing to adjourn a case when it was not asked to.

36. I accept that a different approach may be required in a case where an Applicant is unrepresented, but here the Applicant was represented by a solicitor and had been for some months.

37. The task of the Parole Board is to consider the information and evidence put before them and, in light of any representations by either side, come to a conclusion. That is what the Panel did in this case.

38. I also note that, at the MCA stage, representations were submitted that included a statement that "*There is a robust release plan in place*", so it is clear that the question of a release plan was a live one that the Applicant's representative had turned their mind to.

39. In any event, although the decision letter noted that by the time of the hearing, the release plan was 'underdeveloped', the Panel concluded that there was insufficient evidence that the Applicant's risk could be managed in the community.

40. This finding was based on concerns about factors internal to the Applicant rather than the lack of any specific measures in the release plan. In light of that, an adjournment would not have served any purpose.

41. In those circumstances, I do not consider that there was any unfairness caused by the fact that the case proceeded.

Ground (b) – The Applicant's immigration position

42. Again, no application was made at the hearing to adjourn or defer in order to obtain further information about the Applicant's immigration position. If that had been a concern of the Applicant, then such an application should have been made.

43. In any event, the application states that the Applicant's advocate reminded the Panel of the test to apply in relation to Foreign National Prisoners; namely that it is the same as applies to any other prisoner.

44. Although on one reading of the decision letter it could seem to indicate that the Panel saying that they could not assess the risk in the community, a fair reading of the decision as a whole is that the Panel proceeded on the basis that they were considering the Applicant's release into the community and then assessed that risk, which is what they were statutorily obliged to do.

45. To the extent that it is suggested that if the Applicant was detained and released on bail, then bail conditions coupled with licence conditions would be more robust, I do not consider that that can be accepted.

46. Although there could be a condition such as a surety placed on bail conditions that could not form a licence condition, there is a large overlap between the two and,

in the Applicant's case, no bail conditions that could be imposed that could not be replicated by licence conditions were suggested.

47. Against that backdrop, the decision made was not irrational. Nor was it procedurally unfair to not (on its own initiative) adjourn the hearing for more information.

Grounds (c) – failure to consider the current risk

48. The application quotes an extract from the decision letter. This is, in fact, two different parts of the decision letter (from paragraph 3 and 8) that have been elided.

49. Paragraph 3 of the decision letter contains an analysis of the Applicant's 'analysis of offending'. Of necessity that will involve a consideration of the Applicant's past history.

50. It is not surprising that the Panel took that risk as a starting point, before considering what (if anything) has changed. The Panel concluded that although the Applicant had made progress, this progress was not such as to lead to the conclusion that his risk was now manageable. That was a decision properly open to them on the evidence. The lack of reference to whether the risk was 'imminent' does not make the decision irrational.

Ground (d) – recommendation for a move to open

51. Although the question of whether or not a recommendation to move to open is outside the scope of the reconsideration mechanism, I accept that a decision letter's conclusion on this question may, in certain case, shed light on a question that is within the jurisdiction of the current review.

52. The referral letter (set out above) is the basis of the Parole Board's jurisdiction in a particular case (see **s28(6) Crime (Sentences) Act 1997**).

53. The statutory function exercised by the Parole Board is the decision whether to direct release.

54. If (and only if) it is decided that no direction for release can be made then, if asked by the Secretary of State, the Parole Board can give advice as to whether a prisoner is suitable for a transfer to open.

55. The Secretary of State asked the Panel to give such advice in this case. In those circumstances, the Panel was obliged to do so. When confronted by the referral letter in the terms that it was, it may well have been an abdication of the Parole's Board advisory function to decline to make a recommendation on the basis that the policy appeared to preclude the Applicant's movement. Whether or not the Applicant progressed in light of the recommendation was a matter for the Secretary of State.

56. There is nothing within the decision letter to suggest that the conclusion on the release decision was irrational.

Conclusion

57. I have set out above why I do not consider that any of the individual points fulfil the test for irrationality or procedural unfairness.

58. Further, even taking them together, I do not consider that they are sufficient to say that the decision was an unlawful one.

59. The Panel had the advantage of an extensive dossier of reports and other material. In addition, they had the advantage of seeing and hearing the Applicant as well as the two professional witnesses.

60. In reaching its decision, it fell to the Panel to conduct a balancing exercise of the various factors in the Applicant's case, on the information provided to them, placing due weight on the progress that he has made.

61. The Panel were entitled to conclude that, as things stood at the hearing, the test for release was not met. There was no obligation on them to go further and adjourn for more information that neither party had asked them to obtain.

Decision

62. For the reasons I have given, I do not consider that the decision was irrational, nor was it procedurally unfair.

63. Accordingly, the application for reconsideration is refused.

Daniel Bunting
08 June 2020

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