[2020] PBRA 73

the Parole Board
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Application for Reconsideration in the case of Baker

Application

1. This is an application by the Secretary of State (the Applicant) for reconsideration of a decision of the Board dated 29 April 2020 directing the release of Baker (the Respondent) made following an oral hearing conducted by telephone.

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 an application for reconsideration; the decision letter; the dossier and documents relating to the direction for a telephone hearing. I have also seen a letter dated 23 March 2020 from the CEO of the Parole Board to all external stakeholders, confirming that panel chairs had been asked to review their existing cases, and setting out the procedure to be followed in cases where an oral hearing had been directed but could not take place as the prisons were in lockdown due to Covid-19.

Background

4. The Respondent was convicted of a serious rape of a vulnerable person on 25 June 2013 and sentenced to life imprisonment with a minimum term of ten and a half years. The minimum term was reduced on appeal to eight and a half years. The Respondent attacked the victim in her own home in the course of a burglary. The Respondent had been previously tried for the offence and acquitted in June 1999 on the direction of the trial Judge. The minimum period expired on 15th March 2020. On 18 November 2019 a duty member directed that there should be an oral hearing. The scheduled date for the oral hearing was 29 April 2020. On 23 March 2020 the UK went into lockdown and no more face to face oral hearings by the Parole Board could take place. As a result, the Parole Board reviewed cases which were listed for a face to face hearing to see if there was any other way they could be progressed during lockdown. In April 2020 the panel chair reviewed this case in order to form a view whether it was necessary to have a face to face hearing in the light of the shut down in prisons which made that impossible. The panel chair on 2 April 2020 directed that in the light of his consideration of the papers, the review could be progressed by a remote oral hearing either by video link or telephone link. These directions were issued to PPCS on 2 April 2020. At the time the directions were issued, the relevant prison could not facilitate remote hearings either by telephone or video link. By 29 April 2020 they could facilitate remote hearings by telephone but they could not facilitate remote hearings by video link

until 6 May 2020. (I have been provided with this information by the Board following my request). The panel chair directions were served on the Applicant by e mail on 2 April 2020 and the hearing timetable was served on the Applicant by e mail dated 21 April 2020. There were discussions between the Board and the prison as to their ability to provide a hearing of any sort on 29 April 2020. The prison eventually said that they could provide a telephone hearing. No representations were received from the Applicant that the case was not suitable for a hearing by telephone and the hearing went ahead on the 29 April 2020. The Applicant was not represented at the hearing. He did not make any written representations that a telephone hearing was not appropriate, nor did he make representations on the merits of the application for release. The Psychologist, the Offender Manager (OM) and Offender Supervisor (OS), all of whom are employed by the Applicant, supported release. None of them suggested that a telephone hearing was inappropriate.

Request for Reconsideration

5. The application for reconsideration is dated 22 May 2020.

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

   The decision was irrational because

   (a) a hearing by telephone was inadequate because of the gravity of the crime and the high risk presented by the Respondent;
   (b) there was limited evidence to support a reduction in risk; and
   (c) the panel failed to adequately explore relevant evidence.

7. In view of the ground for reconsideration relating to the hearing by telephone, I have caused enquiries to be made of the Board as to the procedures being followed by the Board at the time of the lock down. The result of those enquiries is as follows. After the lockdown, the Board wished to continue to make parole decisions where it could be done safely. The desire to continue to deal with parole reviews was shared by the Board and the Secretary of State who has done what he can to assist in enabling telephone and video link hearings to take place in prisons. To do otherwise would be unfair to prisoners and might cause considerable tension within prisons. At the time of lock down all chairs of panels were asked to carry out a 'neutral assessment' of cases which were due to be considered at an oral hearing to decide whether they could be decided on paper or alternatively, to consider whether a remote hearing would be suitable in the particular case. Stakeholders including PPCS were informed of this procedure by the letter dated 23 March 2020 and told that they would be notified of the result of the neutral assessment in each case. They were further told that at that stage they could make representations concerning the result of the assessment. Panel chairs were reminded, as set out in the letter from the Parole Board dated 23 March 2020, that in deciding the method of conducting the review and in reaching their decision they had to apply the statutory test. In this case, the panel chair did not consider that the review could be completed on paper despite the recommendation of all the professionals for release on licence but decided that there should be a remote hearing which could be either by telephone or by video link. The Chair issued directions to that effect as set out above.

The Relevant Law

8. The panel correctly sets out in its decision letter dated 5 May 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

9. 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)). It is also eligible if the oral hearing takes place by telephone or video link.

Irrationality

10. 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."*

11. 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.

The reply on behalf of the Respondent

12. Representations in opposition to the Application dated 2 June 2020 have been received by the Board and considered by me. The representations are comprehensive and helpful and I am grateful for them. The submissions point out that the Applicant did not attend the hearing when he was aware that all the professionals were supporting release. It is further pointed out that had the Applicant appointed a representative to attend the hearing, most of the matters of which he now complains could have been drawn to the attention of the panel to consider during the hearing. While the panel were under an obligation to investigate the matters for themselves and make up their own minds whether or not the statutory test is met, if the Applicant disagrees with the evidence of the professionals and considers that the test is not met, then it would have been helpful if he was represented at the hearing or provided written representations setting out his concerns.

Discussion

(a) The Applicant complains about the hearing being conducted by a telephone link and says it should have at least been by video link.

13. As has been set out above, it has become apparent that, at the time the case was listed, there was no facility for video link parole hearings to take place at the relevant prison. While having video link enables you to see the reaction of the witness to questions which are asked, which can be important, it is the substance of the answers to questions which is most important in reaching a correct decision. I am grateful for the reference by the Respondent to the case of ***SS(Sri Lanka) -v-SSHD*** and the quotations from Leggatt LJ which accord with my experience as a Judge. While the crime committed by the Respondent was serious and any repetition would have serious consequences, that does not mean that a telephone conference could not be a satisfactory means of deciding the case. Delaying the case further would be unfair to the Respondent and in breach of the Board's duty to consider the matter speedily. Having considered the dossier myself, I do not consider it to be an irrational decision to conclude the review by a telephone hearing. The evidence in the dossier was clear and all the professional witnesses supported release. Questions could be asked by telephone to clarify any of the evidence or to make further enquiries. The Applicant was fully aware of the Panel's intention to have a telephone hearing well in advance of the hearing date. If he wished to object to this way of proceeding because it was not appropriate, he should have done so before the hearing and not waited for the decision before doing so. PPCS had been told of the result of the 'neutral assessment' on 2 April 2020. They had been told that they could make representations when informed of the result of neutral assessments. In my view that was the time for raising this objection. The Parole Board and the Applicant have worked together to find alternative methods of holding oral hearings. It is important that the process is fair to all parties.

(b) The Applicant asserts that the decision was irrational because there was limited evidence to support a reduction in risk.

14. In my judgment the evidence does not support that assertion. The Applicant points out that the Respondent continues to deny the offence and therefore has not been on the appropriate sex offender's course. The Court of Appeal made clear in **R(ex p Oyston-v-the Parole Board [2000] EWCA Crim 3552** that, while continued denial is a factor which the Board must take into account, it is not an absolute bar to release and the Board has to apply the statutory test. The panel clearly did take into account the Respondent's continued denial but were nevertheless satisfied that it was not necessary for the protection of the public that the Applicant remained in custody. The Applicant was able to rely on the fact that in the 12 plus years that he was at liberty following the commission of the offence, he had not further offended.

15. The Applicant contends that it was irrational of the panel to say that the Respondent had 'completed all the necessary offending work in custody'. He relies on quotations from the psychologist's report to support his case. This complaint relates to an assessment for suitability to undertake particular training

programmes. The Respondent had been prepared to go on this assessment while serving his sentence. He was not prepared to do it when interviewed by the Psychologist because it was so close to his parole date and there had been a considerable delay in arranging for him to go on the course. The Psychologist concluded that it was not necessary for the Respondent to go on this course at the time she interviewed him for the purpose of her report, as he had developed skills and strategies within the relevant areas which it was thought required attention. Instead the Psychologist was of the view that the Respondent could do any necessary work in the community. The panel accepted the evidence of the Psychologist; there was no reason not to. It is important to consider the quotations from the report relied on in the context of the whole report. In those circumstances it was not irrational to conclude that the Respondent had completed all the necessary offending behaviour work in custody.

16. There was abundant evidence to support a reduction in risk coming from the professionals employed in the prison service who gave evidence.

(c) The Applicant finally complains that the panel failed to adequately explore relevant evidence.

17. While it is clear following the decision of the Divisional Court in **DSD** (for reference see above) that a panel may need in the course of its assessment to investigate unproven allegations, that does not mean that every allegation has to be investigated. The allegations referred to by the Applicant are said to have occurred in March and April of 2018 and their reliability is assessed as 'low'. It was not something that was considered by any of the professionals in their risk assessments as being relevant and there was no good reason for the panel to investigate further. The panel was not required to consider every unproven allegation of misconduct. To do so would be disproportionate. In this case the allegations were two years ago; there was no prospect of determining the truth of them and the reliability of the information was assessed as low.

18. The Applicant considers that it was irrational of the panel not to have made further enquiries of the Respondent of his strategy for 'deterring from drug misuse'. The panel did consider drug misuse. The Respondent told the panel that he had not misused drugs since 2009. There was no evidence to contradict this and the panel accepted his evidence. They were entitled to do so and it was not irrational to accept that evidence. Similarly, it is claimed that it was irrational of the panel not to examine the risk assessments in more detail, bearing in mind that the Respondent had not carried out any work specific to sexual offending. The panel did consider the risk assessment and accepted the evidence of all three professionals including a psychologist that his risk could be managed in the community. An important factor was the length of time that the Respondent had gone without re-offending between the date of commission of the offence and his sentence. Finally, the Applicant complains that the panel failed to consider how the risk management plan would prevent offending in the future. It is clear from the decision letter that the panel did examine whether the plan was suitable and was likely to manage the risk. They identified protective factors that they considered would assist and also relied on the evidence that they had heard. The evidence does not support the assertion that the panel failed to adequately explore relevant evidence.

Decision

19. Although the Respondent had committed a very serious offence which he continues to deny, the law is clear that such denial in itself does not mean that it was irrational to direct his release per se. The panel considered all the evidence, including this issue, and reached a conclusion which was open to them. Accordingly, I do not consider that the decision was irrational and the application for reconsideration is refused.

John Saunders
8 June 2020