

[2020] PBRA 98

Application for Reconsideration by Young

Application

1. This is an application by Young (the Applicant) for reconsideration of a decision of the Parole Board made under rule 25(1) of the Parole Board Rules 2019 (the 2019 Rules) that the Applicant was unsuitable for release (the Decision).
2. Rule 28(1) of the 2019 Rules 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, comprising a dossier of 215 numbered pages and written submissions by the Applicant's solicitors dated 16 July 2020.

Background

4. The Applicant is serving a sentence of indeterminate sentence of Imprisonment for Public Protection (IPP) having pleaded guilty to offences of robbery and attempted robbery, having regard to previous convictions for robberies and dwelling burglaries. The minimum tariff was set at two years and six months and expired in September 2011. The Applicant was released in October 2019 on an indefinite licence that was revoked in January 2020 leading to his return to prison in that same month.

Request for Reconsideration

5. The application for reconsideration was received by the Board on 17 July 2020.
6. The grounds for seeking a reconsideration are that the Decision is both procedurally unfair and irrational.
7. The procedural unfairness challenge is that it is stated in the Decision that a future panel would benefit from a psychological assessment of the Applicant's risk and yet, inconsistently and unfairly in the Applicant's view, refused to adjourn for such an assessment to be completed as part of the current review. The grounds assert that the Applicant had argued through his legal representative at the hearing that an adjournment for such an assessment was required to accurately assess risk given that there had been no such assessment since the Applicant completed a significant intervention programme in 2016 and a period of location in open conditions



thereafter, to assess the impact of his 'non-compliance', and to advise on any necessary further treatment.

8. The irrationality challenge also relates to the decision to refuse to adjourn for a psychological risk assessment which, it is asserted, was an irrational position to take when it is 'highly likely' that 'nothing will have changed' by the time of the next review. Reference is made to the approach taken by Mr Justice Saini in **R (on the application of Wells) v Parole Board [2019] EWHC 2710 (Admin)** to assessing whether a decision by the Board is marred by irrationality, which was "... to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the Panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied."

Current parole review

9. The Decision was made on the Secretary of State's referral of the Applicant's case to the Parole Board under **section 28(6)(a) of the Crime (Sentences) Act 1997** to consider whether or not it would be appropriate to direct the Applicant's release.
10. The Decision was made by a panel that considered the Applicant's case at an oral hearing on 7 July 2020 that was conducted remotely, via telephone, due to restrictions on social contact due to the Covid-19 pandemic.

Relevant Law

11. Rule 28 of the Parole Board Rules 2019 provides that a party may apply to the Board for the case of a prisoner who is serving a sentence of a type that is specified by the rule to be reconsidered on the grounds that a decision on the prisoner's suitability for release is irrational and/or procedurally unfair.

Irrationality

12. 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 review 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."

13. 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.
14. The application of this test in applications for reconsideration under rule 28 has been confirmed in previous decisions, such as **Preston [2019] PBRA 1**.

Procedural Unfairness

15. 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.

The reply on behalf of the Secretary of State

16. On 23 July 2020, the Board was informed by the Public Protection Casework Section on behalf of the Secretary of State that no representations were offered in response to the Applicant's reconsideration application.

Discussion

17. It is noted in the letter communicating the Decision, with reasons, that the Applicant had applied for an adjournment and a direction for a psychological risk assessment after oral evidence was heard during the hearing. However, it is stated that the panel concluded that this was not necessary and that a psychological risk assessment was unlikely to assist the panel in assessing risk at that stage of the review. It is also stated in the letter that directing a psychological risk assessment would lead to a considerable further delay in the review and the potential for further requests for the review to be delayed if any further work was identified.
18. The decision letter records that the panel heard evidence from the Applicant, the Applicant's Prison and Community Offender Managers, and from a facilitator on the 2016 intervention programme who had had some further contact with the Applicant more recently. There is also a reasoned assessment of the evidence of those witnesses, and the documentary evidence in the dossier, which included a document produced during the 2016 programme to identify a participant's responsibility needs, existing protective factors and treatment needs.
19. The panel's conclusion on that evidence was that there were parallels in the Applicant's recent behaviour in the community and custody and his previous behaviour that were linked to risk. The panel also took the view that the Applicant had little insight into his behaviour and had yet to take full responsibility for the poor decisions that he had chosen to make. The panel was especially concerned that the Applicant had been in the community for a short period of time only, on life licence, before becoming non-compliant and that that was only identified as a result of enquiries made following allegations from a third party. It was for those reasons that the panel considered that it could not be confident that an escalation in risk would be identified under the proposed risk management plan before the public was put at an unacceptable level of risk of harm from the Applicant.
20. I am satisfied that the conclusions reached by the panel are adequately justified by the reasons stated in the letter. The weighing of evidence in an assessment of risk by the Board is a task that is appropriately performed when the Board has undertaken any further inquiry it considers necessary in the exercise of its inquisitorial function, performed with the benefit of its expertise in the realm of risk assessment; see **DSD**, for example. The exercise of those functions is of course subject to considerations of fairness, and anxious scrutiny, but I am not persuaded

that the panel's decision that obtaining a psychological risk assessment fell short of those requirements.

21. The terms of the Secretary of State's referral expressly state that the Board is not asked to comment or make any recommendation on specific treatment needs or offending behaviour work that may be required. However, the indication that a psychological risk assessment might assist a future panel expressly anticipates the possibility that such work may be completed in the meantime, and there is no reasoned nor any apparent basis for the submission that it is highly likely that there will have been no change by the time of the Applicant's next review.

Decision

22. The application for reconsideration is accordingly refused.

Timothy Lawrence
24 July 2020