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[2021] PBRA 105

Application for Reconsideration by GUELI

Application

1. This is an application by Gueli (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 10 June 2021 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 is serving a sentence of imprisonment for public protection imposed on 2 October 2012 following conviction for two counts of false imprisonment and one count of sexual activity with a child to which he pleaded guilty. A tariff of four and a half years (less time spent on remand) was set, and this expired on 11 March 2016. This is the Applicant's fourth parole review.

5. The Applicant was aged 40 at the time of sentencing. He is now 49 years old.

Request for Reconsideration

6. The application for reconsideration is dated 3 July 2021 and has been submitted by solicitors acting for the Applicant.

7. It advances three grounds for reconsideration:

    (a) There were factual errors in the decision which resulted in the panel's risk assessment being undermined (and thus procedurally unfair); and/or

    (b) The Applicant felt disadvantaged by the hearing being conducted by video link (and this amounted to procedural unfairness); and/or

    (c) Insufficient weight was given to the evidence of professional witnesses, rendering the panel's decision irrational.

8. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State on 5 August 2020 to consider whether or not it would be appropriate to direct his release. If release was not directed, the Parole Board was invited to advise the Secretary of State on the Applicant's continued suitability for open conditions.

10. On 7 January 2021, the case was directed to an oral hearing. Updated reports were directed from the Applicant's Prison Offender Manager (POM) and Community Offender Manager (COM) taking into account the psychological assessment already on file (dated 20 October 2020). The psychological report recommended that the Applicant remained in open conditions to undertake a series of temporary releases.

11. The COM report (dated 12 April 2021) also recommended that the Applicant remained in open conditions to engage in the temporary release process, as did the POM report (dated 14 April 2021); the POM report described temporary releases as "*essential*".

12. The case proceeded to oral hearing on 11 May 2021. This was conducted by video link due to COVID-19 restrictions and took place before a three-member panel, including a psychologist specialist member. The Applicant was legally represented throughout. The panel took extensive oral evidence over some five hours from the Applicant, his COM and POM and the author of the psychological assessment of 20 October 2020.

13. In the hearing, the Applicant's POM did not support release as he considered temporary releases over a 12-month period to be essential. His COM (who has known the Applicant since 2017) did not support release and also considered that periods of overnight releases would be essential before the Applicant could be safely released. The prison psychologist also did not support the Applicant's release. She did note that designated accommodation with a regime designed and supported by psychologists to help people recognise and deal with their problems ("specialist accommodation") would be "*a more attractive option if…available*" but "*it would not change her recommendation".* She said eventual release to specialist accommodation "*was an excellent idea, but at this time it would not resolve the concerns she had raised, as [temporary releases] would*".

14. The panel adjourned for further information from the COM, particularly concerning whether the Applicant would be accepted at specialist accommodation (and, if so, when), together with confirmation of other available community interventions and services. This was provided in writing (dated 18 May 2021) and updated written legal representations were also provided (dated 24 May 2021).

15. The panel concluded the review on the papers and did not direct the Applicant's release. It advised the Secretary of State that the Applicant continued to be suitable for open conditions.

The Relevant Law

16. The panel correctly sets out the test for release in its decision letter dated 10 June 2021.

Parole Board Rules 2019

17. 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)).

18. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

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.

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

Irrationality

22. 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."*

23. 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.

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

The reply on behalf of the Secretary of State

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

Discussion

Ground (a) – procedural unfairness: factual errors undermined risk assessment.

26. The first ground for reconsideration asserts that there are four errors in the decision letter. It is a well-established ground for judicial review that the tribunal has taken into account information which it is accepted is inaccurate. The grounds for reconsideration mirror those for judicial review and therefore it is also a ground for reconsideration. I accept that it is capable of being both irrational and procedurally unfair to take into account inaccurate factual information in making a decision. It is important that decisions are not only fair but are also seen to be made according to a fair procedure. If incorrect information is included in the decision, the fairness of the procedure is called into question.

27. However, it will not invariably follow that if there is an inaccurate fact or facts in the decision that an application for reconsideration will automatically be granted. Reconsideration, like judicial review, is a discretionary remedy and, if I am satisfied that the incorrect fact did not affect the decision then the application is likely to be refused.

28. First, the application claims that the decision states the Applicant was convicted of Section 20 assault in 2014 whereas the actual conviction dated from 2004.

29. I see the list of the Applicant's previous convictions confirms that the Section 20 wounding was sentenced on 27 October 2004. The section of the decision letter with the erroneous statement is, in fact, an extract from the May 2018 decision, repeated in the 2019 decision, and again in this decision. The mistaken year appears to be a simple typo, propagated throughout three Parole Board decisions.

30. I particularly note that the 2019 decision, the Applicant was represented by the same legal representative as in the current review. An application could have been made for that decision to have been reconsidered. However, no such application was made at the time, even though the Applicant was then also seeking release. If the typo was not material then, I cannot see that it is now. Neither can I see any evidence to suggest that the timing of the section 20 wounding offence had a pivotal bearing on the panel's decision.

31. Second, the application notes claim the decision referred to the Section 20 wounding being an assault on the Applicant's cellmate, whereas this was not the case (although it does not offer an alternative account of events).

32. However, the probation service assessment report dated 22 October 2020 states "*[p]revious records indicate that [the Applicant] used a blade in prison to cut his cellmate across the neck*" and "*…[the Applicant] stabbed his cellmate in the neck".* It also states "*[the Applicant] cut another prisoner across the neck with a blade*". I accept the latter statement may be more equivocal regarding the accommodation arrangements of the Applicant's victim. That said, even if the panel had made an error (which, to be very clear, I do not find on the evidence before me) any argument that there is a material difference insofar as risk is concerned between wounding a cellmate and wounding another prisoner who happened to live in a different cell somewhere else is wholly unsustainable.

33. Third, the application claims that the decision erroneously makes reference to the Applicant having assaulted a prison officer. The decision states the Applicant received *"an adjudication for assaulting a prison officer in January 2019"*. The application draws reference to a passage in the POM report (dossier, page 70) dated 13 October 2020 which states *"On 22 January 2019…[the Applicant] was observed on CCTV to have assaulted another prisoner; he was given 14 days loss of privileges*". However, I also see in the separate list of adjudications (dossier, page 66) that the charge for the incident on 22 January 2019 was proved on 12 February 2019 and has been recorded as "*Commits any assault – assault on prison officer"*.

34. Whoever the Applicant was, in fact, proven to have assaulted in January 2019, to argue that a proven assault on another prisoner was so materially different to an assault on a prison officer as to undermine the panel's assessment of the Applicant's custodial conduct must be doomed to failure. The Applicant assaulted someone, and the panel has used this as an example of seriously bad custodial behaviour. Quibbling over who he actually assaulted does not amount to procedural unfairness.

35. Fourth, the application claims that the decision erroneously records that the Applicant had not been accepted to designated accommodation whereas the COM report (provided after the hearing) indicated otherwise. The COM report (dated 18 May 2021) states that the Applicant "*would be accepted"* in the event of a release direction. The decision makes it very clear that the availability of appropriate accommodation made no difference to its decision not to direct the Applicant's release (particularly noting the concurring view of the prison psychologist) and any failure accurately to reflect the status of the accommodation referral in the decision would not be sufficient to make the panel's decision procedurally unfair.

36. The first ground for reconsideration also argues that the Applicant felt disadvantaged by being heard by video as he could have given a better account of himself in person. The Applicant was legally represented and if his legal representative felt he was disadvantaged, they could have said, as could the Applicant himself. The decision records "*The panel was satisfied that there was no injustice to [the Applicant] in holding the hearing remotely, and both [the Applicant] and [his] legal representative agreed."* I find no evidence to the contrary.

37. It is also argued that the Applicant was not offered a break during proceedings. Again, he was legally represented and if he, or the legal representative, considered a break was needed then they should have asked for one. In any event, I find it difficult to imagine that a five-hour hearing would not have included opportunities for breaks during any of which a legal consultation could have been sought.

38. Ground (a) therefore fails.

Ground (b) – procedural unfairness: video hearing.

39. It is claimed that the Applicant felt the decision did not reflect the evidence that was heard at the hearing and the digital recording would demonstrate this. I have already considered and dismissed the examples raised by the Applicant. It is not the job of the reconsideration assessment panel to listen to over five hours of oral evidence and look for any other potential inaccuracies in the panel's decision. The recording is relevant only if it is suggested that evidence material to the rationality of the decision has been given in or omitted from the panel decision. Other than the points already discussed, I find nothing in the application or in consideration of the decision to suggest that this is the case. Ground (b) fails.

Ground (c) – irrationality: insufficient weight given to evidence of professional witnesses.

40. The final ground for reconsideration is that the panel gave insufficient weight to the evidence of professional witnesses and this rendered its decision irrational. In support of this it is argued that all professionals recognised there was not an imminent risk of serious harm and all core risk reduction work had been completed.

41. It is also clear from the written reports in the dossier and the professional witness recommendations in the dossier (which are not challenged) that no professional witness was supporting release. It therefore cannot be said that the panel acted irrationally in agreeing with those witnesses and therefore ground (c) also fails.

Decision

42. For the reasons I have given, I do not consider that the decision not to direct the Applicant's release was procedurally unfair or irrational and accordingly the application for reconsideration is refused.

Stefan Fafinski
23 July 2021