[2021] PBRA 19

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Application for Reconsideration by Spreckley

Application

1. This is an application by Spreckley (the Applicant) for reconsideration of a decision of an oral hearing panel dated 14 December 2020 not to direct his release or to recommend a transfer to open conditions.

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 dossier (including the decision letter) amounting to 424 pages, the request for reconsideration dated 25 January 2021 and the representations made on behalf of the Secretary of State dated 3 February 2021.

Background

4. On 2 October 1998, when aged 30, the Applicant was sentenced to concurrent terms of life imprisonment for two offences of buggery of two children under 16 years of age. He was ordered to serve a minimum term of 5 years imprisonment.

5. The minimum term expired on 9 April 2011.

6. On 6 January 2020, the Applicant was released on licence. The licence was revoked on 7 May 2020 on the ground of the Applicant's repeated sexualised behaviour and failure to abide by his licence conditions.

7. The Applicant will be 53 later this month.

Request for Reconsideration

8. The application for reconsideration was received on 25 January 2021.

9. The application is based both on irrationality and procedural irregularity. The grounds are as follows:

Irrationality

a) *The Applicant did not receive a fair hearing; and*

b) *The decision to conclude the case on the papers, without a direction for release or without taking further oral evidence was irrational.*

Procedural irregularity

10. The decision to conclude on the papers, in the light of the recommendations of professionals was procedurally unfair, on the basis that:

a) *There are inaccuracies within the decision (particularised in the written representations);*

b) *The detailed representations of 11 January 2021 do not appear to have been taken into account; and*

c) *The request for a further oral hearing to be reconvened was not considered in the decision-making process, despite a request for such.*

Current parole review

11. The Secretary of State referred the case to the Parole Board on 22 June 2020; the oral hearing took place on 14 December 2020. The panel reviewed is decision on the papers on 12 January 2020 and the decision letter was issued on 18 January 2020.

12. Previously, on 13 February 2018 a Parole Board review had recommended progression to open conditions and on 20 November 2019, a Parole Board review had directed the Applicant's release on licence.

The Relevant Law

13. The panel correctly sets out in its decision letter dated 18 January 2021, 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

14. 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)).

15. 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**.

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 was dealt with justly.

Other

21. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

22. The position is put very clearly by Sir John Saunders in **Benson [2019] PBRA 46**,

"There are two matters which apply generally to all these applications. First, it is for the panel to assess the weight to be given to any piece of evidence, including the opinion as to risk given by the professional witnesses. It is for the panel to test the assessment and look at the reasons for it. So, even in a case where every witness is supporting release, it is for the panel to make their assessment taking into account all the evidence. The reverse is also true. If the panel disagrees with the evidence given by the professionals, it must give adequate reasons for doing so. Secondly, a decision letter is directed at the prisoner. While it has to descend to sufficient detail so that everyone, but particularly the prisoner, can understand the reasons for the decision, it is not necessary for every point which has been raised in the hearing to be discussed. What is necessary is that everyone is able to understand the reasons for the decision".

The reply on behalf of the Secretary of State

23. Those acting on behalf the Secretary of State have made strenuous efforts to be helpful and I am grateful: they have approached the Community Offender Manager who is of the view that she has been misunderstood in the legal representations and that her current opinion (as appears in her reports) is *"that a robust risk management plan cannot be actioned at this time without adequate accommodation and support arrangements".* Unfortunately, this was not information before the panel and so I am not able to take it into account.

Discussion

24. The Prison Offender Manager, in her report dated 11 November 2020, recommended that the Applicant could be released to designated accommodation with a regime designed and supported by psychologists to help the Applicant recognise and deal with his problems or, if that option were not available, consideration could be given to designated accommodation with a facility to deal with residents suffering from a personality disorder.

25. The Community Offender Manager, in her report dated 16 November 2020, did not recommend release because of the absence of suitable accommodation. She suggested progression to open conditions where the Applicant could take advantage of the temporary release scheme. In the meantime, the Community Offender Manager continued to investigate the availability of suitable accommodation.

26. On 18 November 2020, the Community Offender Manager informed the panel that designated accommodation had agreed to accept that Applicant in March 2021.

27. Unfortunately, the Community Offender Manager (who was a substitute manager) was not available to give oral evidence at the review hearing. Her manager, a Senior Probation Officer, stood in for her and told the panel that the identified accommodation was available only from March 2022. Her opinion was that

psychologically supported accommodation was "better" for the Applicant than standard accommodation.

28. On 14 December 2020, the panel heard oral evidence from all the witnesses, comprising the Applicant, the Senior Probation Officer, the Prison Offender Manager and the Prison Psychologist, who recommended release to psychologically supported accommodation.

29. The panel then adjourned the hearing. The adjournment hearing letter, dated the 15 December 2020, stated at page 330 of the dossier, *"At the end of the hearing, the panel was invited by [the legal representative] to consider adjourning for an updated risk management plan. The panel subsequently decided to adjourn [the Applicant's] case for a short period to allow 3 weeks for the [Community Offender Manager] to confirm the [accommodation] placement, update the risk management plan, complete her written report and then 7 days for legal representations to be sought once this report has been added to the dossier. It is anticipated that this case will then be concluded on the papers unless there are any significant changes. This review is therefore adjourned until 12th January 2021".*

30. The report actually filed and dated 7 January 2021, was from the Community Offender Manager and not her manager. In the conclusion, it was stated that the Applicant was not able to return to his former licence accommodation. The alternative accommodation recently identified had a long waiting list. There was, however, different accommodation available, but the duration of the Applicant's stay would be 3 months and that period could be extended only by the manager of the accommodation.

31. The decision letter runs to 12 pages, is clear, balanced and well structured. The panel took into account the offending behaviour work done by the Applicant in prison prior to release and his good conduct since recall. It also took into account, in some detail, both the Applicant's risk factors and his protective factors. The panel took the view that the risk management plan provided insufficient face-to-face contact and support.

32. The panel set out the reasons why it did not direct release. The salient reasons (not necessarily in the order given by the panel) are as follows:

    a) The index offences were grave, inflicted serious harm and formed part of a pattern of offending behaviour.

    b) The failure of the release on licence in 2020 revealed the Applicant's need for a high level of support and monitoring.

    c) There were incidents linked to the Applicant's sexual urges which suggested he would have difficulty complying with his licence conditions. Some of his sexualised behaviour on licence amounted to offence paralleling behaviour.

    d) The proposed accommodation was available only for 3 months.

e) The panel did not get involved in the details of the accommodation that might or might not become available but observed at page 421 of the dossier, *"It is likely that [the Applicant] will appear to be very compliant and on face value as making good progress; the panel was of the opinion that [the Applicant is] able to present to professionals in a positive manner whilst carrying on doing what [he] want[s] to do. A protracted period of time in a setting where [the Applicant] can be properly monitored and observed would be beneficial to public protection. This is not an option available to the panel for [his] risk management".*

33. Dealing with the allegation of irrationality, the panel considered all the matters it ought to have considered and produced a comprehensive decision letter which set out adequately the reasoning behind their decision. That decision is logically consistent with the reasoning. In nearly all these cases, there is an alternative view; the carefully drafted representations set out the reasons why the alternative view in this case should have prevailed. However, in my judgement, the representations concentrate unduly on what the proposed accommodation had to offer, whereas the panel took a broader approach to the evidence before deciding that the risk management plan would not contain the Applicant's risk. In essence, the representations argue for disagreement with the decision which is not the same thing as stigmatising the decision as irrational.

34. Had the panel's decision rested solely on whether or not the proposed accommodation had the level of facilities necessary to support the Applicant, the position may have been different. However, in my analysis, the panel considered a wider range of factors. I suspect that at the heart of its decision-making, the panel was acutely aware that the appearance of compliance did not always match the reality of the Applicant's actual behaviour and that, for that reason, he required a higher level of support and monitoring than was being offered. There was sufficient evidence for the panel to come to this view.

35. Dealing with the particular arguments in support of procedural irregularity, it is correct the decision letter stated "*they (the Prison Offender Manager and the prison psychologist) did not support release to a standard [accommodation]",* but the rest of the letter demonstrates the panel was aware that those professionals supported release to accommodation providing support, albeit not provided by psychologists.

36. The panel did not deal with the fact that the accommodation, actually identified, did offer a level of support significantly above that offered by standard accommodation. However, it is also clear that the panel's decision was not based on whether the accommodation had psychologists or something less supportive, but on the factors, I have tried to summarise in this decision.

37. The panel seems to have equated the fact that a "*case discussion*" had taken place among the professionals with the Community Offender Manager *"being updated on the hearing by her manager".* Common sense suggests the panel was entitled to assume from the case discussion that the Community Offender Manager had some working knowledge of what had happened at the oral hearing.

38. The fact that the legal representations dated 11 January 2021 were not specifically referred to in the decision letter, does not establish the panel was unaware of those

representations (for which it had made provision in the adjournment letter) or ignored them – see **Oyston [2000] PLR 45** and **Benson [2019] PBRA 46**.

39. In the adjournment letter, the panel sets out the information it wanted. It received that information. The Community Offender Manager's report dated 7 January 2021 did not contain any new recommendation. The adjournment letter had indicated the matter would be concluded on the papers unless there were any significant changes. There were no significant changes and that was the basis for the panel concluding as it did. The legal representations sought an oral hearing on a different basis, namely to *"review the Release and Risk Management Plan".* The panel was entitled to decide that, after a full oral hearing and in the absence of any significant change, there was no purpose to be served in a further oral hearing.

40. Correctly, in my view, no attempt is made to criticise the panel's decision not to recommend progression to open conditions.

Decision

41. For the reasons I have given, I do not consider that the decision was irrational/ procedurally unfair and accordingly the application for reconsideration is refused.

James Orrell
18 February 2021