[2021] PBRA 61

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Application for Reconsideration by Nelson

Application

1. This is an application by Nelson (the Applicant) for reconsideration of a decision of an oral hearing dated 5 April 2021 with respect to their decision not to direct release or to recommend a transfer to open conditions. The application was made on behalf of the Applicant by his legal representatives.

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 and the decision letter. Additionally, I asked for the recording of the hearing. Only some of the recording was available, up to the adjournment, or the first adjournment.

Background

4. In 2008, the Applicant was sentenced to imprisonment for public protection for two counts of robbery. He was sentenced at the same time with determinate sentences for firearm offences and acquisitive offences. His minimum term was set at 8 years less time spent on remand and his tariff expired in May 2015. He was 25 years old at the time of the index offence and aged 39 at the time of his review. He has been transferred to open conditions on three occasions and returned to closed conditions each time. He is currently in closed conditions.

Request for Reconsideration

5. The application for reconsideration is dated 26 April 2021.

6. The sole grounds for seeking reconsideration is irrationality, based on the following points: a) that the Panel did not give sufficient weight to the emotional stress when the Applicant made his flippant remark that he would not go to open conditions. The Applicant has not previously refused such a move; and b) that the decision doesn't sufficiently weigh up the benefits of a progressive move against the risks involved.

Current parole review

7. The original referral is dated November 2019 and asked the panel to consider release or failing release, whether the Applicant remained suitable for open conditions. At the time of the referral the Applicant was in open conditions. In April 2020 a single member panel considered the case on the papers and noted some confusion as to whether the Applicant was still in open conditions or if he had been returned to closed conditions. In any event, that panel also noted that due in part to COVID-19 restrictions, there appeared to be little evidence of progress – in particular for resettlement leaves. That panel deferred the case and made directions for further information. It transpired that the Applicant had been returned to closed conditions.

8. On 19 October 2020, the case was reviewed by a single member panel who directed the case to an oral hearing. That member noted that there was now a new Advice Case referral dated 13 October 2020 following the Applicant's most recent return to closed conditions, and decided to combine the reviews. I note that there appears to be no objection to this decision by the Applicant's legal representatives. The member subsequently directed an oral hearing.

9. A panel of three members – two independent and one judicial – convened to hear the case over a video link on 1 April 2021. The letter noted that the remote hearing held was due to the restrictions imposed by COVID-19. Evidence was taken from the custodial manager from the open estate from which he had been removed and his Prison and Community Offender Managers. The Applicant was represented throughout the hearing.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 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

11. 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)).

12. 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**.

13. I considered whether this Application was eligible for reconsideration given the above paragraph. I decided that the narrow issue of whether or not the panel gave relevant weight to the evidence of the Applicant as to whether he would agree to a transfer to open conditions or not *is* eligible for reconsideration. Clearly, however,

if I were to decide that the manner in which the Applicant's evidence was approached was flawed, it would in my judgement have made that decision unsafe. This means that I have not considered whether the panel's approach to the test for open conditions was lawful (part b) of the complaint of irrationality as stated above as I judge that to be out of scope of the reconsideration mechanism.

Irrationality

14. 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."

15. 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.

16. 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

17. The Secretary of State (SoS), by e-mail dated 5 May 2021, indicated that no representations were made in response to the application.

Discussion

18. The main thrust of the Application is that the panel placed too much weight on the Applicant indicating at the hearing that he would refuse to be transferred (again) to open conditions. It is clearly the case that the Applicant had so far had an unhappy experience of open conditions. He had originally been transferred there in 2016, then again in 2019 and for the last time in 2020 and returned to closed on each occasion. The most recent return was because of a number of security concerns about his involvement in illicit activities, including the drug culture.

19. Regrettably, I was only able to listen to the hearing up to the first adjournment, after which no recording was available. Thus, I take into consideration that I did not hear the Applicant giving evidence when it was his turn to do so. I heard no unusual amount of emotional upset from the Applicant during that part of the hearing I did listen to.

20. I am in no doubt that parole hearings are stressful for prisoners, and the lead up to them must be similarly a time of anxiety and stress. Before the hearing, the Applicant is generally advised of the recommendations of professional witnesses, and that too understandably might be upsetting if the recommendation is not what they would have wanted. There is nothing in the dossier that indicates that the Applicant had particular vulnerabilities that rendered him unable to engage in an oral hearing, and I note that there is no evidence that he suffers from any mental health issue. From the outset therefore, I cannot see evidence that the Applicant was in any more difficult a position than many other prisoners at a parole hearing. From what I heard, the panel was alive to his situation and sympathetic.

21. I am in no doubt the Applicant found it difficult to listen to what the decision letter states as the 'trenchant' views of the custodial manager from his last open conditions. He gave evidence first, and he was clear that the recent return to closed conditions was in his opinion fully justified because of the Applicant's poor behaviour. He went so far as to indicate that the Applicant would not be welcomed back to that establishment. He was unusually strong in his views.

22. It is of note that during this witness's evidence, the panel asked him to provide evidence for his opinions, therefore appropriately and fairly challenging his 'trenchant' views. The decision letter clearly states that it did not find that there was sufficient evidence that the Applicant had been a leader in negative activities (as alleged by the first witness), but accepted that there was sufficient evidence that the Applicant continued to be involved in the drug culture, something that had been a problem for him throughout his custodial journey. It strikes me that the panel were doing everything they could to be fair to the Applicant in weighing the evidence before them, and evidenced this at the time of the hearing before the Applicant.

23. Having listened to the evidence of this officer, the Applicant then had to listen to the evidence of his Prison Offender Manager ('POM'). This officer gave evidence of some positive change in the last few months, and this was acknowledged by the panel in their decision letter. During that evidence I could hear in the recording the Applicant making a few interjections about her evidence. Mainly these sought to correct some piece of information. Again, these interjections from prisoners are not unusual, in the Applicant's case I could detect no distress, and they were dealt with sympathetically by the panel member asking questions of the POM.

24. Towards the end of the POM's evidence, she was asked what her recommendation was, and she stated clearly that in her view open conditions were not suitable for the Applicant. She also stated that the Applicant had made it very clear that he would not go to open conditions. I believe that the Applicant said something at that point, however I could not hear any words clearly. The POM then went on to indicate concerns that the Applicant was 'stuck' in the system and wondered what might be done to assist, such as a psychological risk assessment, and also stated that the Applicant had threatened to self-harm if not released on this occasion. It was at this point that the Applicant interjected, stating that he would do so (self-harm). There was a small exchange where the panel member asking questions sought to reassure the Applicant that the panel recognised how difficult it was to hear things about them, that he would be given a chance to answer questions soon. It is not entirely clear from the recording what the Applicant stated then, but it might have been that

he wanted to leave the hearing. At this point the POM made a suggestion that it might be useful if the Applicant could speak with his solicitor, the Applicant's legal representative agreed and asked for a short adjournment for this purpose and this was readily agreed to.

25. As indicated, I have not been able to hear what happened after the hearing. Clearly the hearing continued after the adjournment. At some point it must be assumed that the Applicant stated that he would not go to open conditions, or it might be that he had said it already when I was unable to hear an interjection he made.

26. I have to consider whether there is evidence that the Applicant was sufficiently emotionally stressed that at the point when he indicated he would not go to open conditions, he no longer had the capacity to give evidence to the panel. I cannot find this evidence based on the following:

a) The Applicant felt able to make interjections when he felt it necessary to do so;
b) At the time of the adjournment it could be said that he was upset, but there was nothing in the recording to indicate that he was so upset that he was unable to give evidence;
c) The Applicant was appropriately granted some time to speak with his legal representative at the point of upset;
d) There is no evidence that the legal representative made an application at any time during the hearing for an adjournment to another day because the Applicant was too upset to continue. Had during the first short adjournment the Applicant's legal representatives been sufficiently concerned about his emotional state, they would have made appropriate submissions or applications when the hearing resumed; and
e) There is no evidence (either in the letter or in the application) that the legal representative sought to address the Applicant's refusal to go to open conditions during the hearing in order to clarify the Applicant's actual stance. If they felt that the refusal had been made 'flippantly' or without being meant, there is no evidence they sought to correct this point.

27. The panel accepted the Applicant's words as stated, and it is not possible to find any fault with that. His approach towards open conditions were further corroborated by his POM who indicated that he had told her he would not go, so this was not the first time that that Applicant had made this statement.

28. Having considered all these points carefully, I cannot find that the panel gave inappropriate weight to the Applicant's statement. In some hearings the panel is criticised for not giving sufficient weight to what a prisoner says. In this case the panel took note of what was said.

29. I must also keep in mind the test for irrationality. The bar for meeting that test is high, and there is little evidence that the panel's decision with respect to how they treated the Applicant's statement about open conditions 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."

30. It should be noted that I have been careful not to stray into any discussion about whether the panel's decision not to recommend open conditions (or release) was irrational and have been careful to ensure that I kept to the narrow remit that I feel is appropriate in this reconsideration.

Decision

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

Chitra Karve
18 May 2021