[2022] PBRA 114

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Application for Reconsideration by Knights

Application

1. This is an application by Knights (the Applicant) for reconsideration of a decision dated the 26 July 2022 when the Board refused to direct the release of the Applicant following an oral hearing.

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. The papers I have considered are: the application for reconsideration; the decision letter; the dossier and a letter on behalf of the Secretary of State in response to the reconsideration application.

Background

4. On 31 March 2000 the Applicant was sentenced to life imprisonment for 2 offences of possessing a firearm with intent to endanger life; 6 offences of using a firearm to resist arrest and for 1 offence of kidnapping. The minimum period to serve was set at 9 years. The applicant was convicted after a trial, and he had been acquitted of charges of attempted murder. The brief facts were that when the police tried to stop the Applicant when he was driving his car, he had fired in the direction of the police. In his attempt to escape and resist arrest, he kidnapped the owner of another car and made him at gunpoint drive him away from the police. He also fired in the direction of members of the public while trying to escape. There was then a siege of the Applicant's home by the police which ended when he was eventually arrested. The Applicant had had a number of firearms in his car when the police tried to stop him in his car and he also took the police to another cache of weapons after his arrest. The Applicant was 42 years old at the time of sentence and is now 64 years old.

Request for Reconsideration

5. The application for reconsideration is dated 11 August 2022.

6. The grounds for seeking reconsideration are that the decision not to direct release was flawed because:

i) The panel were not truly independent and favoured 'official' interpretations of the evidence. As a result, the hearing was unfair.
ii) The panel acted irrationally in interpreting his behaviour during the hearing as being inappropriately assertive when it was in fact due to tinnitus.
iii) The panel further acted unfairly in that they failed to properly consider the evidence of the Applicant and the skeleton argument submitted on his behalf by his solicitor.
iv) Further the panel should have adjourned the hearing to get further information about the risk management plan.

7. The Secretary of State responded to this application by letter dated 22 August 2022.

Current parole review

8. This was the seventh Parole Board review for the Applicant. Evidence was heard on 12 July 2022.

9. The panel heard evidence from the Applicant, the Prison Offender Manager(POM), a prison psychologist and the Community Offender Manager (COM). The solicitor who represented the Applicant made representations to the panel in favour of release. Prior to the hearing he had submitted a skeleton argument.

The Relevant Law

10. The panel correctly sets out in its decision letter 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 (as amended)

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)).

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 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."*

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. 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.

14. 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

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.

16. 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.

17. In considering the amount of detail needed to be included in a decision letter, there has been guidance from the High Court. 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.*"

Discussion

18. The panel is criticised in the application for reconsideration for putting too much emphasis on the conclusions reached by the trial Judge about the offence in preference to the evidence of the Applicant. While the Board is not bound by what the Judge says in his sentencing remarks, they will normally be given considerable weight by a panel. The panel would be correct to do so and would be criticised if it didn't. The trial Judge heard all the evidence during a contested trial and reached conclusions as to the dangerousness of the conduct of the Applicant. This assessment helps to inform the Board of the risks for the future revealed by the conduct of the Applicant when committing the index offence. The trial Judge's comments were balanced. They recognised the fact that the Applicant had been acquitted of attempted murder and did not have the intent to kill. Contrary to what is said in the application for reconsideration, the specific intent to kill is needed to prove attempted murder and recklessness will not suffice. Also, there is no such offence as attempted manslaughter as is suggested

in the application for reconsideration. While it is possible, it would need compelling evidence before a panel would ignore the analysis of offending in the sentencing remarks.

19. This is all part of a broader criticism made in the application for reconsideration that the panel were not independent from the views of the establishment and the hearing was accordingly unfair. I assume that is what is meant by *'the Parole Board have embraced rather than avoided predisposition towards official constructions'.* The Applicant is entitled to have his application decided by an independent and impartial panel. In my judgment there is no evidence that the panel was not independent or impartial. The Secretary of State was not represented at the hearing and did not make written submissions. Two of the three witnesses who were employed by the Secretary of State who gave evidence supported release. While the panel disagreed with the Applicant in their assessment of his risk there is no evidence to support the suggestion of a predisposition towards official constructions. Particular reliance is placed on the fact that the panel did not attach weight to the findings of a medical professional, who had given evidence to a previous parole panel. His report was not in the dossier, and he did not give evidence in this hearing. He apparently had opined at a previous hearing that the Applicant suffered from complex Post Traumatic Stress disorder (PTSD) which means PTSD caused by a series of events rather than one. The panel who heard his evidence had not been convinced by his analysis so the instant panel would have needed to have heard his evidence if they were going to rely on it. The issue of PTSD generally was considered by the psychologist who gave evidence, and she did not consider it to be having any significant effect at the time of the hearing and didn't require specific treatment.

20. It is contended that the panel acted unlawfully in their observation of the Applicant's evidence that he *'struggled to be appropriately assertive but (particularly if frustrated) tended to present loudly, to talk over people and to do so in unhelpfully blunt or direct terms (as evidenced at the first hearing)'.* It is asserted that this presentation was due to the Applicant's tinnitus and that the panel made no allowance for it, thereby acting unlawfully. There is no evidence to support this contention. The fact that the Applicant suffered from tinnitus was clear from the dossier and the panel says that the behaviour they were talking about happened at a time when the Applicant appeared frustrated. The panel would be well capable of distinguishing loud talking due to tinnitus from speaking loudly in blunt terms when not getting the result that was sought.

21. It is suggested that the panel *'has failed to even allude to the relevant considerations noted in the skeleton argument and oral evidence/submissions'.* In fact extensive reference was made in the decision letter to the evidence of the Applicant. While reference is not made to the submissions both in the skeleton argument and at the hearing, it is not necessary to deal with the submissions themselves in detail in a decision letter but the panel should take them in to account when considering the evidence. There is no evidence that they didn't.

22. While the panel did not consider that the Applicant should be released it did also say that the risk management plan was inadequate. The suggestion is made that, if the panel did think that, it should have adjourned for further information. In circumstances where the panel was not going to release for other reasons than inadequacy of the risk management plan an adjournment would have been pointless.

23. The application for reconsideration makes a number of serious allegations against the conduct of this panel. In my judgment none of them are made out. There is no basis for saying that the panel was not impartial nor that the Applicant did not have a fair hearing.

Decision

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

John Saunders
26 August 2022