[2020] PBRA 183

the Parole Board
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Application for Reconsideration by Moore

Application

1. This is an application by Moore (the Applicant), through his legal representatives, for reconsideration of an oral hearing decision dated 28 October 2020 not to direct 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 application for reconsideration (the Application) dated 10 November 2020; a copy of the dossier and Decision Letter (the Decision). After considering these papers I asked for the Applicant's Legal Representatives to provide further particulars on the grounds that they were seeking reconsideration. Brief further information was provided on the template Application Form and was dated 20 November 2020.

Background

4. The Applicant who is aged 48 is serving a life sentence imposed in 1996 for the offence of Murder. He was 23 years old at the time of sentence. He was given a minimum term (tariff) of 15 years and a day which expired in March 2020. Following a recommendation of the Parole Board in 2018 the Applicant was transferred to open conditions.

Request for Reconsideration

5. The original application for reconsideration is dated 10 November 2020 and the further material is dated 20 November 2020.

6. The following are the grounds for seeking a reconsideration based on the ground of irrationality:
    a) That the panel have unfairly stated that the Applicant relied on A, a long term friend with whom he also had an on/off intimate relationship for financial and emotional support;
    b) That there is no evidence to suggest that the Applicant would not comply with his licence conditions if released and report writers confirmed that his risk could be managed in the community; and
    c) That due to the current restriction imposed by Covid-19, the Applicant is unable to prove his ability to be manageable in the community, however

there is a bed available to him at designated accommodation in Jan 2021 which would allow him to demonstrate this.

Current parole review

7. The Secretary of State referred the Applicant's case to the Parole Board on February 2019. The referral asked the Parole Board to consider whether to direct release or, failing that, to advise the Secretary of State as to whether the Applicant remained suitable for open conditions and to further advise on any continuing areas of risk to be addressed. In April 2019 a single member of the Parole Board considered the case and deferred the review for enhanced rehabilitation outcomes. In January 2020 another member of the Parole Board noted that the Applicant had been returned to closed conditions, this was being challenged by the Applicant's solicitors. Further information was directed. He was transferred back to open conditions after a confusion about medication was addressed. The hearing was listed for June 2020 however it was adjourned before the hearing following an application from the Applicant's legal representatives. The hearing was finally effective in October 2020. The final adjournment was in order that the Applicant could evidence ability to comply with periods of temporary leave.

8. A three member Panel heard the case on 13 October 2020 over a telephone link. This was because face to face hearings had largely been suspended due to the COVID-19 pandemic. The Applicant's legal representatives were consulted as to the remote hearing and made no objection. The Panel considered a dossier of 456 pages and took oral evidence from the Applicant's former and current Offender Manager, their Offender Supervisor and from the Applicant.

The Relevant Law

9. 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

10. 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)).

11. 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

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.

Other

15. 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.*"

The reply on behalf of the Secretary of State

16. The Secretary of State offered no representations in response to the application.

Discussion

17. I will address each issue in turn.

Ground a: That the panel have unfairly stated that the Applicant relied on A for financial and emotional support.

18. The Application further states that the Applicant had emotional support from his family.

19. While it is the case that the decision indicates as stated above, I can see that the statement was made following oral evidence from the Applicant and other witnesses about his relationship with A. The panel considered the fact that the Applicant spent his day leaves with her, that the Applicant stated she was a 'very good friend' and had grown up with her, and evidence that his behaviour towards her was of concern. The decision letter also refers to family support.

20. I consider that the Panel, taking into account the evidence before it, was not unlawful in its consideration of the Applicant's relationship with A. Any irrationality would have to meet the high bar for the test of irrationality as related above and would need to be 'outrageous in its defiance of logic'. Having taken the Applicant's own evidence with regard to this relationship, it then made a decision about the nature of this relationship. I cannot find where the irrationality lies in this matter.

21. In any event, it should be noted that the issue with respect to the Applicant's relationship with A played only one part of the consideration of the panel when they arrived at their decision.

Ground b: That there is no evidence to suggest that the Applicant would not comply with his licence conditions if released and report writers confirmed that his risk could be managed in the community

22. The Application focuses on this issue and this is perhaps the central part of the complaint.

23. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

24. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board 2019 EWHC 2710.**

25. It is the case that the professional witnesses recommended release. The decision reflects the evidence provided by the witnesses including their reasons for their recommendation, and these reasons are recorded in the letter. I can also see that the panel accepted that the risk management plan that was proposed was a robust one, and they accepted that the two overnight re-settlement leave periods had been without concern. They gave credit for positive progress, noting an "*…impressive amount of positive behaviour entries from various staff members, highlighting a positive work ethic and significant change in [the Applicant's] motivation to progress to release*."

26. I also note that the panel weighed the evidence in favour of release against other evidence that they had taken from the dossier and the hearing. They noted a number of issues, including the less than smooth transition the Applicant had had from a high security to a lower security prison, the lapses into substance abuse, the problems on day releases, the concerns with respect to relationships, and evidence of difficulties in coping. They also noted the fact that for a number of reasons, not all the Applicant's fault, there had been delays in the provision of overnight leaves. Only two had been undertaken, and none since November 2019. The panel acknowledged and gave credit to recent settled or stable progress but was clear that it did not consider this period of stability to be long enough to be confident that the Applicant had been sufficiently tested in open conditions.

27. The Applicant's solicitors indicate that the problems with compliance were 'minor mishaps' and put the difficulties in progress down to the Applicant being naïve. They submit that none of the mishaps indicate a raised risk of serious harm. They suggest that the Panel wrongly had the 'cynical view' that the Applicant's more recent good progress was all in preparation of the parole hearing. The Application also indicates that the Panel should have placed more weight on the fact that the Applicant was no longer on medication for anxiety.

28. The Panel does indeed question the validity of the Applicant's most recent progress to some extent. It has a duty to consider the protection of the public, and in light of previous difficulties the Applicant has experienced in his progression, it is not in my view unreasonable for the panel to question the motivations behind the improved behaviour. In its conclusion, however, the decision makes it clear that the panel has accepted the improved behaviour but indicates that more sustained evidence of these improvements is necessary. While the Applicant's view may well be that the concerns related to 'minor mishaps', clearly this was not the view of the panel, and as indicated in the case of **DSD**, a panel is to be given due deference sitting as an expert body in making decisions about what weight to give evidence. Given that the decision letter explains why the panel takes a different view to that of the professionals and has done so considering all the evidence before it, I cannot find that the high bar for the test of irrationality is met.

Ground c: That due to the current restriction imposed by Covid-19, the Applicant is unable to prove his ability to be manageable in the community, however there is a bed available to him at designated accommodation in Jan 2021 which would allow him to demonstrate this.

29. It is regrettably the case that at this time many pathways used by the prison system to allow Prisoners to evidence positive change have encountered considerable barriers. This is because of the limitations and restrictions following the COVID-19 pandemic. Offence focused work has either been suspended altogether or carried out on a hugely restricted basis. In open conditions, the usual methods of evidencing change or being

tested involve day and overnight resettlement leaves, as well as working in the community and these opportunities have not been available. For many months now, beds in designated accommodation for overnight leaves have either been non-existent or extremely limited.

30. These limitations must be very frustrating for any prisoner wishing to progress through their sentence. Not having access to means of progression cannot however, be a reason for any panel to consider release or progression. The duty of the Parole Board is to consider the evidence against the relevant test, in this case the corrected cited test for release. Access – or otherwise - to methods that might be able to evidence reduction in risk cannot be part of that consideration. At the conclusion of their consideration, the Panel decided that the test for release was not met and full reasons for their decision were provided.

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
3 December 2020