the Parole Board
working with others to protect the public

[2020] PBRA 68

Application for Reconsideration by Haswell

Application

1. This is an application by Haswell (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 10 March 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 dossier, the decision letter, the representations in respect of reconsideration submitted on behalf of the Applicant and an email explaining the reasons for the lateness of the decision letter.

Background

4. The Applicant was sentenced to an indeterminate sentence for public protection imposed on 6 June 2008. His tariff expired on 19 November 2014.

5. The Applicant was convicted after trial of two offences of rape against the same highly vulnerable victim, committed on two occasions about six months apart, as well as an offence of wounding with intent to do grievous bodily harm, arising from a persistent attack on the same victim, inflicted on her in revenge for her reporting the rapes. He was also convicted of assault occasioning actual bodily harm on a police officer who was attempting to arrest him for these offences.

Request for Reconsideration

6. The application for reconsideration is dated 5 May 2020.

7. The grounds for seeking a reconsideration are as follows:

   The decision was procedurally unfair in that:
   (a) It was made ultra vires (beyond the limits of the powers of the panel);
   (b) The panel failed to allow further representations/evidence;
   (c) The panel refused applications to adjourn the hearing;
   (d) The panel failed to give adequate reasons for its decision;
   (e) The panel failed to explain its finding that a woman with whom the Applicant had formed a relationship was vulnerable;
   (f) The panel admitted and considered evidence which was submitted late and to which the Applicant did not have sufficient time to respond.

8. It is further submitted that the procedural unfairness, set out above, led to the panel making a decision which was irrational.

Current parole review

9. The Applicant's case was referred to the Parole Board by the Secretary of State on the 7 November 2018 for consideration of whether or not to direct his release and, if not, for advice on his continued suitability for open conditions.

10. The panel convened on 15 November 2019. The hearing was adjourned because of time constraints but it was indicated that this adjournment could usefully serve as an opportunity for the Applicant to have further periods in the community on temporary licence and for him to develop an open relationship with his Offender Manager (OM), as well as to develop his release plans.

11. The panel reconvened on 10 March 2020. It considered the dossier and certain further information (of which more, below) and took evidence from the Applicant's Offender Supervisor (OS), the Applicant himself and his OM. The Applicant had a legal representative who asked questions of the witnesses and made applications and submissions to the panel.

The Relevant Law

12. The panel correctly set out in its decision letter dated 30 April 2020 the test for release and the issues to be addressed in making a recommendation to the Secretary of State as to the Applicant's suitability for open conditions.

Parole Board Rules 2019

13. 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

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.

Procedural unfairness

17. 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.

18. 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.

The reply on behalf of the Secretary of State

19. No representations have been made by or on behalf of the Secretary of State.

Discussion

Ultra vires:

20. This complaint fails on at least two grounds.

21. First, it relates to a recommendation as to the Applicant's suitability to remain in open conditions. Since it does not relate to a decision as to release, it is not eligible for reconsideration (see Parole Board Rules 2019, Rule 28(1).

22. Secondly, the recommendation made by the panel was plainly within its jurisdiction. The Secretary of State, as routinely occurs, referred this case to the Board to consider whether or not to direct release. The reference, as is usual, went on thus: *"If the Board does not consider it appropriate to direct release, it is invited to advise the Secretary of State….on the prisoner's continued suitability for open conditions…."*. This is expressly provided for in Rule 25(5): "*Where the Board receives a request for advice with respect to any matter referred to it by the Secretary of State, any recommendation made in respect of that request is final*".

23. The representations make reference to Rule 25(4). It would have been helpful if some thought had been given to Rule 25(5).

Failure to give adequate reasons:

24. This submission appears to focus on and to be limited to a very short passage in the decision letter relating to the contents of a psychological assessment from 2018 and the evidence given by the OM about whether or not the Applicant was suitable for particular programmes. In so far as it is possible to understand the submission, it seems to amount to a criticism of the recommendation that the Applicant be returned to closed conditions on the basis that it was only in such conditions that he could access relevant programmes. On a fair and balanced reading of the papers, this does not appear to be a fair criticism of the panel's recommendation which was based on a considerably wider footing. In any event, this relates not to the decision as to release but to the recommendation for transfer to closed conditions.

Failure to explain why a woman was considered vulnerable:

25. I propose later in this Decision to set out some detail of the Applicant's relevant history and some of the factors which were relevant to the panel's decision. The woman, referred to as HC, was an important part of the decision.

26. The decision letter sets out with clarity at least some of the important reasons why she could properly be regarded as vulnerable. Others are to be found in the dossier. They are all, as it seems to me, strikingly obvious. She had recently been bereaved. Her late husband had met the Applicant in prison. He is described as having being well known to the substance abuse and criminal justice agencies. She had been informed of the offences of which the Applicant had been convicted but was apparently unable to recognise him as a risky potential partner. She had prioritised her relationship with the Applicant over her employment. These were proper grounds for concluding that she was not a person well equipped to make good life decisions and someone who, for that reason, was at risk of entering into a potentially harmful relationship with the Applicant.

27. In support of this submission, reference is made to a judgment of **Munby J**, as he then was, which is said to support the submission, set out in the representations thus: "*The term 'vulnerable adult' is not legally neutral, it is a term of art*".

28. This submission prompted me to track down and read the judgment. I found this at paragraph 81: "*Before parting from this topic, I should explain what I have in mind when I refer to a vulnerable adult. This is not a term of art….".*

Late evidence:

29. This complaint relates to the service of records of telephone calls made by the Applicant to HC from prison. The records were uncomplicated and spoke to matters of which the Applicant had good pre-existing knowledge. He was asked about them in his evidence and, not surprisingly, was able to give full answers. The issue was not whether he had made these calls but what underlay them in terms of the nature of his relationship with HC and his apparent failure to disclose it to his OS or OM. The representations make the bald assertion that the time given ahead of the hearing "*to consider this evidence was not sufficient, considering the weight placed upon it in the decision*" without any explanation as to what difference it would have made to the fairness of the proceedings or the rationality of the decision if more time had been given.

30. This complaint lacks any substance.

31. Before dealing with the other two complaints (which run together and effectively are to the same effect), it is necessary to make some reference to the wider context of the Applicant's offending, risk factors and custodial behaviour.

32. As has been noted, the index offences arose from serious sexual offences against a highly vulnerable victim. She had a variety of afflictions, mental and physical, which meant that she was only able to lead an independent life with the help of a Carer. The Applicant admits that he did indeed have sexual intercourse with her but asserts that it was with her consent. Although he denied the later attack on her, he now admits it, but appears to minimise his responsibility for it by claiming that he was much the worse for drink and in a state of justifiable indignation at what he claims to be her false allegations against him.

33. As the decision letter records, he also has a history of domestic violence, although he has not been convicted of any offences of that kind. Nonetheless, when asked about this at the hearing, he acknowledged that some aspects of his behaviour amounted to domestic violence.

34. The decision letter sets out a lengthy list of risk factors, several of which relate to the Applicant's sexual behaviour, beliefs and attitudes, including a desire to exert power and control over partners and vulnerable females.

35. The Applicant's behaviour in custody has been largely to a good standard to the point that a recommendation was made in 2015 that he be transferred to open conditions. This duly happened in September 2015.

36. The Applicant was, however, transferred back to closed conditions in July 2016 when it was discovered that he was in possession of a mobile phone, for which he received a short custodial sentence.

37. The Applicant's explanation for possessing the phone was that he wanted to keep in touch with his family. It transpired, however, that he had also used the phone to engage with dating sites, and in that way to make contact with women. This discovery gave rise to obvious concern, not only because of this behaviour in itself but also because of its clandestine nature. A critical aspect of managing the Applicant's risk is the extent to which he is able to be open and honest with the professionals who supervise and manage him.

38. The Applicant's behaviour in closed conditions and the good impression he made on the professionals at that time led to him being transferred back to open conditions in 2018.

39. Thereafter, the Applicant's behaviour gave no cause for concern and, albeit with some unfortunate delay (with which he coped well), he began his progression through temporary release.

40. As the panel pointed out, these periods of temporary release had among their purposes the object of testing the Applicant's ability to manage his risk, including behaviour towards women and disclosure of relevant matters to his OS and OM.

41. Both the OS and the OM prepared reports for the hearing which was due to take place in November 2019. They were supportive of release but unable to make a recommendation to that effect because the Applicant had not completed a sufficient number of temporary releases. It was in that context that the hearing was adjourned so that more releases could take place and to allow the Applicant and his new OM to build a relationship.

42. By the time of the resumed hearing in March 2020, however, there had been a significant change of circumstances.

43. In February 2020, the OM had been approached by Social Services on a confidential basis to express concerns about a relationship between the Applicant and HC. This came as a shock to the OM; the OS had a similar reaction on hearing about it. Their concerns were obvious. The fact of the relationship itself was troubling; so was the failure of the Applicant to disclose it. There was a significant degree of similarity between these events and those which had led to the Applicant's return to closed conditions in 2016.

44. It was not surprising that the reports submitted to the panel in March no longer supported release. The OS and the OM proposed that he should remain in open conditions and continue with temporary releases.

45. The panel took evidence from the OS at the conclusion of which the Applicant's representative invited the panel to further adjourn the hearing for several months so that further periods of temporary release could take place and to facilitate the development of the Applicant's relationship with the OM. The application was refused. It was renewed at the conclusion of the hearing and again refused.

46. Because the application for reconsideration has been submitted in the erroneous belief that the recommendation for transfer to closed conditions and the decision not to direct release are both eligible for reconsideration, it is not easy to work out which of the written submissions go to the former (and are therefore of no interest) and which go to the latter, if any.

47. The questions, as it seems to me, are these: Was the decision not to grant an adjournment procedurally unfair to the extent that it bore on the question of release? Was the determination by the panel that they were able to make a fair decision without further delay or further evidence one which was reasonably open to them? If not, does that render the decision as to release irrational, in the sense that it was reached on inadequate information?

48. As to the first question and reminding myself of the principles set out at paragraphs 17 and 18, above, I find the answer to be "No".

49. It is to be noted that the panel had already adjourned the hearing once for the identical purpose. The Applicant had full knowledge of the information which would be placed before the panel (save for the fine detail of the telephone conversations as to which I have already indicated my finding). The Applicant was able to give a full account of himself at a hearing which was fair and at which he was represented. The reasons for the decision as to release have been given to him in a full and clear decision letter, running to 13 pages.

50. It is further noted that the complaints as to procedural fairness in this respect appear to be directed entirely to the recommendation for transfer to closed conditions. They have no discernible relevance to the release decision.

51. As to the second question, the panel were of the view that they had sufficient information before them to make a decision as to whether or not, applying the statutory test, they should direct release. They had full information about the conduct of the Applicant, including the recent developments to which I have made reference. Neither of the professionals supported release. No realistic submission could possibly be made on behalf of the Applicant that he should be released. The hearing had already been adjourned once; a further adjournment, undesirable in

itself, would be likely to create a delay between the reference by the Secretary of State and the decision of approaching two years. In those circumstances the decision not to adjourn was clearly open to them, was not in itself irrational and cannot amount to procedural unfairness.

52. The answer to the third question is, in these circumstances, obvious. There was abundant material before the panel on the basis of which it was open to it to decide not to direct release. This decision cannot be properly described as irrational.

53. For the sake of completeness, I mention a complaint made in the representations as to the lateness of the decision letter.

54. This is a surprising complaint, given that the parties were informed at an early stage that due to the unfortunate indisposition of the Panel Chair it had not proved possible to complete the letter in time. In the event, it took longer than had been hoped for it to be finally completed. This complaint, in any event, has no relevance to the procedural fairness of the proceedings nor to the rationality of the decision.

Decision

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

Alistair McCreath
18 May 2020