[2021] PBRA 92

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Application for Reconsideration by Smith

Application

1. This is an application by Smith (the Applicant) for reconsideration of a decision of an oral hearing dated the 19 April 2021 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 of 387 pages, the decision letter and the application, together with the representations.

Background

4. On the 29 June 2012, the Applicant was given an extended determinate sentence of 4 years custody with a 6-year extended licence for wounding with intent. At the time he was aged 37.

5. The sentence expiry date is in June 2022.

6. In 2014 and 2020, the Applicant was released on licence but subsequently recalled. He is now aged 46.

Request for Reconsideration

7. The application for reconsideration is dated the 24 May 2021.

8. The application is based on both irrationality and procedural irregularity; the grounds run to 29 paragraphs under 5 different headings, preceded by an introduction.

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

   a) The panel failed to assess whether the Applicant's risk had reduced to a manageable level, because it failed to consider the link between his mental health diagnosis and his level of risk.

b) When the panel made its assessment of risk (and differed from the recorded statistical and dynamic risk levels), it relied entirely on historical evidence.

c) The panel's questioning was at times inappropriate and gave the appearance of it having pre-judged the case; occasionally questions were based on an erroneous factual basis, causing the Applicant to be confused and appear argumentative.

d) The panel made findings of fact in respect of the two occasions when the Applicant had been recalled that he had *"been involved in violent conduct"* towards his former partners. In the circumstances, this was unfair to the Applicant. A magistrate's court had found the Applicant not guilty of the 2014 allegation. The evidence in support of the 2020 allegation was inadequate.

e) The panel concluded that the Applicant needed to undertake further work to reduce his risk, when the profession evidence was there was no work outstanding nor available.

Current parole review

10. The Secretary of State referred the case to the Parole Board to consider whether to re-release the Applicant. The panel, consisting of an independent member and a psychiatrist member, heard evidence from the Applicant, his Prison Offender Manager and his Community Prison Manager.

The Relevant Law

11. 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

12. 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

13. 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."

14. 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.

15. 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

16. 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.

17. 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.

18. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Other

19. 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.*"

20. The Secretary of State did not make any representations.

Discussion

21. I will deal with the five grounds in turn.

22. In respect of the connection between the Applicant's mental health and his level of risk, the Applicant relies on a particular passage in the decision letter, namely

"The panel had no evidence of formal diagnosis of any mental health issue or information on the nature of the trauma, so it was not able to judge whether this was relevant to [the Applicant's] risk."

23. The pleaded grounds then refer to the evidence before the panel that the Applicant has for a long time taken medication for depression.

24. As I read the quoted passage, the panel is saying it had not seen formal (i.e. psychiatric or psychological) evidence of a link or the extent of any link between the Applicant's mental well-being, including his suggestion he suffers from unaddressed traumatic episodes from his childhood and his level of risk. The panel was aware that the Applicant takes medication because the decision letter continues,

    "There is information that [the Applicant] have been prescribed medication over a number of years of varying types, generally used to manage drug addiction and depression".

25. The professional witnesses may have concluded there was a link; presumably that was largely based on self-reporting. The report from the Community Offender Manager dated the 25 September 2020, speaks of the Applicant saying that on licence he did not lapse in to drug use, although his mental health was deteriorating; however, the author of the report does not develop this further.

26. The manager's endorsement reads "*Recall was warranted at the time of instigation and appears to have had a stabilising impact upon [the Applicant] in terms of mental health, motivation and possibly substance misuse*". There is no suggestion in the report or in the proposed licence conditions that the Applicant's mental health would require specific supervision.

27. In the circumstances, the panel was entitled to make that observation.

28. The section in the decision letter dealing with risk sets out the main reasons the panel concluded the Applicant's risk was more elevated than the evidence had originally suggested. However, it may not have set out in that particular section all the available evidence.

29. It is helpful to remember what Lord Bingham said in **Oyston [2000] PLR 45.** It is absolutely no criticism of the Applicant's lawyers that the pleaded grounds run to 29 paragraphs, but it should be remembered that a decision letter, which ran to only eight pages, was not necessarily drafted by a lawyer and one must look at the whole letter to see what the panel intended to convey.

30. The panel accepted that the Applicant's conduct in prison had been good but it had reservations about his ability to apply the lessons he had learnt when doing work to address his offending. Life in closed conditions, particularly during lockdown, is not the best environment to test improvement. The panel considered the Applicant's past behaviour, no doubt as an indicator of future behaviour, and also considered the impression that Applicant had made on them. It should be remembered that the panel included a psychiatrist.

31. I am satisfied the panel considered all the available evidence. The point made on behalf of the Applicant that the panel should not have found his risk towards known adults was high is an interesting one. It is speculation, but the panel may have had in mind future partners. However, if the panel was in error in making that particular finding, it was not a finding determinative of the outcome of the hearing.

32. A panel frequently has to challenge what a prisoner is saying; this is an integral and important part of the decision-making process. It is extremely difficult for a reconsideration panel to evaluate how an oral hearing panel framed its questions and the impact that had on the Applicant and the impression it would create on the other participants: very often, people see these things from their personal point of view and impressions can differ.

33. It is unfortunate if some questions were based on an erroneous basis; however, I read from the grounds that the Applicant was able to correct the panel. There is nothing pleaded to suggest the Applicant failed to give evidence he had wanted to because of this difficulty. I assume that he was granted the short break he asked for.

34. The pleaded grounds argue that the nature of the questioning suggested the panel had already made up its mind. This is a serious allegation and no particulars have been pleaded. It is very difficult to press a witness on a particular aspect of their evidence and not create some adverse impression. It is alleged that the confusion on the part of the panel (and the extent of it appears to be confined to the occasional question) made the Applicant appear argumentative. There is nothing in the decision letter to suggest the panel thought that.

35. The panel made certain findings of fact. The first complaint is the circumstances in which they did that made it unfair to the Applicant. Two reasons are put forward. The first is that the Applicant had no prior notice that the panel would do this and consequently he did not have the opportunity to cross examine the two former partners who made the complaints.

36. It seems the panel considered the evidence relating to the 2020 recall because they had to decide whether the recall had been justified. The Applicant would have had some indication that the panel was showing interest in the evidence leading to both recalls because the decision letter tells us:

"During the hearing it became apparent that [the Applicant's] recall may have been considered by the Parole Board previously. The hearing was adjourned for a short time to obtain the previous decision and allow time for all parties to consider it".

37. Notwithstanding that, there was no application to adjourn to obtain further evidence.

38. It is also alleged that learned counsel was not alerted to the panel's interest in that part of the case and so she did not make "in-depth" submissions. It is for the advocate to anticipate what will be of interest to a tribunal and, as I have pointed out, there was a clear indication that the panel was interested in the facts leading to the recall.

39. It is not argued that no submissions were made to the panel as opposed to "in-depth" submissions and no suggestion is given of what might have been said that was not said.

40. It appears correct that the panel found proved on the balance of probabilities that violence had taken place in 2014 although the magistrates in 2015 had found the Applicant not guilty of the allegation. There is not necessarily any inconsistency between the two findings as the magistrates would have to apply the criminal standard of proof. As to the 2020 allegation, the panel had the police statements and the evidence of the Applicant, together with no application for an adjournment for other witnesses to attend. Some panels might have taken a different approach but that does not mean this panel was wrong.

41. The panel concluded that the Applicant needed to undertake further work to reduce his risk. The panel did not say that this work had to be an entire accredited programme. It is not unusual for prisoners who have completed an accredited programme but have then demonstrated an inability to apply the learning to be recommended to do further work to enhance what they have learnt and to consolidate their learning. The panel was entitled to come to that decision. As I read the reports, the reason for the work being unavailable was a problem caused by the pandemic and not the absence of potential work.

42. As has been observed elsewhere, the fairness of proceedings is viewed in the round, having regard to the interests both of the prisoner and the general public. The panel listened to the evidence with care and came to their conclusion. The decision letter, which contains a balanced and comprehensive narrative as well as the panel's own assessment of the relevant factors, reveals that the panel decided that the Applicant (i) minimised his offending history, (ii) gave an implausible account of the circumstances leading to his two recalls; and (iii) demonstrated a limited understanding of the harm he had caused others. Reading the dossier, I have come to the conclusion there was sufficient evidence to support those findings. In addition, the panel found that those factors increased the risk of the Applicant causing serious harm in the future. This was a conclusion a well-qualified panel was entitled to reach.

Decision

43. 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
6 July 2021