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[2023] PBRA 59

Application for Reconsideration by Foster

Application

1. This is an application by Foster (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 6 March 2023 not to direct his release.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the **Parole Board Rules**) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair. This is an eligible case, and the application was made in time.

3. I have considered the application on the papers. These are the decision, the dossier, and the application for reconsideration.

Background

4. The Applicant received a sentence of imprisonment for public protection on 22 May 2009 following conviction for rape (five counts), false imprisonment, attempted rape, and sexual assault. The tariff was set at nine years (less time spent on remand) and expired in June 2017.

5. The Applicant was 31 years old at the time of sentencing and is now 44 years old. This is his fourth parole review.

Request for Reconsideration

6. The application for reconsideration is dated 24 March 2023 and has been drafted by solicitors acting for the Applicant.

7. It argues that the decision was both irrational and procedurally unfair. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No submissions were made regarding error of law.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the referral is undated) to consider whether or not it would be appropriate to direct his release. If release was not directed, the Parole Board was asked to consider whether the Applicant should be transferred to open conditions.

9. The matter proceeded to an oral hearing on 28 February 2023 before a three-member panel which included a psychiatrist specialist member. The Applicant was legally represented throughout the hearing. The panel heard oral evidence from the Applicant, his Prison Offender Manager (**POM**), and his Community Offender Manager (**COM**).

10. The panel did not direct the Applicant's release and made no recommendation for open conditions.

The Relevant Law

11. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

12. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

13. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

14. 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

15. 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."*

16. 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.

17. 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

18. 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.

19. 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.

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

The reply on behalf of the Secretary of State (the Respondent)

21. The Respondent has submitted no representations in response to this application.

Discussion

Procedural unfairness

22. It is first submitted that the panel's decision was procedurally unfair as it relied upon a Programmes Needs Assessment (**PNA**) which it is said was factually incorrect and flawed. Moreover, it is argued that the PNA author should have been called as a witness so that her evidence could be tested.

23. In support of this, an example is given about allegations relating to the Applicant's conduct during employment in the servery, whereas the Applicant had never been employed in the servery.

24. The PNA refers to two security intelligence reports (**SIR**s) concerning the servery: "*information that [the Applicant] is bullying others and using his*

servery position to his advantage" and "*alleged that another prisoner assaulted [the Applicant] at the servery"*. The first of these references implies that the Applicant was employed in the servery.

25. The SIR relating to this reference is found within the Mercury Intelligence Report dated 17 February 2023. The entry is dated 25 November 2022 and states "*Intel suggests [the Applicant] is bullying others on B wing using his job as a servery worker to his advantage"*. It is rated as low reliability. For completeness, the other SIR referred to in the application is also rated as low reliability.

26. The panel's decision notes that the Applicant's legal representative argued at the hearing that it should give less weight to the PNA as its author had taken the SIRs at face value and the panel had not asked the POM about them. However, the decision gives reasons why the panel was not persuaded by the legal representative:

    a) The PNA used the SIRs as evidence of the Applicant not yet consistently applying his learning from TSP (and further noted that the Applicant accepted that he is unable to control his emotions at times); and

    b) The thrust of the PNA related to the lack of offending behaviour work to address his risks of sexual violence, and its conclusions were consistent with an earlier psychological risk assessment from February 2021.

27. I have read the PNA carefully and agree with the panel that the disputed SIRs are used (with others) in support of its finding that the Applicant can struggle with the application of some of the general skills he learned while undertaking the Thinking Skills Programme (**TSP**). The PNA goes on to note that TSP did not cover the Applicant's sexual offending which is a core risk area. It further notes the Applicant's actuarial risk assessment scores which indicate a high risk of future contact sexual reoffending and a high general risk of reoffending. If the Applicant were to reoffend, he is assessed to pose a high risk of serious harm to the public.

28. It is argued that the hearing should have been adjourned for the evidence in the PNA to have been further tested. I disagree. Even if the SIRs had been disproved, either by further written evidence or through cross-examination of the PNA author, this would only have served to weaken the conclusion that the Applicant was unable to apply the learning from TSP. Regardless of this, the Applicant admitted to the panel that he can struggle to control his emotions, and this admission (which is not disputed) would be more likely to carry weight than any analysis based upon SIRs.

29. Moreover, even if the Applicant was perfectly able to demonstrate the learning from TSP, this would not change the fact that he had done no offending behaviour work to address the risk of future sexual violence, and, given the catalogue of serious sexual offences for which the Applicant is in custody, it was not unreasonable or unfair for the panel to give significant weight to this finding.

30. I cannot therefore see what, if anything, having the author of the PNA present would have added to the Applicant's ability to present his case properly. Moreover, the Applicant was legally represented throughout the hearing and, if his legal representative felt that the Applicant was disadvantaged by not having the PNA author there, then it was open to him to persuade the panel otherwise.

31. It is also argued that the POM was unable to answer certain questions from the panel, nor reviewed security information, and her lack of responses were disadvantageous to the Applicant. It is argued that if the panel was unhappy about the information it received, it should have made further directions before making its decision. Of course, the fact that it did no such thing is not automatically indicative of procedural unfairness: it may also indicate that the panel was not unhappy with the information it received, or, even if it had gaps in it, that the overall totality of the evidence was such that there was sufficient for the panel to reach its decision.

32. It is noted that the PNA was only before the panel due to the insistence of the Applicant's legal representative. While this appears to be true, it does not mean that the hearing was unfair. It would have been more likely to have been unfair if the PNA had not been disclosed, or if the Applicant's legal representative's request for it had been declined. It is also worth noting that the request for the PNA did not seek for its author to be called as a witness, and the Duty Member who directed its disclosure also did not see the need for an additional witness.

33. I do not, therefore, make a finding of procedural unfairness. The first ground for reconsideration fails.

Irrationality

34. The essence of the second ground for reconsideration is that the panel's decision was irrational because, it gave weight to a PNA which was "*flawed and based on incorrect information"* rather than the "*strong evidence of the COM for release"*.

35. The application also notes that there was clear evidence from the COM "*that a period in open [conditions] was essential for community testing"*.

36. The decision notes that the COM "*told the panel that she considers it essential for [the Applicant] to spend time in open prison conditions"*.

37. It is difficult to reconcile the argument that the COM gave strong evidence for release with her view (stated by the panel and in the application for reconsideration) that it was essential for the Applicant to progress via open conditions.

38. A decision to recommend open conditions falls outside the scope of the reconsideration mechanism. The decision to recommend (or not recommend) open conditions only arises after a panel has decided that it cannot make a direction for release.

39. The COM's evidence that time in open conditions is essential implies that she does not consider the Applicant ready to be released, regardless of the fact

that the PNA disagreed with her view on the appropriate treatment pathway for the Applicant.

40. It therefore cannot be said that the panel's decision not to direct release was irrational, as it agreed with the COM's implied view that the Applicant was not ready for release. The legal test for irrationality sets a high bar and I cannot that every other rational panel would have decided to release the Applicant on the evidence before me.

41. I therefore make no finding of irrationality, and this ground also fails.

Decision

42. The panel's decision is not procedurally unfair or irrational and the application for reconsideration is dismissed.

Stefan Fafinski
05 April 2023