[2019] PBRA 1

the Parole Board

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Application for Reconsideration by Preston

Application

1. This is an application by Preston (the Applicant) for reconsideration of a decision by a duty member not to refer her case for an oral hearing on the basis that the decision was irrational.

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 that the decision is irrational (a) or that it is procedurally unfair (b).

Background

3. On the 26 February 2010 the Applicant was sentenced to imprisonment for public protection (IPP) with a minimum period to serve of 3 years (the tariff) before she was eligible to apply for parole for an offence of causing grievous bodily harm with intent. That minimum period expired on 29 April 2012.

4. The index offence involved the Applicant taking a leading part in a serious assault, carried out on a man in the street who was unknown to her. This assault left the victim in a coma and requiring intensive care.

5. The Applicant had a very traumatic childhood, which it is not necessary to describe the details of here.

6. The Applicant's last parole review was in late 2017. She did not seek progression as she recognised that there was further work to do in closed conditions before that could be achieved. The panel noted the good progress that she was making.

Request for Reconsideration

7. The application for reconsideration is dated 1 August 2019. The grounds for saying that the decision was irrational are that '*The paper decision dated 26.7.2019 to deny an oral hearing is irrational because it misinterprets the legal representations dated 12.7.2019. The decision is therefore based on erroneous information and is flawed'.* The application goes on to say: '*We note that we did not suggest that the assessment should be undertaken before the EDMR work was completed and we would submit that the representations have therefore been misunderstood. We suggested that the referral for the assessment could be pursued whilst the work was on going but the actual assessment would be undertaken once the work was completed. We fully accept that the work would be an important consideration in*

the assessment. The decision was therefore based on a misunderstanding of the request for an oral hearing and is therefore flawed.'

Current parole review

8. The Secretary of State referred the Applicant's case to the Board in August 2018 to decide whether to direct release or if that was not appropriate to recommend a transfer to open conditions.

9. The first MCA hearing was deferred to await the receipt of further information, and particularly the conclusions from a referral to an outreach programme on the next steps which could be taken to progress the Applicant.

10. The report from the outreach programme recommended that the Applicant should undergo trauma therapy. The Offender Manager (OM) in her report dated 31 May 2019 said that the Applicant had agreed to undergo Eye Movement Desensitisation and Reprocessing (EMDR) trauma therapy and concluded that she could not support progression until that intervention had been completed and its effectiveness assessed. The Offender Supervisor (OS) in a report dated 30 May 2019 reported that the trauma therapy should be concluded by the end of 2019 and she recommended that a psychological risk assessment would be required following the therapy to determine its effectiveness.

11. The legal representative of the Applicant submitted addendum representations dated 7 June 2019 for the deferred MCA hearing. The Applicant was seeking an oral hearing and a direction for release. She asked for the oral hearing to be listed from December 2019 so she could complete the EMDR before the hearing.

12. On 25 June 2019 the deferred MCA paper decision was issued. The member refused the application for an oral hearing and decided the case on paper. The MCA member did not direct release or recommend transfer to open conditions. The relevant part of the decision letter dealing with the reasons for refusing the request for an oral hearing reads as follows: *'The panel noted legal representations requesting an oral hearing but stating that it should not be listed before December 2019 to allow you time to complete further interventions as outlined below. This would essentially be a deferral of the review. The MCA member's view is that this would not be appropriate at this point as after the intervention there is likely to be a need for a full psychological risk assessment. This would mean your review would not take place until March or April 2020-far in excess of current Parole Board guidelines for a deferral. Your case is therefore being concluded on the papers'.*

13. The Applicant, as she was entitled to do, renewed her application for an oral hearing on 12 July 2019. Her legal representative made further representations. The reasons why an oral hearing should be directed as part of this parole review were expanded. The relevant part of the representations is as follows: *'Preston acknowledges the need to complete the EDMR treatment before her parole is considered and she therefore asked for her hearing to be listed from Dec 2019. This treatment is due to start in September 2019 for 5 sessions. The MCA member view is that there would then be a need for a psychological assessment and this would mean the review would not take place until March or April 2020 which is in*

excess of the guidelines for a deferral. Preston agrees that a psychological assessment will be necessary but it is unclear why the referral can only be pursued once the treatment has finished and would therefore take a further 3-4 months to complete. If the assessment is requested when the treatment starts it could coincide with the end of treatment in December 2019. Her case could therefore be listed from January 2020. We understand that the current listing is for October and therefore a 3 month deferral is required. We are concerned that if the review concludes at this stage Preston's next review is likely to commence in July/August 2020 and is unlikely to be heard before Dec 2020. Once the intervention is completed there would be limited benefit to remaining in closed conditions.'

14. The duty member in a decision dated 26 July2019 refused the request for an oral hearing. The decision reads '*We confirm that you have requested an oral hearing. The basis for this request is that whilst you acknowledge that there should be a psychological risk assessment there is no need to wait for EDMR treatment to be completed before it can be directed. The Duty member disagrees. The progress made on EDMR treatment will be an important consideration for the psychological assessment. Therefore it would be inappropriate to begin such an assessment before EDMR treatment had concluded. The assessment would then take a further three months. As acknowledged in the representations, your next review is likely to commence in July/August 2020 which will allow both the completion of EDMR treatment and a subsequent psychological assessment to be provided.'*

The Relevant Law

15. In **R (on the application of 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'.* 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 uses the same word as is used in judicial review demonstrates that the same test should be applied. This test for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.

16. In the cases of **Osborn and Booth -v- the Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. I shall not refer in detail to the decision in Osborn but only in so far as it is necessary for this case. The Supreme Court did not decide that there should always be an oral hearing but said there should be if the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the

prisoner to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

17. At para 2 (vi) Lord Reed said: '*when dealing with cases concerning post-tariff indeterminate sentence prisoners, it should scrutinise ever more anxiously whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff'.* That of course is the situation in this case but, with respect, it has never been easy to understand exactly what is meant in practice by Lord Reed's statement. The test that the Board has to apply to decide on release remains the same however long over tariff the prisoner is. Once the tariff has expired the Board will always examine with as much care as is possible whether or not the test for release is met. No prisoner should remain in custody beyond his tariff if the test for release is met, whether he is one day over tariff or 10 years. What can be said is that where a prisoner is over tariff the Board should do its best to avoid there being further delay due to a failure to produce reports or comply with directions, so that, when a prisoner is safe to be released that can take place as soon as possible.

18. As this statement by Lord Reed appears in the section of the judgment dealing with the test for directing an oral hearing, it may indicate that for a prisoner who is a long time over tariff the Board should be more ready to direct an oral hearing.

Discussion

19. It is accepted, and is apparent on the facts of this case, that there is and was no objective justification for having an oral hearing until the EDMR treatment is concluded. It was not enough to have completed the treatment, it was important to be able to assess what effect the treatment has had on the Applicant's risk factors. In this case it seems to be accepted that this is best done by a psychological assessment which would inform the recommendations of the OM and the OS. It does not follow, and experience suggests it is unlikely, that a proper assessment of the effect on the applicant's risk factors of the treatment could be completed immediately after it had finished. The psychologist might well need to see the Applicant over a period of time to make a proper risk assessment and take into account custodial behaviour following treatment. Updated reports would also be required from the OM and the OS. While it is suggested in the representations that the case could be listed from January 2020, there are a number of imponderables which could affect the listing date and make that speculative if not highly unlikely. The EDMR treatment might not be completed by December and it is uncertain when a psychological risk assessment would be completed. It is not known how much time the psychologist would require to prepare a comprehensive report but experience shows that it can be a period of up to 4 to 6 months. The suggestion that there could be a hearing in January is at best speculative.

20. It follows that it may well be that all the material which the panel would need to make a proper risk assessment would take 4 to 6 months following completion of

the treatment to prepare, so that the case would not be ready for an oral hearing before April, May or even June.

21. The basis for saying that this decision was irrational was that the member misunderstood the submissions made by the legal representative. A careful reading of the duty member's decision does support the suggestion that the application was considered on the basis that the legal representative was suggesting the psychological assessment could begin before the treatment finished. That was not included in the representations. I do accept that a misunderstanding of legal representations is capable of rendering a decision irrational but that will always be a fact specific question. If the decision is justified on a proper understanding of the representations, then the decision itself is not irrational.

22. I accept that to the extent that I have set out the duty member does appear to have misunderstood the legal representations.

23. I do not accept however that that misunderstanding on the facts of this case made the decision not to grant an oral hearing irrational. I do not accept that, had the submissions been properly understood and the duty member had realised that it was accepted that the psychological assessment would take place after treatment, any different result would or should have followed. The consequence of there being a treatment followed by a psychological assessment is that there is likely to be a significant length of time before the oral hearing can take place. I do not consider that there is any proper basis for the assertion that the oral hearing could be ready for a hearing in January. It might be but experience suggests that that is unlikely and that a proper risk assessment could not be completed that quickly after the completion of the treatment. Is it irrational to say that the best way of dealing with this case was to refuse the application for an oral hearing now and deal with the case on paper on the basis that it is likely there would be an oral hearing in the next review period when all the necessary information would be available? In my view it isn't. The likely time when all the further information would be available may well be close to the likely start of the next review, if the normal gap between reviews was chosen by the Secretary of State. On a proper understanding of the representations it was not irrational to refuse the application for an oral hearing, as the alternative might result in the referral continuing for a long time without being resolved. The Parole Board is under an obligation to deal with referrals in a timely fashion and putting the case off for an oral hearing for a period of time which could extend to a year would not be in accordance with that obligation.

24. The Secretary of State has the power to direct a shorter period than normal between parole reviews. It may be appropriate to ask the Secretary of State to consider that in this case. I emphasise whether he does so is a matter for his decision not the Board's.

Decision

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

John Saunders
20 August 2019