

[2019] PBRA 16

Application for Reconsideration by Morrissey

Application

1. Morrissey (the Applicant) applies for a direction that the decision of the Parole Board not to direct his release but to recommend to the Secretary of State that he be transferred to open conditions be reconsidered on the grounds that the decision was irrational and/or procedurally unfair.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on the basis either that the decision was (a) irrational or that it was (b) procedurally unfair.
3. Rule 25 provides that applications for reconsideration can only be made for decisions whether to release. Rule 25(5) makes clear that a recommendation for open conditions made by a panel is final and is not subject to an application for reconsideration.

Background

4. In 2005 the Applicant was sentenced to 6 years' imprisonment for the offences of causing grievous bodily harm with intent; assault occasioning actual bodily harm and dangerous driving. In 2008 he was sentenced to Imprisonment for Public Protection (IPP) with a minimum period to serve of 2 years 6 months for wounding with intent of a prison officer while he was serving the sentence imposed in 2005.
5. In a decision letter dated 9 August 2019, a panel of the Parole Board did not direct the release of the Applicant but did recommend to the Secretary of State that he be transferred to open conditions.

Request for Reconsideration

6. There are grounds settled by the Applicant's solicitor and grounds settled by the Applicant personally. I have read both documents but will concentrate on the grounds settled by the solicitor. I bear in mind the observations made by the Applicant.
7. The Applicant's solicitor argues that it was procedurally unfair for the panel to recommend that the Applicant be transferred to open conditions when he told the panel he didn't want to be transferred. The solicitor relies on the case of **Osborn and others [2013] UKSC 61** to support this proposition. Further, in support of

this ground, the solicitor relies on the fact that the other witnesses did not favour a move to open conditions but recommended release.

8. Additionally, it is contended that the process was procedurally unfair, in that the panel should have first decided that open conditions was not an option, and then gone on to consider whether to release him, in light of the knowledge that a move to open was not an option.
9. It is further argued that it was irrational to recommend a move to open conditions when the Applicant was not applying for it, and that it was contrary to the evidence of all of the witnesses.
10. As set out above, there can be no reconsideration in relation to a recommendation for open conditions. On proper analysis, the argument of the Applicant is that the panel should have considered the question of suitability for open conditions first. The panel should have decided that a transfer to open conditions was not viable and considered the issue of whether to release in the light of that decision. I have decided that it is, in those circumstances, possible for me to consider as part of my decision whether the recommendation of the panel that the Applicant should transfer to open conditions was sustainable.
11. The Secretary of State made no observations in response to this application.

Discussion

12. The same grounds are used to support the submissions that the decision of the panel was procedurally unfair and irrational. In my judgment, the matters complained of are not capable of supporting an allegation that the hearing was procedurally unfair. The Applicant was aware of all the matters in the dossier. He was able to give evidence, and the witnesses were asked questions by his legal representative. The representative addressed the panel on the Applicant's behalf at the end of the hearing. There was nothing procedurally unfair in the way the hearing was conducted, nor the manner in which the panel reached its decision. The panel have set out in their decision letter why they reached their decision. I shall consider all the matters complained of when deciding whether the decision was irrational.
13. The Applicant relies on the case of **Osborn** in support of his case. I am unable to see what relevance that case has to the issues raised by the Applicant. That case was concerned with when the Board should direct an oral hearing. There was an oral hearing in this case and evidence was given by the Applicant. The complaint is that the panel did not act on what the Applicant said. A panel must consider all of the evidence carefully and decide whether or not they accept it. The case of **Osborn** does not say that the panel should follow the wishes of the Applicant.
14. As the Parole Board has made clear in previous decisions on reconsideration applications, the same test for irrationality which is used in Judicial Review will be used in reconsideration cases. 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 first enunciated by Lord Diplock in **CCSU -v- Minister for the Civil Service [1985] AC 374**. It follows that irrationality is difficult to establish. Further, due deference has to be given in assessing irrationality to the expertise of Parole Board panels in assessing risks.

15. It is submitted that the panel should have reached a conclusion that a transfer to open conditions was not a possibility before reaching a decision on whether to release or not. It is said that not to do this renders the decision of the panel irrational.
16. In my judgment that is not correct. The terms of the Secretary of State’s referral are that the panel should consider the question of release *first*. Only if it decides not to release, is it invited to go on to consider whether to recommend a transfer to open conditions. To do as suggested by the Applicant goes against the terms of the reference. The panel was correct to consider the matters in the order that it did.
17. Where the panel is deciding on release it may be necessary for it to consider whether the prisoner can safely be released without spending a period in open conditions but that is not the issue here.
18. It is suggested that it was irrational for the panel to recommend a move to open conditions when the Applicant himself said that he did not want it. The fact that the Applicant did not want to go to open conditions – and gave evidence to that effect – is a relevant factor as to whether to recommend transfer, but cannot bind the hands of the panel. It is for them to consider what steps should be taken in order to safely rehabilitate the Applicant into the community. Further, the panel did not have to agree with the recommendations of the witnesses. The witnesses were of the opinion that it was safe to release the Applicant to approved premises (probation hostel) a probation hostel. They gave evidence to that effect. The panel disagreed. The panel was entitled to disagree with the evidence. It gave reasons as to why it disagreed. The panel did not consider that the Applicant could safely be released into the community. It did consider that he could safely be transferred to open conditions and that a transfer would assist the Applicant in achieving his eventual release and rehabilitation into the community. The test requires that *the panel* be satisfied that it is no longer necessary for the safety of the public that the prisoner remains confined not the witnesses. In making their decision, the panel takes into account the evidence of the witnesses, but it does not have to agree with the witnesses.

Decision

19. I have considered fully the letter sent by the Applicant in support of reconsideration. There is nothing in that letter which would justify a direction for reconsideration. Accordingly, the application for reconsideration is dismissed.



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