[2019] PBRA 28

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Application for Reconsideration by Cook

Application

1. This is an application by Cook (the Applicant) for reconsideration of a decision of the Parole Board given by a decision letter dated 18 August 2019 (the decision letter) following an Oral Hearing dated 30 July 2019. The decision was not to release the Applicant but instead to recommend his transfer to open conditions.

Background

2. The Applicant is serving a life sentence for two counts of murder. His tariff expired in 2010. He was first released on licence in 2017 (following a Parole Board panel hearing) after spending over 26 years in custody. He was recalled in February 2018 after breaches of his licence conditions and having been charged with further offences. Those new charges were affray, making threats to kill, and trespassing with intent. The further charges resulted, following a trial in July 2018, in the Applicant being convicted of the offence of affray for which he was sentenced to 9 months custody. The other two matters were directed to be left on the file.

Request for Reconsideration

3. The application for reconsideration is dated 9 September 2019. It is supported by professionally prepared written representations.

4. The grounds upon which the decision letter is challenged (in respect of the decision not to direct his release) may be briefly summarised as follows:
    a. First, the panel failed to pay due regard to the Board's own Guidance on Allegations issued in March 2019 (The Guidance) when considering and dealing with the allegations made against the Applicant concerning the charges which were ordered to be left on the file (the Allegations); and
    b. Second, the panel failed to give due consideration, when considering the Allegations, to representations made by the Applicant at the Oral Hearing touching on the credibility of the prosecution principal witness at the 2018 trial;
    c. Third, the panel failed to note or deal with fully or fairly the Applicant's explanation of an incident on a train in February 2018 just prior to his recall;
    d. Fourth, the panel, having found it was unclear how he had funded his train and other journeys, failed to ask him for a full or proper explanation as to how the journeys had been funded.

5. Accordingly, it was submitted, the Oral Hearing was rendered procedurally unfair within the meaning of Rule 28(1)(b) of the Parole Board Rules, 2019 (the Rules).

6. The Secretary of State declined the opportunity to make representations.

Current parole review

7. In March 2018 the Secretary of State referred the Applicant's case to the Parole Board for his first review since recall. The referral was amended by a further Referral Letter of June 2019.

8. The panel originally had a dossier of some 459 pages which, following copious additional documents (including detailed and lengthy representations made by or on behalf of the Applicant) grew to 650 pages. The panel heard evidence from a number of witnesses (including the Offender Manager and prison psychologist, both of whom recommended transfer to open conditions, and the acting Offender Supervisor who recommended release) as well as from the Applicant who was legally represented throughout.

9. As stated above, the panel recommended transfer to open conditions, but not release.

The Relevant Law

10. Rule 25 (decision by a panel at an oral hearing) and Rule 28 (reconsideration of decisions) of the Rules apply to this case.

11. Rule 28(1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case based principally on procedural unfairness but that, in my judgment, does not necessarily exclude irrationality.

12. 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 contains the same adjective as is used in judicial review shows that the same test is to be applied. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

13. Procedural unfairness essentially means there must have been some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result. Obvious examples are failure to take into account matters which the panel ought to have taken into account or taking into account matters they ought not. The overriding objective is to do justice. But justice, as it has been said many times, must not only be done but be seen to be done. Thus procedural unfairness may not only be process unfairness (as in the examples cited) but also perceptual unfairness (e.g. failure to deal with the arguments or evidence advanced in an appropriate manner or at all).

Discussion

14. The Guidance contains comprehensive advice on how to deal with allegations referring to conduct which have not been adjudicated upon. It points out the care and caution that must be adopted in relation to such matters. The principles set out in the Guidance are soundly based in law. An "allegation" is simply that, it is not a proven fact whether in criminal proceedings (where the burden of proof is said to be beyond reasonable doubt) or in civil (the balance of probabilities), the latter including Parole Board panel hearings: see, for example, **R (Delaney) v Parole Board [2019] EWHC 779 (Admin).**

15. Paragraph 6 of that Guidance provides:

> "*Panels faced with information regarding an allegation, will have to assess the relevance and weight of the allegation and either:*
>
> *a. Choose to disregard it; or,*
>
> *b. Make a finding of fact; or*
>
> *c. Make an assessment of the allegation to decide whether and how to take it into account as part of the parole review*."

16. This advice is substantially repeated in paragraph 9 of the Guidance.

17. Paragraph 25 under the heading "Giving Reasons" states this:

> *"The parole decision letter should include reference to an allegation made, explain whether the allegation has been disregarded or taken account of, and if taken account of an outline of the panel's analysis and how the allegation has impacted on decision-making. If the allegation has been disregarded the decision letter should explain why it has been disregarded. The decision letter should also set out, in respect of any findings of fact, how and why they were made (namely, upon the balance of probabilities and in order to assist the panel considering risk)."*

18. The Applicant's submissions in substance say that the manner in which the panel dealt with the allegations in relation to the two charges that were left on the file are unclear and, in any event, did not follow the Guidance, particularly in relation to paragraphs 6 and 25.

19. Whilst guidance is just that – guidance, in my judgment there is some force in these submissions. The decision letter shows, in my judgment, that the panel failed to

comply with the Guidance and in particular, paragraphs 6 and 25 thereof, in that the panel failed to set out clearly and fairly whether the Allegations were being disregarded or not, and if not what clear findings of fact were to be made in respect of them (and on what basis or evidence) and how those findings impacted on the panel's conclusions and decision. The panel noted that the Applicant had not been acquitted of the two additional charges (but, it might also be said, he had not been convicted: the charges were simply left on the file as, on the face of it, unproven charges).

20. In my judgment, the first ground is made out on the grounds that the panel failed to deal with the Allegations fairly in accordance with the principles set out in the Guidance.

21. That is not the end of the point however since the second ground, relating to the material and evidence provided by the Applicant (presumably on advice) touching and concerning the credibility of the principal prosecution witness, especially in relation to the second and third charges and accordingly also the Allegations. Instead of considering whether this material might have some relevance as to the source and credibility of the allegations against the Applicant (see, for example, paragraph 20 of the Guidance), the panel decided to ignore it and direct the material be removed from the dossier. Even though the same witness plainly was believed in relation to the offence of affray it does not necessarily follow the witness is to be believed on everything. Why, moreover, the material should be removed altogether was not made clear beyond a brief statement that the panel did not consider they should have been a party to the information concerned (which apparently touched on the witness's childhood). The panel may have been right, but to make such a direction without a very clear explanation seems to me a manifest error and procedurally unfair (both process unfair and perceptually unfair). Further the failure to explain why the material was excluded potentially at least renders the decision irrational. In the absence of such a clear explanation I consider the second ground also made out. Whether this material remains excluded I return to below.

22. As to the third ground of complaint, concerning an incident on a train, the complaint here is that the panel, in substance, appears to have ignored the Applicant's evidence. It was not assisted, to my mind, by the decision letter which repeated the incident (seemingly the same incident) at length in two different places in the letter but with two different dates, exactly a year apart and in the later period at a time when the Applicant must have been in custody. Again, in one place it appears they may have taken his explanation into account, in the other not necessarily so. This too represents in my judgment procedural unfairness and renders the decision irrational.

23. As to the fourth ground (the funding of the Applicant's journeys), there is no substance in this complaint. The questions about how he raised money for the journeys could have been asked in re-examination.

24. Standing back and looking at the matter as a whole I regard this as a troubling matter. Every applicant needs to feel that his case has been given fair, proper, and anxious scrutiny and his evidence, representations and arguments properly taken into account (even if not accepted). It may be that a different panel will ultimately

come to the same conclusion but that is not the test. In my judgment the Applicant was right to feel that he had not had a fair hearing and that his evidence had been unfairly dealt with in the decision letter in the manner complained of, particularly in relation to the first ground of complaint. As I say, these failures render the decision irrational in the above sense.

Decision

25. For the reasons I have given, therefore, the application for reconsideration is granted.

26. I shall direct the matter be referred to a fresh and differently constituted panel for a further oral hearing as soon as administratively possible. The original panel included a psychologist. That should continue. The panel should also in my view (but it may not be a matter for me) be chaired by an experienced chair and include a judicial member. A transcript of the judge's sentencing remarks at the July 2018 trial might also assist. Whether the additional material excluded by the present panel should remain excluded I shall leave to those representing the Applicant and the new chair or Member Case Assessment.

HH Roger Kaye QC
27 September 2019