[2020] PBRA 112

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Application for Reconsideration by Chapman

Application

1. This is an application by Chapman (the Applicant) for reconsideration of a decision of a two-member panel, dated the 22 May 2020, not to direct his release following an oral hearing.

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 consisted of the dossier running to 221 pages, the audio recording of the hearing, the decision letter, the representations for reconsideration from the Applicant's solicitor and three pages of notes from the Applicant himself setting out further grounds of appeal.

Background

4. The Applicant is now aged 43 years old. He was sentenced to an extended sentence of thirteen and a half years consisting of a ten and a half year custodial element and a three year extended licence.

5. Under the regime that he was sentenced under, the Applicant was released automatically on 10 October 2014. He was recalled the next year.

6. He was released again on 25 August 2016 and recalled in June 2019 after being arrested for further offences (that were subsequently not proceeded with).

Request for Reconsideration

7. The application for reconsideration is dated 16 June 2020.

8. The grounds for seeking a reconsideration are that the Panel have reached a decision in a manner that was procedurally unfair.

9. There are a number of complaints that are raised that can be summarised as follows.

   a) The Panel dealt with an issue of non-disclosure in an improper way;

b) The Panel did not take account of relevant material as it was not provided until after the hearing;

c) The Panel failed to correctly state the submissions of the Applicant on a material matter;

d) The Panel incorrectly stated that the Applicant had discriminatory attitudes towards women; and

e) The Applicant had not had sight of the dossier prior to the hearing.

10. Grounds (a) to (c) have been put forward by the Applicant's solicitor, whilst (d) and (e) are of the Applicant's own making.

Current parole review

11. The Secretary of State referred the Applicant's case to the Parole Board after he was recalled to consider whether he should be re-released on licence.

12. The Applicant's case was considered by a single member in August 2019 and an oral hearing had been directed.

13. The matter was listed for an oral hearing on 15 November 2019 but was deferred after the hearing had started at the Applicant's request.

14. This was in part due to developments in the police investigation to the matters that had led to his recall.

15. The other reason was that the community probation officer had stated that there were some outstanding issues in relation to an allegation of child neglect that had not been proceeded with by the police. At that time it appeared that there may be an application to withhold some information from the Applicant.

16. Directions were set by the Panel Chair, including one that said that any application to withhold material should be made by a date in January 2020.

17. The deferred oral hearing was held on 22 May 2020. It was due to be conducted by video link from the Parole Board headquarters, but due to the Covid-19 pandemic this was converted to a telephone hearing. There was no objection at the time to that course of action, and no complaint is made now.

18. On that day, the Panel heard oral evidence from the Applicant, as well as from his Offender Supervisor and his Offender Manager.

19. In the decision letter, the Panel set out the history of the case. Having heard evidence from the Applicant about the recall, it found that he was not a credible witness. In those circumstances, it was concluded that there was insufficient evidence that the Applicant's risk was manageable in the community.

20. In light of that, no direction for release was made.

The Relevant Law

21. The panel correctly sets out in its decision letter dated 22 May 2020 the test for release.

Parole Board Rules 2019

22. 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. This is such a case.

23. Such a decision is eligible for reconsideration on the basis that (a) the decision is irrational and/or (b) that the decision is procedurally unfair.

24. As irrationality is not relied upon, I shall not consider it further.

Procedural unfairness

25. 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.

26. 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.

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

The reply on behalf of the Secretary of State

27. The Secretary of State has confirmed that he has no representations to make in response to the application.

Discussion

28. I shall consider the grounds of reconsideration in turn before returning to the question of whether the decision contained a legal error.

29. It is appropriate to start with the two allegations put forward by the Applicant himself ((d) and (e)).

30. In relation to (d), that the Panel inaccurately stated that the Applicant has discriminatory attitudes towards women, this is an opinion (rather than a fact) that the Panel was perfectly entitled to have given the nature of his previous offending.

31. In relation to (e), rule 16(2)-(3) of the Parole Board Rules 2019 requires the dossier to be served on every prisoner. I accept that it may be that due to administrative failings this does not happen on every occasion, but no evidence has been provided to show that that did not happen in this case. This does not appear to have been raised at the hearing.

32. In any event, the Applicant was represented, and it would be expected that his solicitor would ensure that the Applicant had full copies of everything that they had. Again, there is no evidence to suggest that this was not done.

33. For that reason, there is nothing in this ground.

34. I shall deal next with (b) – the material served after the hearing. The circumstances are that at the conclusion of the oral hearing, the Panel adjourned to obtain an updated and complete risk management plan from the community probation officer, as well as clarification from them as to why it was said that the Applicant had breached a previous Court Order. Although it was said that an adjournment notice would be issued, it does not appear that one was.

35. The decision was dated 2 June 2020 and was distributed that day. A document from the police dated 1 June 2020 was sent in, but only added to the dossier on 3 June 2020. In those circumstances, I accept that the Panel did not have sight of that material before the decision was issued.

36. It is said by the Applicant that the material in that document was supportive of his account of the recall (the account that was rejected by the Panel). For that reason, there is unfairness.

37. The reconsideration mechanism is a narrow one and is confined to the parameters of Rule 28. There is no provision (as there is in some jurisdictions) for a decision to be reviewed or appealed on the basis of fresh evidence.

38. I accept that at the end of the hearing there was a discussion about this further material being provided by the community probation officer. In many cases, proceeding to a conclusion without waiting for the further material would be procedurally unfair.

39. In this case however, I do not consider that it was. Firstly, written submissions were, as anticipated, received by the Panel after the hearing. This was after the risk management plan had been received. In these, the Applicant does not make any reference to further material being awaited.

40. It is also important to consider the background. The question of any further material on this point arose during the Panel Chair's questioning of the community probation officer where the Panel Chair made it clear that she did not "see that there is any evidence of a breach" of a Court order, and she asked the community probation officer to submit any evidence to the contrary in writing after the hearing.

41. That was a clear indication that, whatever view she formed of the rest of the Applicant's evidence, she agreed with his position on this aspect of it. In fact, in the decision letter the Panel states that the panel made no finding as to concerns that there had been a breach of the order.

42. Turning to the material itself, it is clear that although the information from the police is supportive of the Applicant's claim that he did not breach his order, it is couched in cautious terms. For understandable reasons it approaches the case by considering whether a criminal prosecution for breaching an order could follow and explains, in brief terms, why the criminal burden of proof could not be discharged. The Parole Board applies a different standard of proof, and there are different rules relating to the admissibility of evidence. The one factual matter referred to contradicts the Applicant's account.

43. I do not consider that there is anything in that document that could have changed the Panel's view of the case in the Applicant's favour. For those reasons I conclude that this was not a procedural irregularity.

44. Even if I am wrong on that, then given that reconsideration is a discretionary remedy and that this material would not have made a difference to the conclusion, I would refuse relief (**Defpotakis [2019] PBRA 80**).

45. As was said in **Nightingale [2019] PBRA 40**, it is open to the Applicant to make representations to the Secretary of State to refer the matter back to the Parole Board earlier than he otherwise would in order to provide a remedy for any perceived injustice by new material being served.

46. Turning to ground (c), this relates to the use that the Panel made of the written representations made by the Applicant's solicitors prepared in July 2019 for the benefit of the Parole Board member who considered the case on a paper review in August 2019.

47. This relates to the circumstances of the arrest that led to the Applicant's recall. He was arrested in flat belonging to a woman. His account at the hearing was that he arranged to see another flat in the same block of flats. When he arrived, he pressed a buzzer of a different flat that was answered by a woman who was a friend of a family member. She let the Applicant in to her flat and then left. It was therefore a chance meeting, and his presence in the flat was an unhappy accident.

48. The Panel noted that in the representations from July 2019, it is stated that he was 'visiting an old family friend'. This is also the account recorded by the prison probation officer in his written report of 14 October 2019.

49. The Panel also noted that in the representations the solicitors had said, contrary to the Applicant's evidence at the hearing, that he was aware that there was one child left in the property by the woman when she left.

50. The application for reconsideration accepts that the representations state that the Applicant was visiting a family friend. The issue raised is that they did not say that he was aware that there was a child in the flat.

51. It is necessary to quote verbatim from the representations on this point, is a verbatim quotation is set out in the judgment that was sent to both parties but, in essence, the Applicant gave his account of the incident that led to recall.

52. It is said that the Panel impermissibly interpreted this as meaning that the Applicant was aware that there was a child in the flat at the time, merely that he was stating as a fact that there was only one child.

53. It seems to me that the natural (and, in fact, the only reasonable) reading of the representations is that the Applicant was knowingly aware of the child being present. If that were not the case, then one would have expected the representations to say so.

54. The closing submissions (written after the hearing) state that the Applicant's account has always been the same, namely that he had gone to the property to view a flat. It also states that he "*was left with the … child whilst the mother dropped her child off at school, however there was no licence condition stating that he could not be left with children*". Reading this, it is unsurprising that the Panel concluded that the account given by the Applicant previously was that he was aware of the presence of the child.

55. It is not said that there would be an error in principle in referring back to previous submissions made by a representative (the usual rule being that they are acting as their client's agents. See as examples in a criminal setting, **Hayes [2004] EWCA Crim 2844** and **Newell [2012] EWCA Crim 650**).

56. Further, it was a small part of the reasoning of the Panel for disbelieving the Applicant. In addition, the Panel have given ample reasons as to why they found his account an incredible one. It seems highly implausible that a woman who only knew the Applicant in passing would leave him in her flat with her child and without telling him of this.

57. For those reasons, I do not consider that there was a procedural irregularity.

58. Lastly, I shall consider ground (a). One of the reasons for the hearing in November 2019 to be deferred was to allow for a non-disclosure application to be made. None was made however.

59. The representations state that at the start of the hearing the Applicant's lawyers urged the Panel to continue on the day, and that an adjournment was unfair. That was agreed, and the hearing proceeded.

60. However, the representations state that when questioning the community probation officer, the Panel sought to elicit information about what the safeguarding concerns were.

61. In the closing submissions, the Applicant's representative reiterated the law on non-disclosure, and submitted that the panel "*should exercise great care into what weight they apportion to the limited questioning and answers surrounding this issue*".

62. There was no objection to the line of questioning at the time of the hearing, or in the written submissions, which would have been expected if the Applicant objected to the questions being asked. At its highest, it is put that it '*might* be *potentially* unfair' (emphasis added).

63. I also note that after that line of questioning had finished, the Panel Chair specifically gave the Applicant's representative the opportunity to make any submissions that she would wish to make as to the questions. None were made, other than to submit that the Panel should place no weight on the information provided.

64. There is no suggestion that the Panel improperly used the questions and answers given, or that they had or made use of any evidence that they should not have had.

65. The Panel were clear that they made a decision solely based on the evidence in front of them. They were also clear that the possible other evidence that may be available played no part in their decision.

66. The Panel said that it '*did not ask the OM to provide this further information and its decision has been made solely on the evidence before it*', to which objection is taken on that basis that the Panel did seek to ask questions about this at the hearing.

67. I consider that this line from the decision letter, when read in full with the rest of the paragraph, means that the Panel did not consider that it was necessary to adjourn for a non-disclosure application to be made.

68. The Panel were clearly faced with an unsatisfactory situation where the matter had previously been adjourned in part to consider whether a non-disclosure application should be made.

69. Despite it being six months later, none had been. Rule 17(2) of the Parole Board Rules 2019 require that any application be made 8 weeks before the hearing. By the time of the adjourned hearing, the Applicant had been in custody for nearly a year. Against that backdrop, the Panel were entitled to consider that a further adjournment would have been unfair.

70. However, they were in a position where they were aware that it was likely that the community probation had more information that may be relevant to risk (if it were

correct). Any application for non-disclosure at that stage would have derailed the hearing, and the Panel would have been entitled to refuse to hear the application.

71. In those circumstances, they had to carry out a balancing exercise and chose to proceed with the hearing and disregard any potential non-disclosure matter or suggestion from the OM that there was further material relating to any allegation of domestic violence. That was a proper course of action to take (and, in the event, they did not make a finding that there had been domestic violence). I do not consider that the procedure adopted at the hearing was procedurally unfair.

Conclusion

72. I have set out above why I do not consider that any of the individual points fulfil the test for procedural unfairness.

73. Further, even taking them together, I do not consider that they are sufficient to say that the decision was an unlawful one.

74. The panel had the advantage of an extensive dossier of reports and other material. In addition, they had the advantage of seeing and hearing the Applicant as well as the two professional witnesses. The Applicant's account was one that stretched credulity and the Panel were entitled to reject it.

75. The Panel were entitled to conclude that, as things stood at the hearing, the test for release was not met. There was no obligation on them to go further and adjourn for more information that neither party had asked them to obtain.

Decision

76. For the reasons I have given, I do not consider that the decision was irrational, nor was it procedurally unfair.

77. Accordingly, the application for reconsideration is refused.

Daniel Bunting
24 August 2020