[2020] PBRA 116

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Application for Reconsideration by PEARSON

Application

1. This is an application by Pearson (the Applicant) for reconsideration of a decision of an oral hearing dated 14 July 2020 not to direct her release.

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 are the decision letter, the dossier and the application for reconsideration.

Background

4. The Applicant was sentenced to Imprisonment for Public Protection on 24 July 1987 following conviction after trial for murder. A minimum term of twelve years and a day was imposed. Her tariff expired on 24 October 1998. She is therefore almost 22 years post-tariff. The Applicant was 31 years old at the time of sentencing, and is now 64 years old.

Request for Reconsideration

5. The application for reconsideration is dated 27 July 2020 and has been submitted by counsel acting for the Applicant.

6. The application was not explicit in identifying the grounds for review or the legal basis on which reconsideration was sought. My extrapolation of the grounds for seeking a reconsideration are as follows:

   (a) The panel failed to explain its reasons for rejecting the evidence of the Offender Supervisor (OS) that the Applicant was likely to fail in open conditions;

   (b) The panel failed to give reasons for rejecting the recommendations of the Prison Psychologist (PP) and attached more weight to the views of other psychologists who had not seen the Applicant as recently;

   (c) The wording of the decision suggests the panel gave inappropriate weight to an adjudication pending appeal;

(d) The conclusion that the risk management plan was insufficient to protect the public is illogical when the panel then recommended a transfer to open conditions; and

(e) The panel has irrationally relied on a submission of the Secretary of State which does not accurately state the test for release.

7. It is submitted that for these reasons a further decision should be made, whether by convening a further oral hearing or the substitution of a fresh decision.

8. The grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State in April 2019 to consider whether or not it would be appropriate to direct her release and, if release was not directed, to advise the Secretary of State whether she should be transferred to open conditions. This is her eighth parole review.

10. An oral hearing took place on 3 July 2020 before a three-member panel, including a psychologist member and a judicial member. Although not mentioned in the decision letter, submissions refer to an 'all day telephone hearing'. No objections relating to the effectiveness of the hearing have been raised on this matter and the Applicant was legally represented throughout.

11. The panel took evidence from the Applicant's OS, Offender Manager (OM) and a PP. The Secretary of State was also represented.

12. A psychological report from the PP (23 January 2020) recommended that the 'most appropriate course of action' would be direct release from closed conditions. It noted that, although the Applicant's prison behaviour is "*undoubtedly difficult*", her risks were low enough to be managed in the community. It considered that a move to open conditions would serve "*no useful additional purpose*" and could, in fact, encourage her to engage in negative behaviour as she would still be in part of 'the system' by which she feels mistreated.

13. It is noted and acknowledged by the PP that there was a potential conflict of interest in working with the Applicant. The PP was confident that the risk assessment was "*balanced and objective*". The panel appears to have been content to admit the report and take oral evidence from the PP.

14. There are previous psychological reports in the dossier. An assessment of December 2014 ('the 2014 assessment') does not go so far as to recommend what form progression might take but mentions open conditions or a regime designed and supported by psychologists to help people recognise and deal with their problems as the "*only alternative*". It follows that direct release was not considered to be viable.

15. Both an independent psychological assessment of January 2018 ('the independent 2018 assessment') and a further assessment of March 2018 ('the 2018 assessment') favoured a move to open conditions.

16. In oral evidence, the PP told the panel that her view was different from those advanced in earlier reports because she had used a different approach with the Applicant which, in her view, had proven to have been more effective that the approach used by previous psychologists.

17. In their report of 12 May 2020, the OM notes that progression is necessary, but recommends a gradual reintegration via open conditions leading to temporary releases to designated accommodation. While acknowledging the views of the PP, the OM noted that a return to closed conditions from the community would be more damaging for the Applicant than a failure from the open estate.

18. In the sentence planning report (3 June 2020), the OS noted that "*while a period in open conditions may be desirable, it could be counterproductive*" (for the reasons advanced by the PP) and recommended release. Their earlier report (18 October 2019) was limited to a recommendation for open conditions to allow controlled testing of the Applicant's ability to manage herself in the community and for a robust resettlement plan to be created.

19. After hearing oral evidence, the panel did not direct release but did make a recommendation for a move to open conditions.

The Relevant Law

20. The panel correctly sets out in its decision letter dated 14 July 2020 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for remaining in open conditions.

Parole Board Rules 2019

21. 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. Such a decision is eligible for reconsideration whether it is 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)). This is an eligible decision.

22. Rule 28(8) provides that the outcomes of the reconsideration process are (a) reconsideration or (b) dismissal. Rule 28 does not permit substitution of a decision made by a panel.

Irrationality

23. 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."

24. 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.

25. 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

26. 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.

27. 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

28. The Secretary of State has submitted no representations in response to this application.

Discussion

29. Although the application seeks substitution of the decision or a fresh hearing, substitution is not permitted under rule 28. The remedy for a successful application is limited to reconsideration at a fresh hearing.

Grounds (a) and (b): Failure to give reasons

30. I will consider Grounds (a) and (b), both of which concern the duty to give reasons, together. It is submitted that the panel failed to give cogent reasons for rejecting the recommendations of the OS and the PP.

31. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of any professional witnesses. It is their responsibility to make their own risk assessments. They must make up their own minds on the totality of the evidence that they hear and read in the dossier. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

32. If a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, following **R (Wells) v Parole Board [2019] EWHC 2710**.

33. Where there is a conflict of opinion, it is plainly a matter for the panel to determine which opinion it preferred, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above.

34. In this case, there were two cogent (but conflicting) bodies of opinion: that of the OM and previous psychologists (that risk was not manageable in the community) and that of the PP and the OS (that it was). The OS's recommendation for release (over a previous recommendation limited to open conditions) was influenced (at least in part) by the recommendation of the PP even though the resettlement plan had not progressed as much as would have been ideal. The OS had also noted a positive change in the Applicant's attitude towards her but believed that change had come about since she changed her position to recommend release.

35. The panel preferred the recommendation of the OM over that of the OS and the PP, which it was perfectly entitled to do.

36. The panel explained that it found the PP's assessment of risk to be an "*underestimation*". It found "*no significant change or persuasive evidence to undermine the previous psychological assessments*". It found that two risk scenarios put forward in the 2018 assessment remained relevant. It noted the Applicant has not yet been tested in conditions where she will be exposed to "*greater stimuli*". In its conclusion, the panel considered direct release to be "*over-optimistic and unrealistic*" and that any transition to the community would, in any event and notwithstanding any psychological difficulties, be "*extremely challenging*".

37. In my opinion, the panel has undertaken a balanced evaluation between two sets of conflicting views and put forward reasons which are amply sufficient to justify its conclusion. There is therefore no procedural unfairness on these grounds. I also do not find the panel's decision to be irrational; to do so would also be to dismiss the recommendations of the OM and other psychologists as irrational, which they are patently not.

Ground (c): Inappropriate weight given to an adjudication under appeal

38. Ground (c) submits that the panel gave some weight to a recent adjudication for which an appeal was pending and that doing so was inappropriate. In the decision letter, the panel stated it gave "*no particular weight*" to the incident. It is submitted that the use of the word 'particular' implies that the panel gave the matter some weight and doing so was inappropriate.

39. No matter how much or how little weight the panel gave to the incident in question, it was careful to contextualise that incident as one of a series of instances of poor custodial behaviour which was acknowledged by all witnesses. It noted that whatever the outcome of the appeal, the panel took it as part of the "*ongoing and longstanding difficulties*" between the Applicant and prison staff.

40. Even if treated as a mere allegation, the panel is at liberty to decide how much weight to give to that allegation, regardless of whether it is ultimately proven or dismissed for whatever reason. There is nothing in the decision to suggest that this particular incident was pivotal in the decision not to release the Applicant and therefore, even if given some weight, doing so was not inappropriate. There is no irrationality or any form of procedural unfairness on this ground.

Ground (d): Illogical conclusion regarding the risk management plan

41. Ground (d) is that the panel came to an illogical conclusion that the risk management plan was insufficient to protect the public when the panel then recommended a transfer to open conditions. Although the submission on this ground does not mention irrationality, I will treat it as though it did.

42. It is submitted that if the risk management plan was sufficient for temporary release from open conditions to be undertaken safely, then the same plan would be sufficient for direct release to be directed safely.

43. It is common for prisoners to be released from open conditions (when ready) on temporary release on similar or identical terms to those that would be in place for direct release. However, to infer that a risk management plan adequate for temporary release would always suffice for direct release would negate the need for open conditions entirely.

44. Part of the reason for temporary release is to provide incremental progression back into the community. The OM stated that the Applicant needed a natural, gradual progression into the community and the panel agreed. It was perfectly entitled to do so. I do not find the panel's reasoning to be illogical in this regard.

Ground (e): Incorrect test for release

45. Ground (e) relates to the test for release. The first submission advanced on this ground notes the written submissions of the Secretary of State which stated that the Parole Board "*must have total confidence that it is no longer necessary for [the Applicant] to be detained for the protection of the public".* It is submitted that the panel does not have to 'have total confidence' and this requirement arguably creates an irrational total bar for release.

46. The panel correctly states the test for release in its decision. In its conclusion the panel repeats the view of the Secretary of State, but there is nothing to suggest that the panel relied upon or applied this 'total confidence' threshold. It does not mention 'total confidence' anywhere in its reasoning.

47. I do not find that the panel misdirected itself as to the test for release.

48. The second submission on this ground is that the panel misquoted the statutory test (as being "*no longer necessary for the protection of the public that [the Applicant' be confined*") and that the accepted test is whether the prisoner should be 'detained'.

49. The application helpfully provides a footnote to s28(6)(b) of the Crime (Sentences) Act 1997. However, this provides that the Parole Board "*shall not give a direction [for release] unless… the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined*".

50. The statutory test is clear and is as stated by the panel at the very start of its decision. The second submission advanced on this ground, then, is legally erroneous and must fail.

Closing remarks

51. The Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I, as the Reconsideration Assessment Panel, should be expected to substitute my view of the facts as found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel, or a procedural error that led to demonstrable injustice.

52. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.

53. The panel was correctly focused on risk throughout. It was reasonably entitled to reach its own view on the evidence before it and its conclusion cannot be said to be outrageously defiant of logic or accepted moral standards. The legal test of irrationality is a very strict one. This case does not meet it.

Decision

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

Stefan Fafinski

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