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[2020] PBRA 123

Application for Reconsideration by Gray

Application

1. This is an application by Gray (the Applicant), made through his legal representatives, for reconsideration of a decision of an oral dated 23rd July 2020. The decision was not to direct release, but to recommend transfer to open conditions.

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 dossier that was before the panel, the decision letter dated 23rd July 2020 and sent out on 10th August 2020, and the Application for Reconsideration (the Application).

Background

4. The Applicant is serving a sentence of imprisonment for public protection imposed in November 2007 following conviction for sexual offences against female children including rapes, and sexual assaults. His minimum tariff expired in January 2016. The Applicant was 46 years old at the time of sentencing.

Request for Reconsideration

5. The application for reconsideration is dated 13th August 2020.

6. The grounds for seeking a reconsideration are as follows:

   (a) Irrationality: The application states three areas for review on this ground which are:
      (i) That the panel's decision was made without adjourning for further information;
      (ii) That the panel failed to give appropriate weight to the evidence of witnesses;
      (iii) That the panel failed to set appropriate targets;
      (iv) That the panel was unable to make a fair assessment and decision;
      (v) That it was irrational to suggest that the Applicant would be tested while in open conditions (through temporary leaves) when such leave would not be able to be provided in the foreseeable future.

   (b) Procedural Unfairness: In essence, for these reasons:

(i) That the panel should have adjourned for further information and clarification of the risk management plan (RMP) specifically in relation to availability and length of stay at Designated Accommodation (DA);
(ii) Failure to place appropriate weight on the evidence of professional witnesses;
(iii) Failure to set achievable targets.

7. I noticed the particulars provided for both grounds are largely the same, however given they are two distinct grounds with different tests and approaches in law, I have dealt with them separately, although the conclusions I may come to might similarly be largely the same.

Current parole review

8. The Secretary of State referral is dated February 2019 and asks the Parole Board to consider either release on licence, or failing that, whether the panel considers the Applicant to continue to be suitable for open condition. The panel is also asked to advise the Secretary of State on any continuing areas of risk, and to give full reasons for any decision or advice. The Applicant was 60 years old at the time of the hearing.

9. The hearing was conducted over two days, with an adjournment in between. The panel consisted of two independent members and a psychologist member. The first hearing was in the prison in February 2020, following which an adjournment was directed for further information. The second hearing was in July 2020. Because of the restrictions placed on face to face hearings due to the COVID-19 pandemic, this hearing took place over a remote link. Documents considered included Judge's Sentencing Remarks, information about progress on the sentence, including failure in open condition, psychological reports and reports from prison and probation staff. The Applicant's legal representatives had provided written legal representations. Oral evidence was taken from prison and probation staff, psychologist witnesses and the Applicant.

The Relevant Law

10. The Test for release is as follows: *"The Parole Board must 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 person should be confined."* Guidance indicates that a panel should simply state the test rather than attempt to interpret it in any way.

11. I note that in this case the test is stated slightly differently as*: "The panel can only direct release if it decides that is no longer necessary for the protection of the public that you be confined"*. Having considered whether not stating the test precisely was in any way fatal to the decision, I decided that the changes were too inconsequential to be problematic. I do not comment on the interpretation of the test for open conditions as a decision to recommend open conditions is not within scope of the reconsideration process.

Parole Board Rules 2019

12. 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)).

Irrationality

13. 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."*

14. 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.

15. 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

16. 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.

17. 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.

Other

18. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

19. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

The reply on behalf of the Secretary of State

20. The Secretary of State did not make any formal representations in response to the Application.

Discussion

21. As indicated above, the arguments made for both irrationality and procedural unfairness are rooted in the same complaints but have to be treated separately. I propose therefore to deal with procedural unfairness first.

22. I took as the starting point the issue of adjournment and whether there was some procedural impropriety in not adjourning. The Applicant indicates that the panel should have adjourned in order to get further information about the risk management plan. The nexus of the problem, according to the Applicant, is that if the panel had done so and been satisfied that a placement at a DA could have been longer than the stated eight weeks, they may have been in a position to make a decision to release. In the alternative they argue that in any event, the panel should have considered that, being an IPP Prisoner, he would not be 'kicked out' of the DA until move on accommodation could be sourced.

23. On the issue of having to adjourn, I cannot find that there was any procedural impropriety. The panel is entitled to make its decision on the evidence before it. There is no duty on a panel to continue to adjourn for further enquiries as to risk management. Indeed, to impose such a duty would be to make the job of any panel impossible.

24. If I find that there is no *duty* for a panel to adjourn, I then have to consider whether the panel *should* have adjourned in order to be fair. It is the case, as pointed out by the Applicant, that some panels do adjourn for further information on the risk management plan. In this case, however, I note that the failure of the

risk management plan hinged on much more than the availability/length of stay at a DA. It also raised concerns about a 'thin' move on plan; that the Applicant had been in prison for many years without the benefit of temporary and resettlement leaves; that the Applicant's support network was limited. The panel considered the information before it on the day and made a decision, fully explained, that the risk management plan was not sufficiently robust to manage the Applicant's risk.

25. There is no evidence in the letter, therefore that a single failure of part of the RMP led to the panel's decision that the plan was insufficient. An adjournment to repair all the failures, especially if one takes into consideration the issue of temporary leaves, is in my opinion unreasonable.

26. I also note that there is no evidence either in the decision letter or the Application that the Applicant's legal representatives made any application to adjourn at any point during the hearing. This could have been made at any time during or towards the end of the hearing, when the risk management plan was being discussed.

27. The next point I considered was any procedural impropriety or unfairness with respect to the weight given to the evidence of the professionals. There is no dispute that all professionals gave evidence. The application complains that the panel 'disregarded' the evidence of the Offender Supervisor and Psychologist and preferred the evidence of the Offender Manager.

28. I note the very full details of the evidence offered by all three witnesses provided in the decision letter, and the acknowledgement by the panel that their recommendations varied. Having taken and recorded this full evidence, the panel made its decision about whose evidence they preferred and they provided an explanation for it.

29. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. 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.

30. It is clear from the decision letter that the evidence of the Offender Supervisor and Psychologist was in no way 'disregarded'. Their evidence, as is true of the evidence provided by the Applicant and by the Offender Manager, was considered fully, and this is recorded in good detail in the decision letter.

31. I turn now to any procedural impropriety or unfairness with respect to the complaint that the panel failed to 'set achievable targets'. This is an interesting point and it is not clear what duty in law the Applicant seeks a remedy for in relation to this complaint. It is not the duty or within the powers of the Parole Board to 'set targets' for a prisoner to achieve. Indeed, in any referral, it is

expressly forbidden for the Parole Board to indicate what specific work should be undertaken and when.

32. I further note that in the conclusion the panel says: *"If progressed to open conditions [the Applicant] could complete the 1-1 emotional management work previously started at [the prison] and also be assessed for [a psychological therapy]. Professionals would also be able to monitor and test [the Applicant's] sexual interests and sexual preoccupation via [temporary overnight releases from prison] and with diary and schema work. To date this has never been completed. The panel considered this testing to be essential, especially given the uncertainty that remains around [the Applicant's] sexual interests."*

33. The words 'could' and 'would' are indicative of the panel's understanding of their powers in respect to suggesting further work or setting targets, they expressly do not. It is the case that the panel is clear that in their opinion the Applicant does need testing in open conditions via temporary and resettlement leaves. This is not setting a target, it is making an assessment in relation to how the Applicant can evidence a further reduction in risk.

34. The Application also complains that temporary and resettlement leaves are an unachievable target because these leaves are not available at the moment because of the restrictions placed on DA's due to the COVID-19 Pandemic. I have to dismiss this as a reason for there to be procedural impropriety or unfairness as the decision of the panel was made in the legitimate pursuance of its duty to consider options for progress (or otherwise) as required by the Secretary of State.

35. I keep in mind that the procedural impropriety or unfairness has to be serious enough to make the decision 'fundamentally flawed'. I have looked carefully and cannot find that the decision of the panel was procedurally unfair.

36. The Applicant also states that the decision was irrational. I note that the test for irrationality as set out in the case of **DSD** as referred to above sets a high bar for any Applicant to meet. I adopt the reasoning I give above for the complaint of irrationality in relation to not adjourning for further information, for giving weight to the opinion of one professional over others, and for not setting achievable targets, and will not therefore repeat them here.

37. In relation to the complaint that the panel was unable to make a fair assessment and decision, I am not able to find evidence that this complaint is made out. The panel took full evidence from every witness as well as the Applicant who was represented throughout. The panel took account of information in the dossier. It made its decision based on its assessment of the evidence before it and gave reasons for its decision. There is nothing to indicate how the panel was unable to make a fair assessment and no indication of bias in its approach. Because a decision is not the one that is sought for by the Applicant does not in itself make it irrational. There is no evidence that the decision is *"so outrageous in its defiance of logic or accepted moral standards…"*

38. The Applicant also suggests that the decision to recommend open conditions (for testing) is irrational, however a decision – or reasons for the same – to recommend open conditions is not within scope of this reconsideration

mechanism. I would however point out that the panel has a statutory duty to make its decisions, whatever they may be, within the referral from the Secretary of State which in this case required the panel to consider recommending open conditions if they decided release was not an option.

Decision

39. 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.

Chitra Karve
10th September 2020