

[2020] PBRA 146

Application for Reconsideration by Gibson

Application

1. This is an application by Gibson (the Applicant) for reconsideration of the decision of an oral hearing dated 2 September 2020 not to direct his 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. I have also seen an email from the prison psychiatrist dated 24 August 2020.

Background

4. The Applicant was sentenced to imprisonment for public protection on 22 January 2007 following conviction after pleading guilty to robbery, wounding, two counts of affray and possession of cannabis. A minimum term of three years and 259 days was imposed. His tariff expired on 1 July 2010. The Applicant was 30 years old at the time of sentencing and is now 44 years old.
5. He was released on licence on 21 December 2018. His licence was revoked on 21 February 2020 and he was returned to custody on 26 February 2020. This is his second recall on this sentence.

Request for Reconsideration

6. The application for reconsideration is dated 23 September 2020 and has been submitted by solicitors acting for the Applicant.
7. The application submits that the decision is "*irrational and unfair*" for a number of reasons. 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 Applicant considers it unfair that his failure to pay an outstanding service charge in respect of accommodation was cited as a reason for justifying the recall as he would have done so had he not been recalled. He also disputes that he missed any appointments.



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- b. It is irrational and unfair for the panel to have concluded that the Applicant has live mental health issues and that the risk regarding his mental health has been overstated since he has been "signed off" by the prison and community mental health teams.
 - c. The panel has given insufficient weight to the fact that the Applicant has committed no further offences prior to recall, and the recall was due to poor compliance rather than reoffending.
 - d. The panel should have sought a full psychiatric assessment rather than concluding the review negatively without one. Again, the Applicant places reliance on the view of the prison psychiatrist that he is not currently showing any signs of active mental illness.
8. I will deal with the first three grounds as suggestive of irrationality and the last on the basis of procedural unfairness.

Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State in March 2020 to consider whether or not it would be appropriate to direct his immediate (re-)release and, if release was not directed, to advise the Secretary of State whether he was ready to be moved to open prison conditions.
10. The case was directed to oral hearing which took place on 25 August 2020. The panel took evidence from the Applicant's Offender Supervisor (OS), Offender Manager (OM) and the Applicant.
11. The panel found that *"at the time the request [to recall the Applicant to custody] was made, [his] Offender Manager had sufficient grounds to conclude that, in all the circumstances...it was appropriate to recall [him] to prison"*
12. The panel concluded that the Applicant's risks were not manageable in the community and did not direct release or recommend a transfer to open conditions.

The Relevant Law

13. The panel correctly sets out in its decision letter dated 2 September 2020 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019

14. 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.

15. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

16. 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."

17. 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.

18. 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

19. 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.

20. 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

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

Discussion

22. The first ground advanced is that the Applicant considers it unfair that his failure to pay an outstanding service charge in respect of accommodation was cited as a reason for justifying the recall as he would have done so had he not been recalled. He also disputes that he missed any appointments.
23. The Applicant made the point regarding payment of the outstanding service charge in his personal written representations contained in the dossier. It was also covered in oral evidence. In its decision letter, the panel comments more broadly in saying that all written and oral evidence "*specifically the description of the circumstances that triggered the request to revoke [the Applicant's] licence*" led it to conclude the recall was appropriate.
24. In doing so, it mentions other aspects of the Applicant's conduct that culminated in his licence being revoked including threats towards staff members and concerns about the Applicant's mental health, which (in the OM's view) is "*a significant risk factor relating directly to his risk of harm*". The panel's conclusion about the appropriateness of the recall was not solely based on the arrears, and even if it had been, it is not an irrational conclusion simply because the Applicant disagrees with it.
25. The decision letter does not record that the Applicant missed any appointments, so I do not know why he is raising this as a point of dispute now. In any event, there is no irrationality on either submission forming the first ground and it therefore fails.
26. The second ground concerns the Applicant's mental health. He disputes that mental health is a "*live*" or "*continuing*" risk factor. He states that as his mental health deteriorates when he is using drugs and there is no current evidence of drug use in prison, then the risk regarding his mental health is overstated. In support of this, he notes the view of the prison psychiatrist who said (in his email of 24 August 2020, referring to a routine appointment on 3 August 2020) that the Applicant's mental health was currently stable.
27. This is not the only evidence that pertains to the Applicant's state of mind. The Applicant's OS noted the disparity between the views of the prison psychiatrist above and the views of the community mental health team who consider that mental health problems are present. It is reported that the Applicant did not wish to engage with community mental health services as he did not feel he needed medication. His OM expressed concern about the Applicant's mental health since his return to custody, gave examples of such behaviour, and concluded that the Applicant's mental health was not, in fact, stable.
28. His OS notes that the Applicant also has a pattern of insisting "*everything is fine*" even when it appears not to be the case.
29. Taken together, it is not clear whether the prison psychiatrist who concluded there were no live mental health issues was aware of the views of the OM (via the OS to whom he raised his concerns) or whether the Applicant presented with a false impression of everything being fine.

30. Even if the Applicant's current state of mental health is fine, it was not irrational for the panel to conclude that mental health is a live risk factor in the sense that a deterioration in the Applicant's mental health would increase his risk of serious harm.
31. The third ground submits that insufficient weight has been given to the fact that the Applicant committed no further offences prior to recall, and the recall was due to poor compliance rather than reoffending.
32. The weight given to any piece of evidence is a matter for the panel. Disagreeing with it does not automatically make the panel's weighting decision irrational. In any event, the overall decision of the panel was clearly based on a number of factors that are clearly explained in the decision letter. 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. Accordingly, this ground also fails.
33. Finally, it is submitted that *"if the panel would be assisted by a full psychiatric assessment then one ought to have been requested"*.
34. The decision letter stated that *"any updated psychiatric assessment would assist a future panel"*. It is clear from this that the panel was pointing out what information would be helpful for the Applicant's next parole review. It does not follow that the panel thought that it needed one for this review. The panel considered that it had enough evidence on which to base its decision and it did so for the reasons clearly set out in its letter. I do not find there to have been any procedural unfairness for lack of evidence here (neither do I, for completeness, consider the failure to direct an updated psychiatric report to have been irrational).

Decision

35. 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
8 October 2020