[2020] PBRA 147

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Application for Reconsideration by Barker

Application

1. This is an application by Barker (the Applicant) for reconsideration of a decision of a three-member panel, dated the 5 September 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 526 pages, the decision letter and the representations for reconsideration.

Background

4. The Applicant is now aged 35 years old. He was sentenced to detention for life on 7 October 2005 for an offence of section 18 Grievous Bodily Harm. The tariff was set at two and a half years and expired on 7 April 2008.

5. He has been in custody since being sentenced, most recently moving to open conditions (for the second time) in April 2018. However, he was returned to closed conditions after he left his accommodation when in the community on temporary leave and stayed at large for ten days, being returned to closed conditions thereafter.

Request for Reconsideration

6. The application for reconsideration is dated 21 September 2020.

7. The ground for seeking reconsideration are that the decision was an irrational one.

8. This is broken down as follows:

   (a) The Panel failed to give any, or any sufficient, weight to the recommendations of both probation officers at the hearing;
   (b) The Panel did not give sufficient weight to the fact of the Applicant's maturation; and

(c) The Panel did not give sufficient weight to the length of time since the index offence during which there has not been any further offending, or adjudications for violence.

Current parole review

9. The Secretary of State originally referred the Applicant's case to the Parole Board in 2018.

10. An oral hearing was directed in January 2019 and was listed on 19 August 2019. However, this was deferred on 11 August 2019 in light of the Applicant's failure to return to the prison whilst on temporary release.

11. Because of the circumstances where he was returned to closed prison, this referral letter was re-issued in September 2019 to consider whether he should be released. However, the Panel was not invited on the new referral to advise the Secretary of State on whether he should be transferred to open conditions.

12. On 6 January 2020 an oral hearing was re-directed. This was due to be heard on 22 May 2020 but was adjourned in advance due to the difficulties caused by Covid-19. The matter was marked by the Panel Chair that it should be a face to face hearing.

13. In fact, no doubt because of the ongoing situation with Covid-19 and the uncertainty over when face to face hearings would resume, when the Panel convened on 25 August 2020, the case proceeded by remote video hearing. No objection was taken to that at the time or subsequently.

14. The Panel heard oral evidence from the Applicant, as well as his Offender Supervisor (the official supervising his case in custody) and Offender Manager (community probation officer).

15. By the time of the hearing both the prison and community probation officers were recommending release.

16. The Panel noted the risk reduction work that the Applicant had undertaken whilst in custody, but concluded that the circumstances of him failing to return to prison, and his attitude which showed a lack of insight into his risk, and further showed that there was core work outstanding, meant that no direction for release could be made.

The Relevant Law

17. The Panel correctly sets out in its decision letter dated 5 September 2020 the test for release.

Parole Board Rules 2019

18. 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.

19. 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. It is not alleged that there was any unfairness, and I shall say no more about that.

Irrationality

20. 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."

21. 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.

22. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28 (see **Preston [2019] PBRA 1** and others).

The reply on behalf of the Secretary of State

23. The Secretary of State has not made any representations in response to the application.

Discussion

24. I shall consider the issues raised in the heads as set out above.

    Ground (a):

25. 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.

26. However, 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, per **R (Wells) v Parole Board 2019 EWHC 2710.**

27. In this case, the Panel had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant as well as the two professional witnesses.

28. In this case, the Panel set out the recommendations of the professionals, and the reason why those professionals considered that the Applicant's risk could be managed in the community. It is clear that it had those recommendations well in mind when coming to its conclusion.

29. In setting out its conclusions, the Panel gives clear reasons for concluding that, notwithstanding the undoubted progress that the Applicant had made, there was still core work outstanding.

30. Further, the Panel explained why it took the circumstances in which the Applicant failed to return to prison when he was granted temporary release as being more serious, and more indicative of risk, than did the professionals.

31. I consider that in those circumstances, although it had regard to the assessment of the professionals, the Panel came to its own conclusion on risk, which is what it was duty bound to do.

Ground (b) and (c): These two can be taken together.

32. The Panel addressed the length of time since the index offence and noted the positive progress made. However, the Panel then went on to assess the evidence (including, significantly, the evidence of the Applicant to the Panel) and gave reasons why there was not sufficient evidence of a reduction in risk to mean that release could be directed.

33. Although there is not a specific mention of maturity, the Panel were aware of the Applicant's age at the offence and now, and set out the progress made. There was no requirement to go further and make an explicit reference to his maturation.

34. The grounds put forward are effectively reasons why the Panel should have come to a different conclusion on the facts.

35. My job when considering an application for reconsideration is not to make an assessment of risk myself, or determine whether I would have directed release when presented with the case, but to assess the decision to see if there are any errors on the grounds set out above.

36. I consider that it is clear that the decision that the Panel made was one that was open to it, and someone reading it would understand why it was made (even if they may not agree with it).

37. In those circumstances, even taking the various grounds together, I do not consider that there can be said to be a legal error in the decision.

Decision

38.For the reasons I have given, I do not consider that the decision was irrational.

39.Accordingly, the application for reconsideration is refused.

Daniel Bunting
13 October 2020