

[2020] PBRA 158

Application for Reconsideration by Collyer

Application

1. This is an application by Collyer (the Applicant) for reconsideration of a decision of the Parole Board made under rule 25(1) of the Parole Board Rules 2019 (the 2019 Rules) that the Applicant was unsuitable for release (the Decision).
2. Rule 28(1) of the 2019 Rules 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, comprising a dossier of 575 numbered pages, which included the decision letter dated 18 September 2020, written submissions by the Applicant dated 19 September 2020 and written representations dated 22 October 2020 by the Public Protection Casework Section on behalf of the Secretary of State for Justice.

Background

4. The Applicant is serving an indeterminate sentence for public protection that he received in September 2009 after pleading guilty to a sexual assault on a female child. The minimum tariff was set at three years and expired in March 2013. The Applicant was aged 37 at the time of conviction and he is now aged 48.

Request for Reconsideration

5. The application for reconsideration is said to have been received by the Board on 29 September 2020. In written submissions, the Applicant asserts that his hearing was unfair, for several reasons.
6. The Applicant asserts that his hearing was unfair because his solicitor was not helpful and not interested in putting forward evidence that might have been helpful, and because some of his testimony was dismissed.

7. The Applicant asserts that the position he was given in the proceedings did not allow him to '*evidence*' or provide '*mitigation*' in relation to the evidence given by witnesses who had spoken later in the proceedings.
8. The Applicant asserts that he had had little contact with his Prison Offender Manager (POM), and that his Community Offender Manager (COM) had not adequately communicated her expectations to him.
9. The Applicant asserts that he was not given the complete 567 pages of the dossier that is referred to in the decision letter.
10. The Applicant asserts that a mental health diagnosis by the Doctor was unreliable, and unsupported by evidence of appropriate testing and as such should not have been accepted.
11. The Applicant asserts that his evidence was disregarded by the panel and that the panel had made up their minds before the hearing.
12. The Applicant asserts that he has not seen the written representations made after the hearing by his legal representatives.
13. The Applicant asserts that the short time between the hearing and his receipt of the decision letter indicates a lack of proper consideration of the evidence and of his case.
14. The Applicant asserts that the decision was irrational, because his hearing was unfair.

Current parole review

15. The Decision was made on the Secretary of State's referral of the Applicant's case to the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release, and if not, and if relevant, to advise on suitability for open conditions. That was the fifth such referral of the Applicant's case by the Secretary of State during the sentence he received in September 2009.
16. The Decision was made by a panel of the Board that considered the Applicant's case at an oral hearing on 15 September 2020 that was conducted remotely, by telephone conference call, due to restrictions on social contact during the COVID-19 pandemic.

Relevant Law

17. Rule 28 of the Parole Board Rules 2019 provides that a party may apply to the Board for the case of a prisoner who is serving a sentence of a type that is specified by the



rule to be reconsidered on the grounds that a decision on the prisoner's suitability for release is irrational or procedurally unfair.

Irrationality

18. 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 review 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."

19. 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.

20. The application of this test in applications for reconsideration under rule 28 has been confirmed in previous decisions, such as **Preston [2019] PBRA 1**.

Procedural Unfairness

21. 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.

The reply on behalf of the Secretary of State

22. In the written representations dated 22 October 2020, it is stated that the Secretary of State has found no evidence of a report written by the Doctor in the dossier but instead found evidence within the COM report that the COM had contact with the Doctor, who works for the regime to help people recognise and deal with their problems, on 21 March 2019 in order to establish which interventions may be beneficial to the Applicant. It is stated that no evidence has been found that the Doctor completed or was required to complete a report or assessment that hasn't been included in the dossier. It is stated that it appears the Doctor's input was solely a conversation with the OM to establish what options for progression there were. Additionally, there is no information that the Doctor had made a mental health diagnosis.

23. It is also stated in the 22 October 2020 written representations that a Case Administrator at the prison where the Applicant is located had nothing on file to say



that the Applicant received the parole dossier. However, a file note recorded that contact had been made with the Applicant's Solicitors prior to the Oral Hearing and that no request was made to supply a copy to the Applicant.

Discussion

24. I begin by noting that the decision letter records that the Applicant's request was that the panel consider his suitability for open conditions only, as opposed to his suitability for release. Reconsideration under rule 28 of the 2019 Rules applies only to decisions made by the Board under rule 19(1)(a) or (b), 21(7) or 25(1) of those Rules, which are decisions on suitability for release. Recommendations as to suitability for a move to open conditions are outside of the scope of rule 28, so reconsideration could not be directed on the grounds that the Board has erred in its consideration of a request by the Secretary of State to advise on that matter. See also **Barclay [2019] PBRA 6**.
25. The referral by the Secretary of State was however for the Board to decide whether to direct the Applicant's release, as a primary matter, therefore I shall proceed to consider the Applicant's submissions but in relation to that matter only.
26. The Applicant's assertion that his hearing was unfair because his solicitor was not helpful and not interested in putting forward evidence that might have been helpful are not criticisms of the Board and are of no relevance to the fairness or rationality of the decision.
27. The Applicant asserts that the position he was given in the proceedings did not allow him to '*evidence*' (which I take to mean challenge) or provide '*mitigation*' in relation to the evidence given by witnesses who had spoken later in the proceedings. The Applicant does not suggest that he or his legal representative at the hearing requested and were not given the opportunity to challenge the later witnesses in the order of proceedings by questioning or by way of submissions; the decision letter and the Applicant's submissions for this application refer to written submissions by the Applicant's solicitors, so it cannot be said that he was denied any such opportunity at the appropriate time in the proceedings.
28. The Applicant asserts that he had had little contact with his POM, and that his COM had not adequately communicated her expectations to him. The degree of contact with the POM is however noted by the panel, which can therefore be assumed to have taken that into account when assessing the weight to be given to the POM's evidence. The Applicant does not explain how he came to identify the COM's expectations he refers to, whether from reports in the dossier or the COM's oral evidence. In any event, there is no suggestion that the Applicant or his legal representative requested and were not given the opportunity to challenge the POM about the alleged failure to make herself clear to the Applicant, or to make submissions on the relevance of any such alleged failure to the decision whether to



direct the Applicant's release, so it cannot be said that he was denied any such opportunity to do that at the appropriate time in the proceedings.

29. The Applicant asserts that he was not given the complete 567 pages of the dossier that is referred to in the decision letter. However, and similarly, there is no suggestion that the Applicant or his legal representative raised that as an issue at any time during the proceedings.

30. The Applicant asserts that a mental health diagnosis by the Doctor was unreliable, and unsupported by evidence of appropriate testing and as such should not have been accepted. The response on that point by the Secretary of State appears to me to be correct: there is no evidence that the Doctor made any such diagnosis. If the Applicant intended to refer to the assessment by the Clinician in 2013 that the Applicant was at the threshold indicative of psychopathy, that assessment did not feature in the panel's reasoning so any justified criticism of the methodology used by the Clinician would be immaterial to the panel's decision.

31. There is no basis for the Applicant's bare assertions that his evidence was disregarded by the panel, that the panel had made up their minds before the hearing, and that the short time between the hearing and his receipt of the decision letter indicates a lack of proper consideration of the evidence and of his case. The reasoning displayed in the decision letter is indicative of a fair and rational decision as to the necessity for the protection of the public that the Applicant should remain in confinement, on the assessment of the evidence referred to by the panel which included the Applicant's oral evidence.

Decision

32. The application for reconsideration is accordingly refused.

Timothy Lawrence
28 October 2020

