[2020] PBRA 176

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Application for Reconsideration by Bretton

Application

1. This is an application by Bretton (the Applicant) for reconsideration of a decision of the Parole Board dated 29 September 2020 made following an Oral Hearing held on 15 September 2020 which decided 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 dossier, the decision letter dated 29 September 2020 and the application for reconsideration itself dated 19 October 2020 from solicitors acting on behalf of the Applicant.

Background

4. The Applicant is serving an indeterminate sentence of Imprisonment for Public Protection (IPP) sentence for an offence of arson. This offence saw him start a fire in the car of his ex-partner. At the time there was a non-molestation order in place to protect the ex-partner and an anti-social behaviour order, both of which he was also convicted of breaching. He was aged 22 at the time of the offence and is now 34.

5. The Applicant's sentence was varied on appeal on 13 January 2010. His minimum tariff of 1 year 118 days expired on 14 November 2010.

6. The Applicant was released from custody in July 2017 but recalled within a month on suspicion of substance misuse. He was released for the second time on 6 February 2019 and recalled on 15 July 2019.

7. The Applicant's 2019 recall to custody followed him being arrested on suspicion of having assaulted his partner by strangulation.

Request for Reconsideration

8. The application for reconsideration is dated 19 October 2020.

9. The application was not made on the published Reconsideration Application form CPD 2, which contains guidance notes to help prospective applicants ensure their

reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints and, reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made.

10. The grounds for seeking a reconsideration are not entirely clearly defined into discreet grounds, but I consider they are as follows:

That the decision was irrational on the basis that:

(a) The panel took into account inaccurate information during the decision making process, with the decision not accurately reflecting the evidence before the panel or the reasons for the panel rejecting certain evidence; and
(b) That the Applicant had completed all risk reduction work.

That the decision was procedurally unfair on the basis that:

(c) The panel took into account inaccurate information during the decision making process.

Current parole review

11. The case was referred to the Parole Board in September 2019. The referral was for the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release. If after considering the case, the Board decided to direct the Applicant's release on licence, the referral invited the Board to make a recommendation in relation to any condition which it considered should be included in the licence.

12. If the Board did not decide to direct release on licence, the referral invited the Board to make a recommendation whether the Applicant was ready to be moved to open conditions, commenting on the degree of risk involved if this recommendation were to be followed.

13. The referral was considered by a Member Case Assessment panel on 7 November 2019 and 25 February 2020. The case was directed to oral hearing which was cancelled due to restrictions put in place owing to the COVID-19 pandemic. The case was referred to a further Member Case Assessment panel on 3 June 2020 and again directed to oral hearing.

14. The oral hearing was conducted remotely by video link on 15 September 2020 by a three member panel, which included a judicial member. Oral evidence was heard from the Offender Manager (OM), Offender Supervisor (OS), a prison Keyworker and the Applicant. The Applicant was legally represented during this hearing.

The Relevant Law

15. The panel correctly sets out in its decision letter dated 29 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

16. 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)). I am satisfied that this decision is eligible for reconsideration.

Irrationality

17. 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."

18. 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.

19. 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

20. 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.

21. 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

22. The Secretary of State has indicated in an email dated 28 October 2020 that he does not wish to make representations in response to this application for reconsideration.

Discussion

Ground (a)

23. The panel are said to have misrepresented the position of the three professional witnesses who gave evidence at the Oral Hearing by stating in the decision letter that "*they did not place weight upon the circumstances of recall because you were not charged or convicted of any new offence*." This is said to be an inaccuracy which in turn led to the panel placing much less weight than was appropriate on the expertise of the professionals, which ultimately led an irrational decision being made.

24. 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 OM, OS and Keyworker.

25. It is apparent from the dossier that the circumstances of recall were set out within the reports from both the OS and OM. The decision letter recorded that the Keyworker felt she could not comment on the allegation made by the ex-partner as it was not proven.

26. The guidance produced by the Board on the issue of its consideration of allegations, titled Guidance on Allegations dated March 2019 ("the Guidance") sets out that the panel is not required to make a finding of fact in relation to an allegation, but must assess its relevance and the weight to be attributed to it. The guidance that the Board is entitled to consider allegations where it is not in a position to make a full finding of fact was an aspect of the Guidance which was approved by the Divisional Court in **Morris, R (on the Application of) v The Parole Board & Anor [2020] EWHC 711 (Admin)**.

27. The decision letter should set out the panel's analysis and conclusions and any impact this has upon the parole decision. The panel did so clearly within their letter.

28. The panel's analysis of the recall incident in the decision letter was that the events presented a considerable threat to life. They noted that the Applicant denied assault and claimed he had strangled his partner during a sex game. They considered that even if the sexual activity had been consensual that it was a high risk situation and that the Applicant should have recognised this. They concluded that the risk of life-

altering injury or death to the partner was very high and that the contemporaneous evidence suggested the Applicant had acted aggressively and had used physical force against her rather than engaging in consensual activity.

29. 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.

30. 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 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.

31. The panel was entitled to make its own mind up as to the recall allegations and the effect that they considered it had upon their assessment of risk. There was evidence to support their conclusions in the dossier and it is plain from the decision letter that they considered the contemporaneous evidence as well as the evidence of the professionals and the Applicant. The letter recorded that the OM, in common with other witnesses agreed that relationships, substance misuse and emotional wellbeing related to risk.

32. 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.

33. 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**.

34. The panel accepted that the assessments made by others generally gave a good reflection of day-to-day risk and that the Applicant would be classed as a high risk service user if re-released. In carrying out its own assessment of risk, as it is required to do, the panel clearly recorded its concerns about "*the considerable*

possibility of a sudden increase to very high or imminent risk within an intimate relationship as seen in the recall. The panel considered that, whatever the reasons for your behaviour (putting your hands around your partner's neck) the actual risk to life and limb would be very high in that moment."

35. There is no evidence in the decision letter, when it is viewed as a whole, that the panel placed less weight than was appropriate on the expertise of the professionals. On the contrary, they considered the opinions and recommendations and carried out their own assessment of risk. It is my view that the panel reached a considered and well-reasoned decision and I do not consider it is appropriate to interfere with it. I find there is nothing in this ground.

Ground (b)

36. As set out at paragraph 31 above, using their expertise the panel must consider all of the evidence before coming to their decision. The panel noted in its decision letter that the Applicant had completed all risk reduction work. However, the completion of all risk reduction work does not necessarily equate to the Applicant meeting the legal test for release and I find therefore there is nothing in this ground.

Ground (c)

37. The Applicant has not set out in the application how there is said to have been any procedural impropriety in the proceedings. Although described as a separate ground, the application merely repeats those matters set out in support of ground (a) which relate to the actual decision, not how the decision was made. I am not therefore satisfied that any potential procedural impropriety has been identified, nor that any has been established. Accordingly, there is nothing in this ground.

Decision

38. 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.

Angharad Davies
19 November 2020