

[2020] PBRA 194

Application for Reconsideration by Ham

Application

1. This is an application by Ham (the Applicant) for reconsideration of a decision 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). The Decision is dated 26 November 2020.
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, comprising a dossier of 525 numbered pages that includes a copy the Decision, and written submissions for the Applicant by his solicitors dated 30 November 2020, requesting reconsideration.

Background

4. In November 2000, the Applicant was sentenced to life imprisonment for murder, with a minimum tariff of 15 years that expired in October 2014. The Applicant was aged 32 when he received the sentence in November 2000, and he is now aged 53.

Request for Reconsideration

5. The application for reconsideration is dated 30 November 2020.
6. The grounds for seeking a reconsideration are that the decision is irrational.

Current parole review

7. 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 said to be the fourth such referral of the Applicant's case by the Secretary of State during the sentence received by the Applicant in November 2000.
8. The Decision was made by a panel of the Board that considered the Applicant's case at an oral hearing on 16 November 2020 (the Panel). The Panel was comprised of four Members of the Board, two of whom were Psychologist Members. The hearing



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was conducted remotely, by video link, due to restrictions on social contact during the COVID-19 pandemic.

The Relevant Law

9. 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

10. 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."

11. 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.
12. 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

13. 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.

The reply on behalf of the Secretary of State

14. On 10 December 2020, the Board was informed by the Public Protection Casework Section, on behalf of the Secretary of State, that no representations were offered in response to the Applicant's reconsideration application.

Discussion

15. The Applicant's written submissions challenge the Panel's reasons for rejecting what is referred to in the submissions as '*a unanimous view presented in evidence that [the Applicant] met the test for open conditions.*'

16. However, 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**.
17. Insofar as the submissions could be construed as challenging the Panel's reasoning in relation to the decision on suitability for release, the Decision letter correctly describes the test that the Board needed to apply when deciding whether to direct the Applicant's release. The Decision letter provides cogent reasons for the Panel's assessment that a longer period of consolidation was required, in relation to the Applicant's development of the ability to manage and control his emotions in particular, before he could safely be located in a less structured and supported environment. The Decision letter refers to reports that the Applicant coped well with his emotions after the death of his brother in September 2020, with the support of peers and professionals including accessing drop-in sessions with the psychology department in his location within a progressive regime where he enjoyed the benefit of Enhanced Behaviour Monitoring (EBM). However, the Decision letter states that the Panel considered that the progress that the Applicant's management of his emotions could at best be described as short-lived, given that as recently as May 2020 the Applicant had reported having swallowed a large quantity of prescribed medication, requiring a visit to hospital, and had made threats of self-harm on a separate occasion. The panel considered that a longer period of stability and emotional management was required.
18. The reasoning displayed in the Decision letter, thus described, is revealing of a fair and rational consideration of the correct test of 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.

Decision

19. For the reasons I have given, the Decision was irrational and the application for reconsideration is accordingly refused.

Timothy Lawrence
17 December 2020