[2020] PBRA 2

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Application for Reconsideration by Proctor

Application

1. This is an application by Proctor (the Applicant) for reconsideration of a decision of a Parole Board panel given in a letter dated 23 November 2019 (the decision letter) following an oral hearing on 14 November 2019. The decision was not to direct release.

Background

2. The Applicant is serving an extended prison sentence of 10 years (5 years custodial and 5 years licence period) imposed in August 2012 for two offences of arson endangering life and two breaches of a restraining order. His sentence expiry date is 25 March 2022.

Request for Reconsideration

3. The application for reconsideration was dated 3 December 2019 and was lodged on 12 December 2019. The application stated that it enclosed a letter from the Applicant's current Offender Supervisor. This addendum was not received by the Parole Board. The Board requested the addendum from the Applicant's Solicitor in an email on 12 December 2019 but received no response.

4. The grounds on which the application was made was that the evidence of two of the witnesses before the panel hearing, as recorded in the decision letter, was not that as recalled by one of the witnesses or as noted by the Applicant's Solicitor. What is therefore sought is a fresh hearing on the basis that "*not to reconvene another hearing with out* [sic] *clarification of this evidence would be both irrational and unfair upon*" the Applicant. This seems a potential attack upon the decision made at this stage as opposed to the oral hearing stage and thus a confusion of the grounds upon which an application for reconsideration can be made. I am prepared however to treat it as an application on the basis that the panel either disregarded or incorrectly noted the evidence of two witnesses which had in fact been given and therefore produced, in substance, an irrational decision.

5. The way in which this evidence was said to be mistaken was summarised in the application as follows:

> "*In short* [the Applicant's Offender Supervisor] *has committed to a [sic] email his recollection of the hearing and his evidence along with the*

evidence of [the Senior Probation Officer]*. In particular* [the Senior Probation Officer's] *change of view that a period in the community on licence would be beneficial*."

6. No further details of how the "clarified" evidence would or should have produced a different result or differed from that reflected in the decision letter were set out or relied on in the application, save to refer to an email and letter from the Applicant's Offender Supervisor. The basis of the application at its highest therefore appears to be as summarised above.

7. The Secretary of State offered no representations in response to the application for reconsideration.

Current parole review

8. The Oral Hearing Panel, consisting of an independent Chair and a Judicial member, had a dossier of 310 pages. In addition, they heard evidence from the Applicant's previous Offender Supervisor, as above-mentioned, his current Offender Supervisor, a Prison Psychologist, and also above-mentioned, a Senior Probation Officer, who stood in for the Applicant's Offender Manager. The panel also heard evidence from the Applicant and submissions from the Applicant's Solicitor. The application was for release.

The Relevant Law

9. Rule 25 (decision by a panel at an oral hearing) and Rule 28 (reconsideration of decisions) of the Parole Board Rules 2019 apply to this case.

10. Rule 28(1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case.

11. In **R (on the application of 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."*

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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

12. Procedural unfairness essentially means there must have been some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result. Obvious examples are failure to take into account matters which the panel ought to have taken into account or taking into account matters they ought not.

13. This does not mean that every single minor detail if omitted or mentioned (as the case may be) will render the proceedings procedurally unfair. It is a matter of degree. It must be something which if mentioned, or if omitted (again, as the case may be), is so significant as to render the decision flawed or manifestly unfair leading effectively to an irrational result.

Discussion

14. Although the Applicant's Solicitor refers to the Senior Probation Officer's change of view that a period in the community on licence would be beneficial, it must be remembered that the task of the Parole Board is not to direct release unless satisfied that it is no longer necessary for the protection of the public that the Applicant remains confined.

15. In reaching its decision, the panel will give due consideration to all the evidence before them, including, as they did in this case, the fact that the Applicant had twice been previously released on licence and twice returned to custody for breaching licence conditions.

16. In reaching their decision not to recommend release, the panel pointed out the assessment of the Applicant's risk of causing serious harm to the public and to known adults as high and that to children as medium. What particularly concerned the panel was what they regarded as a "*significant*" history of a clear pattern of involvement in incidents of domestic violence over a number of years. They accepted the evidence of the Prison Psychologist that the Applicant should, before release, complete core risk reduction work aimed at increasing insight, and addressing issues of inter-personal violence and substance misuse.

17. The panel also noted that since his last recall the Applicant's conduct in prison had been mixed but since July, in the run up to the parole hearing, his behaviour had dramatically improved for which the Applicant deserved credit.

18. The Applicant's current Offender Supervisor's evidence was recorded in the decision letter as not currently supporting release. He agreed with the recommendations of the Prison Psychologist that the Applicant should complete outstanding core risk reduction work before release.

19. The Senior Probation Officer is recorded as having agreed for the need to do offending behaviour work to treat the risk of domestic abuse. The decision letter also stated:

> "… [The Senior Probation Officer] *also said that* [the Applicant] *should have a suitable period on licence prior to* [the] *sentence expiry date.* [The Senior Probation Officer] *also said that he believes that your risk is not*

manageable in the community without you undertaking additional work but if the panel were minded to direct your release you should undertake [a training course addressing relationships and the handling of emotions] *in the community*".

20. This does not seem to me to be a misunderstanding of the expression of a view by the Senior Probation Officer that a period in the community on licence would be beneficial. No doubt it would, but the Senior Probation Officer was also recommending that core risk reduction work should be undertaken as was the Applicant's current Offender Supervisor.

21. I can thus discern no evidence from either of these two witnesses, as recorded, that needs any clarification. If any doubt about the evidence arose at the hearing, then there would have been an opportunity for the Applicant to have matters clarified through cross-examination or his own evidence. It would be entirely up to the panel to decide which evidence to accept as reliable on the basis of having seen and heard the witnesses and read the material in the dossier. I see no reason for thinking it would be irrational or unfair to the Applicant not to reconvene another hearing. There was ample evidence upon which the panel could reach the decision they in fact did.

Decision

22. For the reasons I have given, I therefore do not consider that the decision was either irrational or procedurally unfair and accordingly the application for reconsideration is refused.

HH Roger Kaye QC
3 January 2020