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[2020] PBRA 205

Application for Reconsideration by Henessey

Application

1. This is an application by Henessey (the Applicant) for reconsideration of a decision of a four-member panel, dated 1 December 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 475 pages (including the decision letter) and the representations for reconsideration.

Background

4. The Applicant was sentenced to an extended sentence of imprisonment of 14 years on 7 October 2013 for sexual offences committed against children. The Parole Eligibility Date was 11 June 2018 and the Conditional Release Date is 10 August 2021.

5. He has been in custody since being sentenced. He was 44 years old at the time of sentencing and is now 51 years old.

Request for Reconsideration

6. The application for reconsideration is dated 18 December 2020.

7. There are a number of different grounds put forward, under both the headings of irrationality and procedural unfairness.

8. These can be broken down as follows:

   (a) The Panel Chair approved the attendance of a prison psychologist without waiting for representations from the Applicant (procedural unfairness).

(b) The Panel failed to allow sufficient time for the Applicant's representative to join the pre-hearing reading of the (VPS) Victim Personal Statement (procedural unfairness).

(c) The Panel failed to consult with the Applicant's representative over the order of witnesses (procedural unfairness).

(d) By the time that the Applicant gave his evidence, the hearing had been going for more than 5 hours at which point the Applicant was tired and unable to give the best account of himself (procedural unfairness).

(e) The hearing lasted for approximately seven and a half hours and the Panel Chair did not consider of his/her own volition to request written rather than oral representations (procedural unfairness).

(f) The decision letter wrongly states that the Applicant would have a further review of his detention prior to being released automatically, which may have influenced the decision not to direct release (procedural unfairness).

(g) The decision letter wrongly refers to the specialist Parole Board member being a psychologist, rather than a psychiatrist, which is unfair given the extensive amount of psychological evidence.

(h) Even though the decision letter states that it would 'concentrate' on the period since the last review, there are a large number of references to events prior to then (irrationality).

(i) There was not sufficient evidence for the conclusion that the reason why the Applicant wished to attend the reading of the VPS was due to a continuing sexual interest in the victim (irrationality).

(j) The decision of the Panel that the diagnosis of ASD was a further risk factor is an irrational one (irrationality).

(k) The decision letter refers to the specialist Parole Board member making an assessment, which not something that they could properly do (irrationality/procedural unfairness).

(l) The Panel erred in assessing that there was a current risk to children (irrationality).

(m) The Panel failed to give sufficient weight to the opinion of the independent psychologist (irrationality).

(n) The Panel failed to mention the Applicant's completion of a particular piece of offence related work (irrationality).

(o) The decision letter did not state that the Applicant could seek reconsideration of the decision, neither was this stated at the hearing (procedural unfairness).

Current parole review

9. The Secretary of State originally referred the Applicant's case to the Parole Board in April 2019.

10. An oral hearing was directed in November 2019, to be heard at a face to face hearing, and was listed on 30 June 2020.

11. However, on 21 May 2020 in light of the Covid-19 pandemic, the Panel Chair indicated that the case would proceed by way of telephone hearing and invited representations from the Applicant and the Secretary of State.

12. The Applicant responded, raising a number of reasons as to why the case should not proceed as planned, including representations that a telephone hearing was not appropriate given the complexity of the case.

13. These were accepted and, as a result, the case was adjourned on 11 June 2020.

14. The hearing proceeded on 19 November 2020. With the agreement of the Applicant, this proceeded by video link

15. The Panel heard oral evidence from the Applicant, as well as his Offender Supervisor (the official supervising his case in custody), Offender Manager (community probation officer). In addition, two psychologists (one instructed on the direction of the Parole Board – the 'prison psychologist' - and one instructed by the Applicant – the 'independent psychologist') had prepared risk assessments and gave evidence to speak to them.

16. Lastly, there was an ASD assessment prepared in January 2020 and, in the circumstances considered in more detail below, the author attended the hearing as a witness.

17. At the hearing both the prison and community probation officers, and the prison psychologist were recommending that the Applicant remain in custody, whilst the independent psychologist recommended release. The author of the ASD assessment (quite properly) did not make a recommendation.

18. The Panel noted the recommendations and concluded that the evidence of the prison psychologist was to be preferred to the independent psychologist. It concluded that the Applicant still had a sexual interest in children (including the victim of the original offence) and that there was still core risk reduction work outstanding that needed to be completed before the Applicant could be safely released.

The Relevant Law

19. The Panel correctly sets out in its decision letter dated 1 December 2020 the test for release.

Parole Board Rules 2019

20. 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.

21. 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.

Procedural unfairness

22. 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.

23. 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 properly informed of the case against them;
    (c) they were prevented from putting their case properly; and/or
    (d) the panel was not impartial.

    The overriding objective is to ensure that the Applicant's case was dealt with justly

Irrationality

24. 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."

25. 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.

26. 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

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

Discussion

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

Ground (a):

29. The psychologist had prepared an ASD assessment, at the direction of the Parole Board, in January 2020.

30. An application was made by PPCS (on behalf of the Offender Management Unit) for him to attend as a witness. This application was made on 11 November 2020, so shortly before the hearing.

31. The Panel Chair responded the next day, granting the application.

32. It is not clear why it could be considered to be unfair to have directed the psychologist to attend as a witness or, given that he was the author of a report directed by the Parole Board, what argument could be made to say that he should not attend.

33. In those circumstances I do not consider that this could be procedurally unfair.

Ground (b):

34. Before the hearing started the victim attended to read the VPS. The Applicant was not due to attend but his representative was. However, the Applicant's representative had technical difficulties and could not get access to the hearing (which was conducted in a different video room to the main hearing).

35. After '*a few minutes of waiting*' the Panel Chair continued with hearing the VPS without the Applicant's lawyer. The decision letter says the wait was ten minutes before the Panel decided to proceed. The Respondent has not commented either way on that. It does not seem to me necessary to resolve whether there is a difference between 'a few' and 'ten' as it could make no difference to the outcome of the application.

36. It is the experience of all people who have undertaken remote hearings since the Covid-19 pandemic started that technological issues are an unfortunate feature. When faced with that, the Panel will often have to make difficult decisions.

37. It is important to remember what the role of the VPS, and the reading of it, is[1]. The victims will not be giving evidence as such and cannot be cross-examined on anything in the statement. The full text of the VPS is (in this case, as in most) included in the dossier and any issues relating to it can be raised in advance (none were in this case). It also "does not directly link to the panel's decision whether to direct the prisoner's release on licence".

[1] *See, as background, How a victim personal statement is used by the Parole Board (publishing.service.gov.uk) (Parole Board, 2018)*

38. It is for that reason that prisoners are routinely not in attendance when the VPS is read, without there being any question of there being a breach of their Article 6 rights.

39. Although this was the only case listed on the day, it was a lengthy one (several of the other complaints relate to this). This would have inevitably been a stressful time for the victims, with a further delay to resolve the technological issues only aggravating that.

40. In those circumstances, and remembering that the victims were not giving evidence that bore on the test for release, the Panel were entitled to consider that once the technological issues could not be quickly resolved, it was appropriate to proceed with hearing the VPS being read without the Applicant's representative.

41. The grounds raise the alleged disparity between that, and the fact that when there were further technical issues during the hearing, on that occasion the Panel Chair could not connect and the case was adjourned whilst that was resolved.

42. I do not consider that there is a valid comparison for the reasons set out above between the reading of the VPS and the 'hearing proper' (as it was described by the Panel).

43. Had the representative been unable to connect during the hearing, there would have been no question of continuing the hearing without him. However, in these circumstances, the decision of the Panel to do so was not unfair.

Grounds (c) and (d)

44. It is appropriate to take these two grounds together.

45. Firstly, there is a complaint that the Applicant was not sufficiently consulted on the order of the witnesses. The simple answer to this is that there is no requirement to do so (see r24(1)(a) Parole Board Rules 2019 which states "*At the beginning of the oral hearing the panel chair must ... explain the order of proceedings which the panel plans to adopt*".)

46. The other aspect is a complaint that the Applicant gave evidence at the end of the day where he was 'tired and not at his best' and would have had his anxieties increased whilst waiting to give his account.

47. There are many reasons why a prisoner is often not the first witness, and it is frequently the case that the Panel will wish to hear in a particular order (for example, so as to allow the prisoner to hear the evidence of a psychologist before speaking, or for the psychologist to hear the evidence of the prisoner before giving their evidence).

48. Further, there is no suggestion in the grounds for review that the Applicant made an application to vary the proposed order, or that the issue of his tiredness was

raised at the time. Although this is not a pre-requisite to raising it now, this is a good indication that it was not a significant issue.

49. The Applicant was represented and the Panel is entitled to proceed on the basis that the Applicant's representative would be astute enough to safeguard his interests and would raise the issue if there were any concerns about the Applicant's ability to properly engage in the hearing.

50. In addition, written submissions were made after the hearing (dated 20 November 2020) where this was not raised. Nor was there any suggestion that the Applicant had been disadvantaged in the way that the hearing was conducted.

Ground (e)

51. It is not clear why the fact that the Panel Chair did not raise of his/her own volition the possibility of written submissions being made could go to the fairness of the hearing.

52. In any event, it appears that the Applicant requested that this happen, and that request was granted. He then made representations in writing after the hearing. There is nothing in this point.

Ground (f)

53. The Panel does not explicitly state that there will be another review. Rather, paragraph 9 ('next steps to assist future panels') is completed. That is not the same thing. The question of whether there would be another review is a matter for the Secretary of State, and not within the control of the Parole Board.

54. In any event, there is no suggestion that the Panel placed any weight on the possibility of there being another review, which would be an irrelevant matter.

55. The Panel set out the correct test and identifies the correct issues; namely the current risk that the Applicant presents, and whether that could be managed in the community.

56. For that reason, there is nothing in this ground.

Ground (g)

57. I have not been given the composition of the Panel, but the Secretary of State has not disputed that there was a psychiatrist specialist member.

58. I note that when the Panel Chair adjourned the case s/he stated that there was a need for a specialist psychiatrist (not psychologist) member.

59. It would appear that the reference to psychologist in the decision letter is therefore a misprint by the Panel Chair (who would have drafted the letter).

60. It must be remembered that this was a decision of the Panel as a whole. As part of that, all panellists, including the psychiatrist specialist member, would have read and had the opportunity to comment on the letter. It could not realistically be suggested that the psychiatrist themselves was not aware of his/her speciality either during the hearing or when considering the letter. It appears that this was a simple mistake that passed unnoticed.

61. I do not accept that this can be taken any further than being a simple typo that introduces no suspicion of unfairness.

Ground (h)

62. Under section 5 of the decision letter (the heading being 'Evidence of change since last review and progress in custody') the Panel states that it will 'concentrate on' an assessment of events since the last Parole Board review in 2018.

63. Although any Panel will focus on events since the last review, it is inevitable that consideration will have to be given to events prior to that in order that a full assessment can be made.

64. In light of the fact that whether the Applicant had an ongoing sexual interest in children was a significant issue, it was clearly necessary for the Panel to refer to the matters that were referred to in section 5.

65. The Panel analyses this material in section 8 of the decision letter. It is notable that, when referring to the matters that the Applicant raises in his grounds, these are referred to as being 'historic examples' which shows that the Panel were aware of when these matters had been logged.

66. Further, it is not correct to say that these was all old matters. For example, there was an adjudication from March 2020 for possessing a photograph of the victim.

67. The Applicant's grounds put forward arguments in relation to that, and to the other matters, as to why it is that this should not count against him. This is effectively an attempt to re-argue the case which is not the purpose of the reconsideration mechanism (which is a review rather than a re-hearing on the papers).

68. The Panel then go on to give reasons why the matters set out was indicative of a current concern. This was a conclusion that was open to them to reach, and they gave reasons as to why that was. It cannot be said to have been an irrational decision.

Ground (i)

69. The Panel concluded that the only inference to be drawn from the Applicant's wish to attend the reading of the VPS was a desire to see the victim.

70. The grounds submit that this was irrational. The Applicant's evidence to the Panel was that he wanted to hear the victim explain how she feels. That would appear to

be a weak explanation and the conclusion drawn by the Panel to reject that was one reasonably open to the Panel.

Ground (j)

71. It is said that the author of the ASD assessment made it clear in his report and the oral evidence that ASD is not related to risk of serious harm.

72. No evidence has been put forward to support that that was what was said in oral evidence. In the report, the author states that he would be *'happy to liaise with the author of the risk assessment or other staff supporting [the Applicant] to discuss how the issues identified in this assessment may relate to risk"* which does not appear to support the arguments put forward by the Applicant.

73. The Panel make it clear that ASD was one factor to be considered amongst others. The prison psychologist was of the opinion that ASD introduced new elements of risk. This gave a clear evidential foundation for the conclusion that further work around that was required. This aspect of the decision could not be said to be irrational.

Ground (k)

74. It is correct to say that the decision letter does make such a reference. This is in section 5 (that summarises the evidence).

75. There is one reference to that person, and it follows shortly after a summary of the evidence of the author of the ASD assessment.

76. It is clear from the context (specifically that the question that was being addressed was whether work on ASD was core work or not) that this is a typographical error in the letter and that the Panel was setting out and contrasting the differences between the two witnesses referred to, rather than between a witness and a Panel member completing their own assessment (which would not, as all the Panellists would have been aware, been permissible).

Ground (l)

77. This ground rehearses various arguments as to the weight to be placed on the assessment of the prison psychologist.

78. As noted above, the purpose of a reconsideration application is not to rehear the evidence. It is not open to me to re-assess the case, the sole question is whether there was a legal error.

79. Here, the Panel gave reasons why they accepted the evidence of the prison psychologist. There was evidence (for example the adjudication in March 2020) which could be taken to be indicative of a continuing interest in the victim.

80. In those circumstances, the Panel's conclusion could not be said to be irrational.

Ground (m)

81. As is often the case, the Panel was faced with two psychologists who gave differing opinions. The Panel's job was to assess both and reach a conclusion as to which one they preferred. It is a matter for them which they accept (in whole or in part), provided that sufficient reasons are given.

82. In this case, the Panel set out clear reasons why they preferred the conclusions of the prison psychologist. That was a conclusion open to them.

Ground (n)

83. The decision letter is, of necessity, a summary of the evidence in the dossier (here running to nearly 500 pages) and at the hearing (which, in this case, is said to have been up to 7 hours).

84. Inevitably there will be matters left out of that summary. In this case the programme work referred to is not an accredited piece of work and, significantly, features only briefly in the representations after the hearing.

85. Although there may be cases where the absence of a reference to a piece of work completed rendered a decision irrational, in the circumstances as set out above this is not one of them.

Ground (o)

86. No evidence in support of the assertion that the Panel Chair did not discuss the possibility of reconsideration at the hearing, but I will proceed on the basis that that is the case.

87. The decision letter is produced from a template, where there is a box to tick if the case is one to which the reconsideration mechanism applied. It is not known if this was not ticked in error, or if there was some other technical glitch.

88. It is hard to see how either of those points could make the hearing unfair. It may be if an unrepresented prisoner did not know that he could apply to reconsider, but the Applicant was represented in this case.

89. Further, it is clear that the Applicant's representative was well aware of the rules around reconsideration, as can be seen by the fact that an in-time application was made.

90. In those circumstances there was no unfairness.

Conclusion

91. My role 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.

92. I consider that it is clear that the decision that the Panel made was one that was open to it, and there is nothing to suggest that it was conducted in an unfair manner.

93. 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

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

95. Accordingly the application for reconsideration is refused.

Daniel Bunting
16 January 2021