[2020] PBRA 36

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Application for reconsideration by Ricketts

Application

1. This is an application by Ricketts (the Applicant) for reconsideration of a decision of an oral hearing panel dated 3 February 2020 not to direct his release or recommend open conditions.

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 decision letter, the dossier, the application for reconsideration and an email from the Offender Supervisor.

Background

4. The Applicant was sentenced to imprisonment for public protection on 17 December 2009 following conviction after trial for kidnapping and robbery. The Applicant denies the offences. A minimum term of eight years (less time spent on remand) was imposed. The Court of Appeal (Criminal Division) varied the minimum term to six years and six months on 24 June 2010.

5. His tariff expired on 26 November 2014.

Request for reconsideration

6. The application for reconsideration is dated 18 February 2020 and has been submitted by solicitors acting for the Applicant.

7. The grounds for seeking a reconsideration are as follows:

   i. the panel made irrational findings on matters that were material to the outcome;

   ii. the panel committed a procedural irregularity capable of making a difference to the outcome or the fairness of proceedings; and

iii. the panel placed an irrational amount of weight on past psychological assessments and did not explain its reasons for doing so in the decision letter.

8. The grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current parole review

9. The Applicant's case was referred to the Parole Board by the Secretary of State in August 2018 to consider whether or not it would be appropriate to direct his release and, if release was not directed, to advise the Secretary of State on whether he should be transferred to open conditions.

10. On 28 January 2019, his case was directed to oral hearing by a single member MCA panel. An up-to-date psychological risk assessment (PRA) was directed as the two most recent psychology reports available (by two separate report writers) were dated June 2015 and December 2015. Updated reports were also directed from Offender Manager and Offender Supervisor in the light of the new PRA.

11. The MCA panel also noted that the Applicant's Offender Supervisor had begun 1:1 work with him and the Applicant was reportedly engaging well.

12. On 29 March 2019, the direction for the up-to-date PRA was revoked by a Duty Member. As the Applicant was undertaking 1:1 work focussed around motivation and risk reduction with the aim of progressing into further work, prison psychology suggested that further progression was made with that treatment pathway prior to a psychological assessment being completed.

13. On 14 May 2019, another Duty Member reinstated the direction for the up-to-date PRA. The Applicant's Offender Supervisor had reported that she had come to the end of the 1:1 work. They said they had made no further progress in securing his co-operation with a referral to a regime designed and supported by psychologists to help people recognise and deal with their problems. They said he had co-operated with the 1:1 work and often gave desirable pro-social answers, but 'evidenced continued traits of paranoia and also resumed his attempts to convince [them] of his innocence and miscarriage of justice in his case'.

14. An assessment of autistic spectrum disorder (ASD) was also directed on the suggestion of the Offender Supervisor. This was completed by an independent psychologist in August 2019, who concluded that the Applicant did not have ASD. This report was not a risk assessment.

15. The up-to-date PRA was completed on 24 October 2019 by the prison psychologist. It recommended that the Applicant should be given the opportunity to progress to open conditions.

16. The case proceeded to an oral hearing on 22 January 2020. A panel of the Parole Board, comprising two independent members and a psychologist member heard

the case. It took oral evidence from the Applicant, his Offender Supervisor and Offender Manager and the prison psychologist.

17. The Offender Supervisor's written report (30 December 2019) recommended progression to open conditions. This was a change in recommendation from their previous report (15 November 2018) which did not recommend release or progression. They noted the recommendation of the PRA, updated assessments, the Applicant's conduct since his last review and the supervision sessions they had undertaken with him. They were not supporting release.

18. The Offender Manager's written report (29 November 2019) also supported progression to open conditions, based upon the recommendation of the PRA, current satisfactory custodial behaviour, the fact there was no current risk reduction work available due to the Applicant maintaining his innocence, and that risk was not considered to be imminent. They were not supporting release.

The relevant law

19. The panel correctly sets out in its decision letter dated 3 February 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

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. 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)).

21. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

22. 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.*

23. 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.

24. 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

25. 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.

26. 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 an applicant's case was dealt with justly.

The reply on behalf of the Secretary of State

27. The Secretary of State has submitted no representations in response to this application.

Discussion

28. The application refers to the panel's decision not to direct release or recommend open conditions. It is only the decision not to release that is amenable to reconsideration and this discussion will only consider that aspect of the panel's decision-making. I will deal with each ground in the application separately.

Ground i: Irrational findings on matters that were material to the outcome

29. It is submitted that the decision letter contains a significant number of inaccuracies which, taken as a whole, mean the decision is based on flawed and irrational findings that were material to the outcome of the review.

30. In support of this, the application contains an email from the Applicant's Offender Supervisor expressing concern in relation to the panel's interpretation of their evidence.

31. It is a well-established ground for judicial review that the tribunal has taken into account information which it is accepted is inaccurate. The grounds for reconsideration mirror those for judicial review and therefore it is also a ground for reconsideration. I accept that it is capable of being both irrational and procedurally unfair to take into account inaccurate factual information in making a decision. It is important that decisions are not only fair but are also seen to be made according to a fair procedure. If incorrect information is included in the decision letter, the fairness of the procedure is called into question.

32. However, it will not invariably follow that if there is an inaccurate fact or facts in the decision letter that an application for reconsideration will be granted. Reconsideration, like judicial review, is a discretionary remedy and, if I am satisfied that the incorrect fact did not affect the decision then the application is likely to be refused.

33. While there are aspects of the decision letter and the panel's interpretation of oral evidence that are disputed, I do not find that, taken individually or as a whole, the areas of dispute materially affected the decision not to release the Applicant, particularly given that none of the professional witnesses were supporting release. This ground therefore fails.

Ground ii(a): Account of index offence

34. The first submission advanced under this ground is that the panel did not question the Applicant about the index offence during the course of the oral hearing but went on to make findings about his account of the index offence on the basis of documentary evidence within the dossier.

35. The forensic approach of a parole panel will be unique to its own constitution. The panel starts from an informed position – a question need not be asked if a point covered in the dossier does not require amplification. The Applicant was legally represented throughout. If the Applicant's representative thought anything important had been overlooked in the panel's questioning, they had the opportunity to remedy this by asking more questions of the Applicant. The Applicant was not prevented from putting his case properly. Accordingly, this ground also fails.

Ground ii(b): Failing to adjourn

36. The second submission advanced under this ground is that the panel did not adjourn to obtain further information about the risk management plan and protective factors. The decision documents the panel's view that release should not be discounted on grounds of an inadequate risk management plan, but, in the event of the possibility of release, an adjournment would be appropriate.

37. The panel did not adjourn. It found that the Applicant did not meet the test for release. The decision did, however, note that the panel did not find the current plan effective as it was undeveloped.

38. The risk management plan is one of many elements to be considered when a panel is contemplating release. The panel was entitled to find that its risk assessment was such that there was no possibility of direct release. 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. If the panel considered that a fully-formed risk management plan would not have made a difference to its decision to release, then it did not have to adjourn. Accordingly, this ground also fails.

Ground iii: Undue weight given to past psychological assessments

39. Finally, it is submitted that the panel did not adequately provide reasons why it preferred the recommendations of the psychological assessments from 2015 to those of the 2019 PRA.

40. The June 2015 report did not recommend release or progression to open conditions. The December 2015 report was confined only to an examination of certain aspects of the Applicant's personality and therefore offered no view or recommendation on either release or progression. The 2019 PRA did not recommend release, but it did support a move to open conditions.

41. Where there is a conflict of opinion, it was plainly a matter for the panel to determine which opinion they preferred, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above.

42. 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, following **R (Wells) v Parole Board [2019] EWHC 2710**.

43. Insofar as release is concerned, the panel did not make a contrary decision and there was no conflict of opinion. None of the professional witnesses were supporting release and the panel decided not to release the Applicant. The panel could therefore in no way be considered to have acted irrationally in its decision not to grant release. This ground also fails.

Decision

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

Stefan Fafinski
14 March 2020