

[2020] PBRA 46

Application for Reconsideration by GORDON

Application

1. This is an application by Gordon ("the Applicant") for reconsideration of a decision by a Panel of the Parole Board dated 31 January 2020 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 comprising 341 pages, the Decision Letter dated 31 January 2020 and the Reconsideration Application. The Secretary of State did not make any formal representations in response to the application.

Background

4. The Applicant is serving a Mandatory Life Sentence for Murder, with a minimum term of 17 years which expired on 3 October 2019.
5. His first Parole Board review took place in January 2019, following which he was transferred to Open conditions in March 2019. He remained there until 11 December 2019, when he was returned to closed conditions. This was as a result of adverse developments following his Oral Hearing which had taken place on 9 December 2019.

Request for Reconsideration

6. The application for reconsideration is dated 19 February 2020 and has been submitted by the Applicant's solicitors.
7. It is made on the basis that the Panel's decision not to release the Applicant was procedurally unfair as it was informed by material (in particular, updated reports from a newly appointed Offender Supervisor and Offender Manager) submitted to the panel after the oral hearing, and that material had not been disclosed to the Applicant.

The Relevant Law

8. Under Rule 28(1) of the 2019 Rules the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release. 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)).
9. Rule 28(1) of the 2019 Rules provides that one of the grounds for reconsideration is procedural unfairness. Procedural unfairness means that there has been some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and, therefore, producing a manifestly unfair, flawed or unjust result.
10. 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.
11. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Current parole review

12. The Applicant's Oral Hearing took place at the prison on 9 December 2019 before a panel of the Parole Board ("the Panel"). Oral evidence was given by the previous Offender Supervisor ("OS1"), the previous Offender Manager ("OM1") and the Applicant. Both OS1 and OM1 recommended the Applicant's release.
13. The following day, 10 December 2019, the prison received the laboratory results of a drug sample taken from the Applicant on 4 December 2019, when he was staying at Designated Accommodation during a period of temporary release. The result was positive for an illegal drug. As a result, on 11 December 2019 the Applicant was returned to closed conditions to undertake and await a full Mandatory Drug Test.
14. The Panel was notified of this adverse development and received a form, dated 12 December 2019 and completed by OS1, which offered his opinion that the positive illegal drug test did not impact upon risk or his recommendation for release.



15. On 21 December 2019, the Panel issued further Directions, which adjourned their decision pending receipt of further information, namely:
 - (a) a brief update from the current Offender Supervisor ("OS2") in the Closed prison to which the Applicant had been transferred;
 - (b) an updated risk assessment and recommendation from the current Offender Manager ("OM2"); and
 - (c) any representations from or on behalf of the Applicant.
16. In a Decision Letter dated 31 January 2020, the Panel concluded that the Applicant did not meet the test for release but recommended that he be transferred back to open conditions.
17. The Panel by this time had available to it all the documentary evidence which was before it at the Oral Hearing on 9 December 2019, all of which had been disclosed to the Applicant. It also had additional material, as follows:
 - (a) the report referred to above in paragraph 13;
 - (b) a report from OS2 dated 13 January 2020;
 - (c) a report from OM2, dated 14 January 2020; and
 - (d) email representations from the Applicant's solicitors, dated 15 January 2020.
18. The reports from OS2 and OM2 both expressed opinions that the positive illegal drug test did not of itself link to risk of serious harm but that the Applicant's *response* to that adverse development in the period since the Oral Hearing led them to the conclusion that he was not ready for release. Both recommended that he should spend a further period in open conditions. This, of course, was contrary to the recommendations for release from OS1 and OM1 at the Oral Hearing, before the adverse development.
19. Neither OS2 nor OM2 had been present at the Oral Hearing; accordingly, the Applicant has never had an opportunity to test or challenge their opinions.
20. More fundamentally, the Applicant had not seen the reports of OS2 and OM2 either at the time of submitting the email representations on 15 January 2020 or at any time prior to receiving the Decision Letter dated 31 January 2020. The only document the Applicant had received was the report (mentioned in paragraph 13 above). The Panel may well have been unaware of this fact.

Discussion

21. This was clearly a procedural irregularity. It was also a significant one. The recommendations provided to the Panel in the reports of OS2 and OM2, and not seen by the Applicant, were a significant change in recommendation by witnesses whom he has never had an opportunity to challenge.

Decision



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



@Parole_Board



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22. For the reasons set out above there was procedural unfairness, requiring reconsideration of the panel's decision. Therefore, the Reconsideration Assessment Panel has decided that this application must be granted.

Directions

23. The Reconsideration Assessment Panel has given careful consideration to the question whether this case should be reconsidered by the original panel (with the benefit of representations from the Applicant's solicitors now that the reports from OS2 and OM2 are available to them) or whether it should be considered afresh by another panel.

24. The Reconsideration Assessment Panel has no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, the question of justice being seen to be done arises. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision not to direct release was wrong. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh panel.

25. The following further Directions are now made:

- (a) The case should be heard by a fresh panel, which should be a three-member panel. The time estimate for the hearing is 3 hours.
- (b) The re-hearing should be expedited.
- (c) The original decision dated 31 January 2020 must be removed from the dossier and must not be seen by the new panel.
- (d) The new panel should be told that this is a reconsideration but not made aware of the reasons why it was ordered.
- (e) This reconsideration decision dated 25 March 2020 should not be added to the dossier.
- (f) The new panel should also be advised that the fact that this is a reconsideration should not in any way affect their decision. It is a complete re-hearing.

Elaine Moloney
25 March 2020

