

[2020] PBRA 87

Application for Reconsideration by Burnett

Application

1. This is an application by Burnett (the Applicant) for reconsideration of a decision of a Panel of the Parole Board following the holding of an oral hearing on the 23 May 2020 in consequence of which they declined 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 made up as follows:
 - o An Application for Reconsideration dated the 15 June 2020.
 - o Member Case Assessment (MCA) Directions extracted from the dossier.
 - o The dossier comprising 298 pages of which the first 4 pages are the List of Contents.
 - o A submission by email from the Secretary of State.

Background:

4. The Applicant is now aged 34. On the 3 December 2007, having pleaded guilty at the Crown Court, the Applicant received an Indeterminate Sentence for Public Protection for wounding with intent to cause grievous bodily harm. The sentencing tribunal imposed a notional determinate term of imprisonment of 7 years. The minimum term the Applicant was expected to serve before he became eligible for parole was 2 years 10 months and 11 days. His minimum term expired on the 13 October 2010. The Applicant has now served a little over 13 years in prison.
5. The index offence occurred on the 9 April 2007 when the Applicant was aged 20. The offence involved an attack on his then partner who was 18 years old. It appears that she came to pick the Applicant up after she had finished work. The Applicant was at a friend's house and was said to be "*spoiling for a fight*". When his partner arrived, at about 11 pm the Applicant started to abuse her and then attacked her. The sentencing judge described what happened as a serious assault subjecting his partner to "*appalling violence*".
6. At the point of sentence, the Applicant had fifteen previous convictions for forty one offences including four previous convictions for Assault Occasioning Actual Bodily Harm, including a previous conviction for holding a knife to his then

partner's throat in November 2004 and then attacking her in the presence of her young child. The Applicant was then aged 18.

Relevant Chronology

7. In March 2018 a panel of the parole Board considered the Applicant's case and recommended that he be transferred to the open estate. The Secretary of State accepted the recommendation, and on the 22 May 2018, the Applicant was transferred to an open prison.
8. In October 2018 the Secretary of State referred the Applicant's case to the Parole Board for a review.
9. On the 10 March 2019 a member of the Parole Board considered the reference under the Member Case Assessment procedure (Member Case Assessment ("MCA") is a procedure which seeks to identify the issues in a case and decides the future progress of the case) and directed that the Applicant's case be sent for an oral hearing.
10. I note that the panel member was assisted by representations from the Applicant's lawyer who has represented him throughout the proceedings and continues to act for the Applicant.
11. The representations made on behalf of the Applicant are dated the 20 February 2019 and they set out, on behalf of the Applicant, the Applicant's representations as to the issues in the case. At the outset the representations sought to have the Applicant's hearing "*deferred for a period of two months*" to allow the Applicant to complete unaccompanied leave or more commonly known as 'Overnight temporary Releases' (ROR) or 'temporary releases' (ROTL) from the prison.
12. The panel member referred to the submissions made by the Applicant's representative and, exercising his judgement, decided that the better course would be to direct "*a delayed hearing date*" to allow for the Applicant to carry out sufficient "ROTLs" directing that the case should not be listed before the 1 July 2019. The panel member gave various directions for reports to be filed and witnesses to attend and he concluded by stating that the panel should be made up of three members.
13. The MCA directions invite comment from the parties within fourteen days of receipt. No submissions were lodged.
14. The Applicant's case was set down for an oral hearing. A date was set: the 22 October 2019. A panel was appointed.
15. I note that the Panel Chair assigned to the Applicant's case has not changed throughout these proceedings and has been responsible for the conduct of the case to its conclusion.



16. On the 27 September 2019, the Panel Chair considered the dossier for the purpose of issuing Panel Chair Directions for the forthcoming hearing. The Panel Chair noted that, despite the delay, through no fault of his own, the Applicant had not been provided with sufficient opportunity to undertake unaccompanied leave ("ROR") from the prison. Accordingly, the Panel Chair judged that the hearing may not be effective. The Panel Chair invited the Applicant's representative to lodge representations "*as soon as possible*". The Panel Chair decided at that point that there should be "*no change to the panel logistics*". In other words, the constitution of the panel and the witnesses who had been directed to attend should remain the same.
17. On the 22 October 2019 the panel convened at the relevant prison. The hearing was adjourned. It is recorded in the Adjournment Notice that there had been an "*adverse development*". The Applicant's representative had "*thought a deferral request had been submitted*" and did not attend the hearing. According to the Adjournment Notice he had concluded that the Applicant had not undertaken sufficient unaccompanied leave from the prison, and, as recorded, he was content for the hearing to be adjourned.
18. On the day of the hearing the panel convened expecting to see the representative. The representative was contacted by telephone and the hearing was treated as a "Directions Hearing". The witnesses to the hearing were consulted and further attempts were made to ensure that the Applicant had unaccompanied leave from the prison, sufficient for the panel to be able to assess whether his risk might be manageable in the community.
19. I note that, once again, apart from further directed reports there was no change to the panel logistics.
20. On the 17 November 2019 the Applicant went absent without leave and was subsequently returned to closed conditions. He received an additional sentence of six months imprisonment.
21. On the 23 December 2019 the Applicant's representative lodged further submissions requesting that, despite this adverse development, the case should be set down for a hearing. The Applicant continued to seek his release and the representative suggested that the case might be listed "*before a fresh panel*". The Panel Chair did not accept the suggestion. No objection was made.
22. By reason of the fact that the Applicant had absconded, the Secretary of State had amended the reference to the Parole Board, and the Applicant was now no longer eligible to be returned to open conditions. Accordingly, the only issue for the panel was whether they could direct the Applicant's release into the community.
23. On the 11 January 2020 the Panel Chair issued fresh directions. It was agreed that the case should proceed to an oral hearing "*in the interests of fairness*". The case was set down to be heard on the 15 May 2020. The Panel Chair issued a fresh set of directions and concluded that the hearing required "two members".



Thereafter no further written submissions were lodged by the Applicant's representative. It was open to him make representations.

24. The hearing took place on the 15 May 2020. By reason of the Coronavirus crisis the Panel Chair had concluded that a hearing could be conducted remotely. I note that the Decision Letter refers to the fact that the Applicant's representative gave his consent to the oral hearing proceeding with all parties attending by remote means and he "*confirmed his consent on the day of the hearing*".
25. No mention is made as to the constitution of the panel but as the decision letter makes clear the hearing was now before a two-member panel and no objection was taken at the hearing.

Request for Reconsideration

26. The application for reconsideration is dated the 15 June 2020.

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

There are two grounds of challenge.

Firstly, Ground (a) asserts that by reason of the constitution of the Panel the hearing was "procedurally unfair".

- (a) It is submitted that the case had originally been set down to be heard by a panel of the Parole Board consisting of three members. In the event the final hearing was undertaken by two members. The Applicant's application refers to the guidance to members when deciding whether a case should be heard by one member, two members or three. It is submitted that as the hearing did not proceed before a three-member panel as originally directed there is a procedural irregularity.
- (b) Secondly, it is submitted that the decision letter is "Irrational/Procedurally Unfair" (sic) in that it does not make a specific finding of fact relating to why the Applicant was found in a particular location after he had absconded.

Current parole review

28. The Applicant's case was referred to the Parole Board in October 2018. Following the Applicant's decision to abscond, the reference from the Secretary of State was amended and is dated the 19 November 2019.
29. On the 21 May 2014 the Secretary of State changed his policy and in consequence the Applicant is ineligible for a recommendation that he be transferred to open conditions.

The reply on behalf of the Secretary of State



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30. The Secretary of State has indicated by email dated the 25 June 2020 that he does not seek to make any representations.

The Relevant Law

31. I have concluded that this is an eligible application. As I have indicated Ground (a) asserts that the proceedings were unfair. I must therefore consider the application by referring to the following principles.

Procedural unfairness

32. 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.

33. 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 the Applicant's case was dealt with justly.

Discussion

The issue of a two member panel:

34. In paragraphs 7 – 21 I have outlined the chronology in the case. In arriving at my conclusion I note that at no stage did the Applicant's representative seek to lodge any representations as to how the panel might be constituted, nor did he seek to make any objection to the two member panel when the panel convened to hear the Applicant's case on the 15 May 2020.

35. In any event the Applicant's position had altered by reason of his decision to abscond and the underlying assumptions behind the decision taken by the MCA member had altered.

36. The Panel Chair had been appointed before the first hearing date and had retained oversight of the case. The Panel Chair had concluded that the issues in the case could properly be resolved by a two-member panel. It was within the discretion of



the Panel Chair to decide that a fair hearing could properly be conducted by a two-member panel rather than a three-member panel.

37. In my judgement the application for reconsideration is without merit. If the application had any merit, objection could and should have been made on or before the final hearing.

Irrationality

38. The Application for Reconsideration asserts that the decision of the panel repeats the evidence relating to the actions of the Applicant following his abscond. I note that the Applicant concedes that the panel dealt with the issue “*in great detail*”, but then adds that the application concerning the issue of the Applicant’s “*motivation*” had not been considered.

39. The submission goes on to say that “*it is not stated if the position of [the Applicant] is accepted or whether the panel are of the view that [the Applicant] was in the place he was [the relevant location] with an intention of making contact with [a female]*” he had got to know whilst on ROR. The complaint is that by failing to make this specific finding of fact as to the Applicant’s intention, it might hamper the approach of future panels to a specific risk issue, namely inter partner violence.

40. 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.”

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.

Discussion

41. I have considered the decision letter. It is detailed and well constructed. Where appropriate it charts the Applicant’s progress at the open prison location, and it deals with the events leading up to the Applicant’s decision to abscond and what happened when he went absent without leave. There are many findings of fact. The decision letter refers at length to the way in which the Applicant had made



friends with a female with whom he was working whilst in the community on leave from the prison. The decision letter reviews the evidence in detail.

42. I have concluded that the application for reconsideration is without substance. Panel's do not have to make findings of fact on every issue with which they are presented.
43. Any subsequent panel is at liberty to explore a panel's findings when assessing the risk a prisoner presents. That includes, in my judgement, where there has been a finding of fact or whether there has been no specific finding, but which might be of relevance to the approach a subsequent panel adopts when assessing the risk which the prisoner may present.

Decision

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

Nicholas Coleman
4th July 2020

