

[2020] PBRA 97

Application for Reconsideration by Dixon

Application

1. This is an application by Dixon (the Applicant) for reconsideration of a decision at an oral hearing dated 3 July 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 case management directions of 28 November 2019, deferral directions of 13 April 2020, the dossier (356 pages), the decision letter dated 3 July 2020 and the representations submitted on behalf of the Applicant.

Background

4. The Applicant was convicted of murder in December 2002. He was sentenced to the mandatory life sentence with a minimum tariff of 12 years, later reduced to 11 years. He was released in July 2014 but subsequently recalled. He was re-released in January 2017 but recalled for a second time in October 2019.

Request for Reconsideration

5. The application for reconsideration is dated 14 July 2020.
6. The grounds for seeking a reconsideration are as follows:
 - (a) The decision of the panel was irrational in the light of the contents of the dossier and the recommendations of the Offender Manager and Offender Supervisor;
 - (b) The panel "*held [the Applicant's] decision not to give evidence at the hearing...against him*". It is submitted that the panel thus acted in a manner which was procedurally unfair.

Current parole review

7. The Applicant's case was referred to the Parole Board by the Secretary of State on 7 November 2019 to decide whether or not to direct his release and,

if it did not, to consider whether or not to recommend that he be moved to open conditions.

8. The matter was considered by a single member on 28 November 2019 who decided that there was insufficient material in the dossier for a decision as to release to be made on the papers; an oral hearing was directed.
9. The oral hearing was scheduled to take place on 13 April 2020 but for a variety of reasons, not least that important documents had not been made available to the panel nor to the Applicant, it was agreed between the panel and the Applicant's legal representative that there was no alternative to the deferral of the hearing; this was duly directed.
10. The deferred hearing took place on the 3rd of July 2020 when the panel considered a dossier of 352 pages. See below for further relevant details of the manner in which the hearing proceeded.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 3 July 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

12. 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)).
13. 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

14. 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."

15. 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.

16. 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

17. 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.
18. 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.

The reply on behalf of the Secretary of State

19. No representations have been received from the Secretary of State in response to this application for reconsideration.

Discussion

20. Before turning to the substance of the complaints made in the legal representative's submissions, it is important to set out how the hearing proceeded. There is a clear and, as I understand it, undisputed account of this in the decision letter.
21. At the start of the hearing, the Applicant's legal representative informed the panel that the Applicant accepted the contents of the most recent reports and that he wished the panel to conclude the case on the papers. The representative said that he had no questions to put to the witnesses (the Offender Manager and the Offender Supervisor).
22. The panel was also informed by the representative that the Applicant did not intend to give evidence to the panel. The chair, as is clearly set out in the decision letter, checked that the Applicant was fully aware of the potential



implications of this, in terms of leaving questions unanswered about the events leading to the recall, his current circumstances and his future plans. The chair offered the representative an opportunity to have a further discussion with the Applicant. The offer was accepted but, after further discussion with the Applicant, the representative informed the panel that the position was unchanged.

23. There was some discussion, initiated by the representative, about whether the panel should question the professional witnesses. The panel considered the matter and decided that in the circumstances this would not be necessary.
24. The panel then proceeded as suggested by the representative to conclude the case on the papers. The panel's decision was not to direct the Applicant's release nor to recommend a transfer to open conditions.
25. Against that background, I turn to the two complaints made on behalf of the Applicant.
26. First, that the panel did not follow the recommendations of the professional witnesses.
27. The complaint is developed in the representations in support of this application to include an associated complaint that if the panel were not minded to follow these recommendations the professional witnesses should have been questioned by the panel.
28. This appears to be a strange complaint in light of the application made on the Applicant's behalf that the case should be concluded on the papers. Whilst the panel had a duty to make its own determination as to whether this was the appropriate procedure, no criticism is made of its decision that an oral hearing was no longer necessary and thus to accede to the application (see Parole Board Rules 2019, rule 21).
29. It hardly needs stating that a hearing on the papers does not involve taking oral evidence. The request by the representative that the panel should do so was inconsistent with the application for the case to be concluded on the papers. The panel nonetheless considered the matter and expressed itself content not to hear evidence.
30. In so far as these inconsistent applications appear incomprehensible, they are probably explicable in the light of the recommendations of the professional witnesses, neither of whom recommended that the Applicant should be released. They went on, however, to suggest that the Applicant's risk could be managed in open conditions and proposed that the panel should make a recommendation to that effect.
31. The reconsideration representations reveal that the reason for the application for the case to be concluded on the papers was that the Applicant "*agreed with the contents of the reports in terms of risk assessments, risk management plans and their recommendations*".



32. I infer from this that the representative assumed that a determination on the papers would inevitably lead to the making of a recommendation for transfer. That was plainly a mistaken assumption. As the representations before me correctly acknowledge, panels are not obliged to follow recommendations contained in the reports in the dossier but are under a duty to make their own decisions based on their own independent assessment of the materials before them. The conclusion of the case on the papers requested on behalf of the Applicant left it open to the panel to disagree with the recommendation for transfer. The panel in the event did so on the perfectly rational basis that his current risk was not manageable in open conditions.
33. As it now transpires, the application which the representative ought to have made was not for a conclusion on the papers, but for the oral hearing to proceed on the basis that it would not be submitted that the Applicant met the statutory test for release but was suitable for a recommendation for transfer.
34. The representative expressly did not wish to ask questions of the witnesses and applied for a paper determination. The panel were satisfied (as they were fully entitled to be) that the dossier contained all of the information necessary to make a fair determination. The decision of the panel to proceed in accordance with the representative's request cannot in those circumstances be characterised as procedurally unfair.
35. The panel carried out a balanced assessment of the Applicant's risk factors and the evidence of his relevant behaviour in relation to them and concluded, as it was fully entitled to on the material before it, that his risk could not be safely managed either in open conditions or in the community. This decision falls far short of fulfilling the criteria for irrationality set out above.
36. Second, that the panel held the Applicant's decision not to give evidence against him.
37. The assertion that the panel in any sense drew adverse inferences against the Applicant is unsustainable.
38. The panel acknowledged expressly that this was a decision he was entitled to make and recognised that it may have had its roots in feelings of anxiety on his part. They also expressed regret that he had taken that stance and set out carefully the matters which he could have helped them with if he had elected to give evidence.
39. None of this amounted to procedural unfairness. The Applicant had a free choice as to whether to give evidence. He was offered an opportunity to reconsider his position at the outset of the hearing, having been informed of the potential implications of not giving evidence, not in the sense that adverse inferences would be drawn against him but that there would be gaps in the evidence on important matters that only he could have filled. He persisted in his election to remain silent. The panel duly noted in the decision letter the gaps in the evidence and their relevance to the panel's decision.
40. Generally:



41. I have set out these matters at a little length in fairness to the Applicant.
42. There is, however, an overwhelming difficulty which he faces in making this application.
43. It is correctly conceded in the reconsideration representations submitted on his behalf that the decision not to direct his release was inevitable.
44. As I have already indicated, I am unable to detect any procedural unfairness in these proceedings. Even if there was, it is not, nor can it be, submitted that it had any bearing on the decision not to direct release.
45. Likewise, I am unable to find any irrationality. Likewise, even if there was, it is not, nor can it be, submitted that it had any bearing on the decision not to direct release.
46. In reality and as is abundantly clear from the reconsideration representations, the Applicant's complaint relates not to his release but as to whether there should have been a recommendation for transfer.
47. In those circumstances, the decision of the panel does not fall within the reconsideration provisions (see paragraph 13, above).

Decision

48. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair nor do I consider it falls within the provisions of Rule 28. Accordingly the application for reconsideration is refused.

Alistair McCreath
27 July 2020

