[2021] PBRA 42

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Application for Reconsideration by FEVZI

Application

1. This is an application by Fevzi (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 13 February 2021 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 decision letter, the dossier and the application for reconsideration.

Background

4. The Applicant was sentenced to imprisonment for public protection on 15 July 2011 following conviction after trial for rape against a 16-year-old girl. A minimum term of four years and three months (less time spent on remand) was imposed. His tariff is reported to have expired on 2 August 2015. The Applicant was 50 years old at the time of sentencing and is now 60 years old. He is maintaining his innocence of the index offence.

Request for Reconsideration

5. The application for reconsideration is dated 11 March 2021 and has been submitted by solicitors acting for the Applicant.

6. It sets out two grounds for reconsideration as follows:

   (a) The panel failed to follow Parole Board guidance on allegations and so the decision was procedurally unfair; and

   (b) The decision made no sense based on the evidence of risk that was considered and therefore the decision was irrational. It provides two instances of this, relating to the extent of testing in the community and the length of proposed placement at designated accommodation.

7. It also sets out an 'additional matter' submitting that the decision letter was not an accurate reflection of a particular piece of evidence and that it was both procedurally unfair and irrational for the decision to have described it as it has.

8. These 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 2019 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 the Applicant continued to be suitable for open conditions (the Applicant having transferred to open conditions in May 2019 on the recommendation of the Parole Board following an oral hearing on 13 March 2019).

10. His case proceeded to an oral hearing via video link on 8 February 2021 before a three-member panel, including a psychologist specialist member. The panel heard oral evidence from the Applicant's Prison Offender Manager (POM), his Community Offender Manager (COM), a prison psychologist and an independent psychologist.

11. By the time of the oral hearing, the Applicant had completed four periods of overnight temporary release, the last of which took place in March 2020 prior to the suspension of temporary release in response to the COVID-19 pandemic restrictions. All witnesses supported the Applicant's release.

12. The panel did not direct the Applicant's release.

The Relevant Law

13. The panel correctly sets out the test for release in its decision letter dated 13 February 2021.

Parole Board Rules 2019

14. 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)). This is an eligible decision.

15. 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

16. 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."

17. 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.

18. 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

19. 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.

20. 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.

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

The reply on behalf of the Secretary of State

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

Discussion

Procedural unfairness - allegations

23. It is first submitted that the panel failed to follow the Parole Board guidance on dealing with allegations.

24. The decision letter refers to the Applicant's arrest in 2005 over allegations of inappropriate sexual behaviour towards two teenage girls (neither of whom was the victim of the index offence). It notes that the complainants made statements and

supported prosecution, but the matter was discontinued by the CPS for insufficient corroborating evidence. The Applicant told the panel that he was probably overfamiliar with the two girls but said the alleged events did not happen.

25. The published Guidance on Allegations (March 2019, v1) sets out that panels faced with information regarding an allegation should assess its relevance and weight and either disregard it, make a finding of fact or assess whether and how to take it into account as part of the parole review.

26. It is argued that the decision does not confirm the position of the panel in respect of the allegation. However, the application states that it is clear that the panel did not disregard the allegations as they are mentioned in the decision and did not go so far as to make a finding of fact. I agree. The question then becomes whether the panel made a fair assessment of the level of concern it gave the allegations.

27. It is argued that the panel *'form[ed] the opinion that the Applicant put [himself] in a position where [he] was subject to previous allegations by two teenage girls'.* It is a fact that the Applicant was subject to such allegations, having been arrested. In his oral evidence he acknowledged overfamiliarity with the complainants, so it is difficult to see how the panel could have formed any other opinion.

28. The Guidance on Allegations says that if an allegation has been taken into account, the decision should provide an outline of the panel's analysis and how the allegation has impacted upon decision-making.

29. The application argues that the decision fails to provide such an outline and that this is sufficient to render the decision procedurally unfair (and has consequently denied the Applicant a fair hearing).

30. I disagree. First, the Guidance on Allegations is, as its name suggests, guidance, rather than an express procedure laid down by law. Moreover, in just the same way it is contextually self-evident (as conceded by the application) the panel did not disregard the allegations or make a finding of fact, it is equally obvious the panel gave the allegations only minimal weight in its overall assessment of risk. The passage quoted in the application appears only as a parenthetical comment in the conclusion as supplementary evidence of the Applicant's emerging sexual interest in teenage girls, underlined by his later commission of the index offence. It is clear to any sensible reader of the decision the allegations are not pivotal to the panel's reasoning, and they have been given rather limited weight in the grand scheme of things.

31. I find no procedural unfairness on this ground.

Irrationality – community testing

32. It is next submitted it was irrational for the panel to conclude that the Applicant required further testing via additional periods of temporary release.

33. The decision states "*The panel carefully considered whether [the Applicant was] an exceptional prisoner who did not need full testing, as suggested by the witnesses.*

The panel did not agree". The decision went on to state the panel's reasons for disagreeing in some considerable detail.

34. It is first argued that the panel did not quantify the number of periods of temporary release that would have been sufficient and should have assessed the quality of the temporary releases undertaken. As such, it is argued that the panel has irrationally applied an undefined standard.

35. It is disingenuous to suggest that any prisoner in the Applicant's position would have a quota of temporary releases which, if met, would ensure their release. Panels will take the quality and extent of community testing, whether via temporary overnight release or external employment on day release, into account when assessing that prisoner's overall risk. The decision reflects that the panel has done precisely this in the Applicant's case, concluding that "*given the seriousness, variety and persistence of [the Applicant's] offending, that testing…needs to be particularly thorough"*. The panel was entitled to reach that conclusion which was perfectly rational.

36. It is also argued that the decision's reference to "*an exceptional prisoner"* is not understood as the term "*exceptional"* is undefined and applying such an undefined term makes the Applicant subject to an incorrect test for release. While this is pleaded as irrationality, I consider it is better treated as procedural unfairness, since it relates to the test for release.

37. The panel is under no obligation to define words that have an ordinary meaning.

38. If the panel meant 'exceptional' in the broad sense of 'atypical' or 'unusual', it would infer the meaning that most prisoners in the Applicant's situation would not be released without satisfactory testing in the community unless there was something extraordinary to justify their release. This is not an irrational interpretation for the panel to take. It was also not irrational for the panel, applying this interpretation in its independent assessment of the Applicant's risk, to find that (in the absence of extraordinary circumstances) the Applicant had not been sufficiently tested in the community, despite the contrary views of the witnesses.

39. Alternatively, if the panel meant 'exceptional' in the narrow sense referred to in the independent psychologist's evidence that the Applicant is "*something of an exception as [he] is financially secure and [has] a job offer"*, then this assertion was subsequently undermined by the evidence of the COM who said the Applicant's financial situation was not as secure as had been suggested. It is also not irrational for the panel to have concluded that the Applicant's purported relative financial stability was not an extraordinary circumstance that would override its concerns that the Applicant had not been sufficiently tested in the community.

40. In either sense, the Applicant has not been made subject to any erroneous test for release, and there is therefore no procedural unfairness either.

Irrationality – designated accommodation period

41. It is also submitted that it was irrational for the panel to describe the proposed 12-week period of accommodation as "*relatively short"* given that 12 weeks was the

pre-COVID-19 standard and, given the current paucity of such accommodation, is now, in fact, relatively long.

42. This is nonsense. The comparator here is not the length of other placements at designated accommodation. As the decision makes clear in the next sentence, "*[The Applicant is] an indeterminate prisoner so the panel has to consider risk over a lengthy licence period*". The comparison is therefore between the Applicant's first 12 weeks in the community and the remainder of the Applicant's indeterminate licence. His time at designated accommodation would (save some catastrophic event) be relatively short when compared to the remainder of his time on licence.

Additional matter

43. It is finally submitted that it was both irrational and procedurally unfair for the panel to have recorded certain evidence inaccurately in its decision.

44. 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

45. 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.

46. The disputed matters surrounding the nature of the Applicant's contact with his daughter do not appear to me to have been a pivotal matter in the panel's overall decision and therefore, even if the information is inaccurate, the panel did not act irrationally or procedurally unfairly.

Decision

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

Stefan Fafinski
6 April 2021