[2022] PBRA 137

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Application for Reconsideration by Dowrick

Application

1. This is an application by Dowrick (the Applicant) for reconsideration of a decision of a panel following an oral hearing dated the 25 August 2022 refusing to direct the applicant's release.

2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases both 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 application for reconsideration, the decision letter and the dossier.

Background

4. The Applicant is serving a total sentence of 18 years imprisonment for offences of rape, incest and indecent assault committed against his daughter. The Applicant had admitted the less serious of the charges but was convicted by a jury of some of the most serious having pleaded not guilty. He still denies the offences of which he was convicted by a jury and also says that to some extent his daughter was the instigator of the offences although he does not blame her for that. The Applicant has had very few interventions during his sentence because of the low assessment of his continued risk. The offences were committed when his daughter was very young but they were not reported to the police for many years. The Applicant was 61 years of age when convicted and he is now 72. The Applicant has no other convictions and his behaviour in custody has been good. He previously served in the army and did a number of tours in Northern Ireland.

Request for Reconsideration

5. The application for reconsideration is dated 13 September 2022.

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

   (a)It is argued that the decision was procedurally unfair in that in their decision letter the panel expressed concern about the small amount of contact between the Community Offender Manager (COM) and the Applicant prior to the hearing. It is argued that in those circumstances it was unfair of the panel not to tell the Applicant of those concerns during the hearing so that he could apply for an adjournment to

remedy the failing. Accordingly it is said that he did not know the case he had to meet which was unfair.
(b)Further it is said that the decision was irrational in that, not only did the panel go against the recommendations of all the witnesses, but the evidence did not support the conclusions that the panel came to.

Current parole review

7. The case was referred to the Parole Board by the Secretary of State to consider release on 30 July 2020. The case was adjourned on a number of occasions as the Board had not been provided with relevant information by PPCS.

8. The oral hearing took place on 18 August 2022 by video link. The panel was made up of a judicial member, a psychologist and an independent member. The panel heard evidence from the Prison Offender Manager, the Community Offender Manger and a prison psychologist. The Applicant was represented by a legal Representative who made representations to the panel.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 25 August 2022 the test for release.

Parole Board Rules 2019

10. 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. It follows that this decision is eligible for consideration.

Irrationality

11. 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."*

12. 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.

Procedural unfairness

13. 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 separate to the issue of irrationality which focusses on the actual decision.

14. 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.

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

Other

16. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

The reply on behalf of the Secretary of State

17. The Secretary of State has made no representations in response to this application.

Discussion

18. In arguing the first ground for reconsideration, the Applicant sets out the course of the proceedings which included several adjournments required because PPCS had not supplied information and evidence required of it. The Applicant has good reason to complain about that but that was not a fault of the panel and it does not affect whether the hearing was unfair. The Applicant's complaint is that the panel did not express during the hearing their concerns about the amount of time the COM had spent with the Applicant prior to the hearing which would have given the Applicant an opportunity to apply for an adjournment to make more contact. In my view that ground is not made out. One of the matters which the panel is bound to consider in deciding whether to release a prisoner is whether the risk management plan is sufficiently robust to ensure that the Applicant is not a risk to public safety. In some cases that may not require there to be a close relationship between the COM and the prisoner. In this case the panel concluded having considered all the evidence that a close relationship was required to make the risk management plan effective. They were perfectly entitled to come to that conclusion on the evidence. They were not bound to offer an adjournment. The hearing had already been adjourned several times. The issue would only have arisen if the panel were minded to say that they would have directed release had there been closer contact. There is no evidence that that was the panel's view and looking at

the decision as a whole it is unlikely that it was. It is wrong to say that the Applicant did not know the case that he had to meet. He knew that the issue of whether the risk management plan was adequate would be something which would be very important to the panel.

The Applicant further asserts that the decision of the panel was irrational. The Applicant accepts that that is a very high bar and also concedes that a panel is not bound to direct release even though all the witnesses recommend release. While the Applicant remarks on the difficulty caused to witnesses in complying with the Secretary of State's controversial direction to prevent witnesses giving recommendations that is not relevant to this case. It was clear from their reports that they recommended release and the panel accepted that that was their view. The panel set out their reasons for not considering that the test for release had been out in para 4.4. I accept that it would have helped if the panel had set out clearly what their second of their two reasons were but I consider that the paragraph does make clear why they reached their conclusion.

First they were concerned that, in the light of the Applicant's continued denials of the offences and the part he attributes to the victim in the offending, that there was still work to be done to lessen the risk that the Applicant presents to young girls. I understand, as the panel did, that this places the Applicant in a catch 22 situation as the prison service have decided, guided by their psychologists, that there is no more core work to be done with him, but the panel had to make their own decision. It is to be noted that there was a psychologist on the panel. The mere fact that a convicted prisoner continues to deny the offences does not mean he cannot be released but the panel is entitled and should be concerned as to whether the prisoner fully understands the reasons for his offending. Secondly they were concerned whether the Applicant would be able to provide internal controls to prevent further offending. They were entitled to reach that conclusion having heard considerable evidence from the Applicant and considered the full facts of the offences. It was therefore up to those responsible for supervising the Applicant's licence to identify any factors which might increase the Applicant's risk to young girls. The relationship of the COM to the Applicant was relevant to whether others would recognise an increased risk of offending. The panel were also concerned that the witnesses were giving undue weight to the Applicant's previous good behaviour in the army and when serving his sentence in reaching their opinion.

I consider that the panel were entitled to reach that conclusion because it is their view of the evidence which matters.

I also consider that within the terms of the test in **Oyston** (see above), the panel gave an adequate explanation of why they had reached the decision that they did.

Decision

19. I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

John Saunders
30 September 2022