

[2019] PBRA 10

Application for Reconsideration by Perez

Application

1. This is an application by Perez (the Applicant) for reconsideration of a decision by a Parole Board panel not to release him on the basis that the decision was irrational and procedurally unfair.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on the basis either that the decision was irrational or that it was procedurally unfair.

Background

3. On the 6 December 2016 the Applicant was sentenced to 5 years imprisonment with an extension period of 3 years after his conviction by a jury of an offence of attempting to inflict grievous bodily harm with intent. His conditional release date is 21 November 2020. He was transferred to open conditions in June 2018. A Parole Board panel considered his suitability for release at an oral hearing on 23 July 2019. The panel heard evidence from the Applicant's Offender Supervisor (OS) and Offender Manager (OM) and the Applicant himself. This was the first parole review.
4. The index offence involved an unprovoked attack with a blunt instrument – probably a rock - on a lone woman at a bus stop. A Victim Personal Statement was included in the dossier.

Request for Reconsideration

5. The application is dated 19 August 2019. The Grounds in summary are as follows:
 - (a) That the hearing in July 2019, 3 months after his first possible release date in March 2019, represented a breach of his Article 6 ECHR rights.
 - (b) That since he has, since January 2017, been held in open conditions and has had many successful temporary releases and the opportunity to work outside the prison, he has in effect already been released and that therefore the statement in the Decision concerning the limitations on Board's power to direct release is legally flawed.
 - (c) That the Board "*failed to state why risk cannot be managed in the community*".
 - (d) The hearing was conducted in such a way as to render it incapable of doing justice to his case. It lasted 4 hours on a warm day in a room with no fan and the windows closed. The panel's questioning of witnesses



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- was “*very aggressive if not hostile*”. The panel were aware of the prisoner’s particular needs and did not accommodate them.
- (e) Panel members from time to time made improper observations such as to render the proceedings unfair:
 - (i) Use of inflammatory and derogatory language.
 - (ii) A comment derisory towards prisoners who maintain their innocence, suggesting that denial of the index offence was a significant feature of the decision to refuse parole.
 - (iii) Improper questions were asked concerning an appeal and the Applicant’s record.
 - (f) No questions were asked – and should have been – about the Applicant’s criminal history, education, or completion of programmes.
 - (g) In general, that the Applicant was “*denied an opportunity*” to be questioned, and that the panel was not informed that the Applicant is pursuing a fresh appeal against his conviction having had leave refused by the single judge and by the full court.
 - (h) A failure to understand that at his trial the Applicant’s principal challenge was to the evidence of the police investigating officer who, he alleged, had fabricated the witness statements (or parts of them) of other witnesses.
 - (i) Errors and inconsistencies in the pre-sentencing report – in particular in the risk assessments - were not followed up.
 - (j) A procedural error in not giving the applicant “*an opportunity to defend his actions*”.
 - (k) A failure to ask relevant questions, e.g. about the applicant’s previous convictions, and about his community ties.
 - (l) A wholly inappropriate comment concerning the state of the Applicant’s marriage.
 - (m) Factual errors concerning an incident involving a visit to a supermarket.
 - (n) Misunderstanding of the visit to the supermarket which affected the ultimate decision not to release.
 - (o) Misunderstanding the circumstances which led to the Applicant giving a positive alcometer reading.
 - (p) “*A failure to admit*” that the Applicant’s “*failure*” to do courses was due to the fact that his risk score was too low in one instance, or that he had not been allowed to apply to take the course in another.
 - (q) A failure to refer in the decision to the fact that the Applicant had completed a large number of courses during his sentence as well complying with the Category D regime, which is in effect a “*course*”.
 - (r) A failure to refer in the decision letter to the recommendation of the psychologist.
 - (s) The fact that the Applicant has been granted leave to sleep and work outside the prison belies the “*cautious*” recommendations of the OM and OS for release.
 - (t) A failure to apply the Imprisonment for Public Protection regime properly and to take the proper course in view of the fact that no relevant agency opposed release.
 - (u) The panel made no reference to the many academic and other achievements of the Applicant over the years.



- (v) In summary, that the decision was both procedurally defective (above) but also irrational since the applicant's ability to abide by the temporary release regime proves that he presents no, or no significant, risk of serious harm to the public.

The Relevant Law

6. In **R (on the application of 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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

7. There are a great number of cases in which the principles of procedural irregularity have been considered. The most often quoted passage is from the speech of Lord Diplock in the **CCSU** case quoted above:

"a ... failure to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred."

Cases in which the accused in criminal cases or the party to quasi-criminal proceedings like the present are represented by a lawyer are highly unlikely to generate a successful appeal if there had been no challenge made to the alleged irregularity by the Applicant, save in the event for instance of a failure by the other party – in this case the Secretary of State – to disclose material relevant to the ultimate decision to the Applicant or the tribunal.

Discussion

8. I will deal with the complaints together since some of them could be said to allege both irrationality and procedural irregularity.
9. Ground a. A delay in the listing of a hearing has nothing to do with its rationality or procedure. If a person is caused injury by an unwarranted delay in his hearing, he may be able to take legal action for damages in a civil court.



10. Ground b. This ground has no grounds in law. The fact is that a prisoner is a prisoner for the purposes of the parole process until his release is directed by the Board or the expiry of the 'tariff' period.
11. Ground c. The decision letter made it clear that the panel did not believe that a combination of the Applicant's record, his instant offence and the fact that it had been committed during a period of difficulty in his marriage, the only identified protective factor in his case was sufficient to drive them to direct release.
12. Ground d. The conditions for Parole Board oral hearings are rarely perfect and sometimes fall far short of perfection. However, in the absence of any recorded request for a short or longer adjournment and an unreasonable refusal of such a request, it is impossible to make a case for the unsustainability of the eventual decision.
13. Ground e. It is impossible to characterise – on the basis that the applicant has accurately quoted them – the remarks as inflammatory. Parole hearings frequently have to deal with extremely sensitive issues about which people present at the hearing may have strong views. However, no suggestion is made that any time during the hearing was a complaint made by the Applicant's representative that the panel were using inflammatory language. I am unaware either of any such complaint made by the witnesses who gave evidence.
14. Ground f. The vast majority of the material relevant to a Parole Board hearing is contained in the dossier. If the panel need to expand on or challenge matters in it, or to raise matters not within it, they will do so. If not, not. The same applies to the offender and his representative. This was an extensive dossier which contained a large amount of information relative to the offender which did not need repeating during the hearing. It is hard to see how the offender's service history could have played any part in the decision – there is no reference to it – and so the issue of whether any question should have been asked is irrelevant. In court proceedings, questions are frequently asked, which on reflection should not have been, but it is only if the answer had some bearing on the eventual decision that the decision itself can be impeached.
15. Ground g. The Applicant was not denied the opportunity to be questioned. He had an advocate there to ask any questions of him which the panel had not asked or which he would have wished to answer. The fact that he is pursuing a fresh appeal against conviction might justify an application to adjourn or defer the hearing but could not have any bearing on the outcome of the hearing under way.
16. Ground h. The fact that at his trial it may have been that the Applicant accused the officer alone of fabricating evidence given on paper by himself and other witnesses rather than accusing each witness individually has nothing to do with the decision necessary at this parole hearing. It was open to the Applicant, through his representative, to correct any false impression on this score. (N.B. Denial of the index offence. This is a relevant topic. Those who at the time of trial, or subsequently have admitted their offences, are more likely to realise that their behaviour was intolerable and to take every possible step to avoid behaving in



that way again. The Parole Board has to assume that the verdicts of the jury were correct if the trial was contested. It is not a Court of Appeal.)

17. Ground i. The inconsistent risk scores in the pre-sentencing report may perhaps have formed – or are still to form – part of an appeal or renewed appeal against the sentence passed. They have no relevance whatever to the parole decision.
18. Ground j. This ground is hard to understand. The Applicant had every opportunity to do so. His advocate was able to ask him and the other witnesses questions which could have thrown more light on his behaviour.
19. Ground k. The panel have no duty to go into detail concerning every previous conviction. The offences usually speak for themselves. If there were a particular relevant aspect of any of them which the Applicant wanted to draw to the panel's attention, his lawyer could have done so. If the Applicant had not already fully instructed his lawyer, or wished for more time to speak to her, he could have asked for it.
20. Ground l. The phrase used by the panel was a strange one. However, the panel were entitled to express the concerns that they had around the index offence, the deferral, and the significant risks that might manifest if the Applicant's situation were to become unstable.
21. Grounds m, n, and o. These three grounds concern the recent events of May 2019 which led to an adjudication. The Applicant alleges that the circumstances concerning his visit to the supermarket were misunderstood and indicate a preconception in the minds of the panel based on pre-reading of the papers. The possibility that the panel may have misunderstood the facts concerning the visit to the supermarket could not detract from the facts of the visit and that the Applicant had made up a story to cover himself. It was clearly this, together with other concerns, which tipped the balance of the panel's thinking towards declining to order release.
22. Grounds p and q. There is some force in the first complaint, (p). The decision letter might be read as alleging that the Applicant may have refused to do such work whereas in fact he had – as is clear from the dossier – not been able to do it because of his 'risk' scores. However, the fact remains that such work had not been done, so that the concerns the panel clearly had concerning his behaviour most recently and the background of the index offence and his record, remained. The contention at (q) that the Applicant had in fact done work to reduce his risk factors and that his failure to do other work was not his fault. The fact remains that the panel was entitled to conclude that the risk factors identified, one or more which of which had led to the commission of the index offence, were still outstanding. It is inconceivable that the panel was not aware of the work. The courses highlighted by the Applicant were referred to within the dossier.
23. Ground r. It is true that there is no explicit reference in the reasons to the evidence of the psychologist. It would undoubtedly have been better had there been such a reference, and it is correct that he, on balance, supported the recommendations for release. However, a case of this complexity required the



Board which makes the decision, as opposed simply to making recommendations, to make its own estimation of the degree of risk the offender still represented.

24. Ground s. The contention that the Applicant has in reality already been 'released' as the result of the amount of time he is at liberty under the Category D conditions, while perhaps an understandable point of view, is wrong. The Applicant remains a prisoner subject to prison rules and of course, recategorization, rather than being released on licence and only liable to recall if licence conditions are breached.
25. Ground t. Although it is easy to understand the acute disappointment felt by an Applicant in respect of whom the professional witnesses 'cautiously' recommend release on licence it is far from unknown for this to happen. The law still requires the Parole Board, an independent court-like body, to make the ultimate decision on the degree of risk posed by an offender.
26. Ground u. It is hard to see what relevance his academic achievements had to the Applicant's case. He acquired them before he committed the index offence, which itself represented a reversion to violent offending. The panel did not express concerns as to the Applicant's ability to understand, but to his ability to control his actions.
27. Ground v. An ability to comply with the conditions of the temporary release, while very positive, cannot of itself make a decision not to direct release irrational. In any event, it is clear from the decision letter that it was a failure to abide by one of those conditions which played a significant part in the ultimate decision.
28. In short, the grounds submitted do not reach the high standard needed to obtain a judicial review – or in this case a reconsideration – whether considered separately or together. Clearly the case was not 'open and shut' and required a careful hearing. The dossier contained a lot of material and included information from all relevant sources. The hearing lasted, according to the Applicant, for some four hours.
29. Mere allegations, unsupported by any independent evidence, whether from professional witnesses or legal representatives, that the hearing generally was conducted in such a hostile way as to make its conclusion irrational, cannot amount to sufficient grounds for reconsideration. The grounds for refusing to direct release, succinctly stated at the conclusion, indicate that the panel could not be sure that the Applicant's risk of causing serious harm had reduced sufficiently to direct it.

Decision

30. The application for reconsideration is therefore refused.

Sir David Calvert-Smith
10 September 2019



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