[2019] PBRA 13

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Application for Reconsideration by Mottram

Application

1. This is an application by Mottram (the Applicant) for reconsideration of a decision of the Parole Board dated the 2 August 2019 declining to direct his release but making a recommendation to the Secretary of State for a progressive move to Open Conditions.

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 that the decision is (a) irrational or that it is (b) procedurally unfair.

Background

3. In January 1990 the Applicant was sentenced to life imprisonment for murder with a minimum term specified at 14 years. The Applicant was convicted following a trial in which the issue was identification. He denied he had anything to do with the death of the victim and he has maintained that denial throughout his sentence. This has inevitably impacted on his sentence planning and the assessment of his risk. As to that there was no issue at trial that whoever was responsible for killing the victim by strangulation, had subjected the victim to a sexual assault before doing so.

4. The Applicant is now some 17 years over tariff. Although after his last review (in January 2016) the Secretary of State, on the 22 August 2016, approved the Board's recommendation for a progressive move to open conditions, he declined the transfer.

5. The Applicant continued to decline the offer of a transfer until 3 August 2017 when he indicated his preparedness now to move to open conditions. It is reported that he was told that should he confirm this then appropriate enquiries would be made. He then apparently confirmed to his Offender Supervisor (OS) that he had changed his mind and did not wish to move, after telephoning his Offender Manager's (OM) office to report that he was removing himself from the Parole Process.

6. His OM confirmed that this was also her understanding of the Applicant's position. She nonetheless reported that if he changed his mind about open conditions, she would pursue enquiries to see if the Local Authority ('LA') closer to his partner's home would take over responsibility for him to assist with his resettlement plans.

7. The Applicant has submitted, it would appear, three applications for reconsideration of the panel's decision made following the hearing on the 25 July 2019. These applications are respectively dated the 15 and 18 August 2019, written in his own hand, and one dated the 24 August 2019 submitted on his behalf by his legal representative. Although the latter version attempts, I think, to encapsulate what he has written himself, I have considered all the representations which have been made in each of the three applications.

8. Overall it is submitted both that there was procedural unfairness and/or that the decision the panel made not to release the Applicant was irrational. In support of each submission, reliance is placed both on a number of specific complaints and on several general ones. All have been considered for the purposes of the discussion below, even if later I do not separately address some of them.

9. In response to the application the Secretary of State, by letter dated the 23 August 2019, asserts that a number of the matters raised are not amenable to reconsideration under Rule 28, but otherwise the Secretary of State has no representations he would wish to make.

Current parole review

10. The Secretary of State referred the Applicant's case to the Board on 26 June 2017 a year earlier than planned because the Applicant had declined open conditions. Since the referral was made the following events have taken place:

    (a) In November 2017 the OS confirmed that the Applicant had not engaged with her and had written to her indicating he did not wish to engage in the Parole Board proceedings at all. In May 2018 the OS confirmed the Applicant still refused to engage with the proceedings but she was still supportive of a move to open conditions.

    (b) In June 2018 the OS confirmed the Applicant still refused to engage with her or with the process.

    (c) In June 2018 an oral hearing was adjourned on the day because of confusion as to whether the Applicant intended to appear. The Applicant was notified there would be a short adjournment enabling him to seek representation and/or submit representations, and, if he did not, he was told the case would be decided on the papers.

    (d) In July 2018 the Parole Board received confirmation that the Applicant wished to participate and be represented by a named person (whose contact details were not provided and who was never heard from).

    (e) In October 2018 the case was reviewed and a new hearing directed with updated reports.

    (f) In January 2019 the OM confirmed that the Applicant had (in September 2018) indicated he wished to move to open conditions, and she was willing

to try to locate one outside his designated LA area, but any open prison or probation hostel place outside his local area was not in her gift.

(g) In February 2019 the OS again reported that she would try and secure a transfer of responsibility for him to the LA of his choosing, if release was directed.

(h) Two days before the hearing in February 2019 the Applicant's representative raised a concern that release outside the local area had not been explored.

(i) At the hearing in February 2019 the representative put forward further medical evidence and requested an adjournment. The panel agreed to adjourn the case and directed further reports. These were provided in June and July 2019. They did not recommend release but supported a move to open conditions.

11. The oral hearing took place on 25th July 2019. The Applicant's representative did not request a further adjournment. The panel heard from all witnesses and from the Applicant himself. There is no suggestion that the representative was unable to examine the witnesses and the Applicant, or to raise any matters relevant to the issues of risk, the criteria for release, or recommendation for transfer to open conditions.

The Relevant Law

12. The panel correctly sets out in its decision letter dated the 29 July 2019 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.

13. The fact that Rule 28 of the Parole Board Rules 2019 uses the same wording for the exercise of Judicial Review as used in the High Court indicates that the same test for the assessment of "procedural unfairness" (as for "irrationality") as would be applied in the High Court should be applied here (and should be applied without qualification). In summary an applicant seeking to complain of procedural unfairness under Rule 28 must satisfy the reviewer that express procedures laid down by law were not followed in the making of the relevant decision; and/or that they were not given a fair hearing; and/or they were not properly informed of the case against them; and/or they were prevented from putting their case properly; and/or that the panel was not impartial.

14. These issues (which focus on how the decision was made) are entirely separate to the issue of "*irrationality*" which focusses on the actual decision made, for which the test is "*whether the … 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*".

Discussion

15. The Applicant submits that there was procedural unfairness in that his OM has not pursued enquiries regarding the availability at a probation hostel outside his local area should the Parole Board direct his release, and in his handwritten submissions he complains of the OM's suggestion that persuading them to do so might be difficult in light of a lack of past connection by the Applicant with the other areas. However, although enquiries as to the specific availability outside the local area might have been desirable for the purposes of the hearing it was not critical to it. Moreover, as the Panel Chair noted in the directions she made in February 2019, had release emerged as a realistic option in the course of the hearing it would have been open to the panel to have adjourned for specific enquiries to be made. There is no reference to an application by the Applicant's legal representative to defer or adjourn the hearing on the 25 July 2019 for such enquiries to be made. In the circumstances I can see no procedural unfairness arising from the failure to make this specific enquiry and no evidence that it impeded the panel from making a fair and reasonable assessment of the Applicant's risk or progression. The Applicant gives me no indication how his complaint in this respect breaches Rule 7 of the Parole Board Rules (whether they be the Rules of 2019 or 2016), and I can identify no conceivable connection myself.

16. In his submissions on the issue of irrationality, the Applicant repeats this complaint and submits it should have been dealt with by an adjournment, but as I have indicated, he was legally represented and no such adjournment was applied for. There was ample material before the panel in the dossier, as well as in the evidence given at the hearing, for the panel to make a rational decision as to whether to adjourn for such an enquiry. In the light of the conclusion that the Applicant's risk could not be adequately managed in the community whatever release plan might have been devised for him. Had this enquiry been made and been responded to positively before the panel hearing would have made no practical difference.

17. The Applicant complains that the comment "*denial makes it far more difficult to identify an offence chain*" is a "*conclusion without reasons*". The panel did not need to give its reasons for the comment, which is taken out of the fuller context in which it was made, where the panel seeks to explain why a continued denial of guilt by someone such as the Applicant impedes an assessment of risk and appropriate sentence planning to cover all his risk factors. The passage in the relevant paragraph in the recent decision letter is in fact a complete repetition of the same passage which appears in the same section in the Applicant's previous decision letter and reflects the understanding of the Parole Board accumulated over many years. It has therefore been open to the Applicant to challenge it, since he was alerted to this approach to the issue in January 2016. I can find no evidence that any submission has ever been made on the Applicant's behalf that it is an inappropriate approach to be made by the Board to the case of someone such as the Applicant, or of any evidence given at the hearing or provided beforehand to challenge it.

18. The Applicant's complaint of a failure to refer him for assessment under "*the Care Act*", without identifying the Act to which he refers or to the section of it which he might say is relevant to someone in his particular position. He also complains that

an adjournment ought to have been granted to ensure "*reasonable avenues of support were explored"* but save for the issue of a probation hostel outside the local area (which I have dealt with), he fails to assist with what these avenues might be. The assistance of voluntary agencies who might help the Applicant on release were known to the panel.

19. Further complaint is made of some of the conclusions reached by the psychologist in her psychological assessment, based on what she understood the Applicant to have said to her. Not only did the Applicant have the chance fully to review the report in interview with her, which he declined to do, but she very fairly reported on all that the Applicant had noted in his own review of her report when it was given to him. The Applicant also had the opportunity to question the psychologist at the panel and give his own evidence about what he had said to her and what he had meant by it.

20. It seems to this reviewer somewhat unreasonable on the Applicant's part to complain about the evidence that was put before the panel by the psychologist, when it was as a result of his own request, and adjournment in February 2019, that this assessment of him was actually undertaken. That the Applicant should disagree with her conclusions – which are perhaps more sympathetic and more favourable to him than he seems to realise – does not support the complaints he makes. The panel was obviously entitled to consider her evidence and take some account of it.

21. The Applicant points out in his submissions that for the panel to record "*whilst you have not evidenced violence for many years you have yet to be tested in conditions of lower security and it is to be seen how you will engage with professionals and others in that environment and in the community*" is not the test for release. The panel did not suggest that it was. They correctly set out the test for release in the first paragraph of their decision letter. The passage identified is recorded by the panel as part of the evidence given to them, what value they placed on it, and why; and it is obviously material that is relevant to the decision to recommend progression to open conditions.

22. Further complaint is made that the panel highlighted "*that all professional witnesses were of the view that [the Applicant] would benefit from completing … [an intervention course] before moving to open conditions*" and said "*it shared that view*". It is said that it was not for the panel so to comment and that this demonstrates a predisposition towards the Applicant remaining in prison. No explanation is however given to why they were not entitled to make the comment, but I disagree with the complaint or that it demonstrates the bias alleged. First, because this evidence is relevant to assessment of immediate risk and therefore has some bearing on the argument that the Applicant should be released; and, second, it also has some bearing on the success of any progressive move the Applicant might be allowed to make. A panel is perfectly entitled to comment on such work which might be undertaken to address risk factors where they consider those risks have not yet been sufficiently addressed.

23. As far as those other matters of which complaint is made, the Secretary of State is correct to observe that the complaints made about removal of the Applicant's

category D status, the conduct of his OM generally, and of management within the prison, are not matters relevant to the issue of whether in its dealings with him the Parole Board did not provide procedural fairness or made an irrational decision in his case.

24. Moreover, the complaint that the panel has improperly reported his offending by including details of the index offence is entirely without foundation and is also illogical. As I have set out earlier the undisputed evidence at the Applicant's trial was that whoever killed the victim attacked in the way described before doing so. The Applicant denies that that was him, as is his prerogative, but the fact is that he was and remains convicted of the killing, which was committed in the circumstances described. Upon these facts and upon this information the Parole Board is bound to act in the performance of its duties. These facts must of course inform upon, and clearly do inform upon, any evaluation to be made of the risks in the case of the person convicted of the offence.

25. There are several other personal complaints in the handwritten submissions including a complaint against the Applicant's own representative. These are not matters for the Parole Board and do not provide any substance to the submissions made under Rule 28.

26. Finally, the Applicant makes a generalised complaint about delay in the hearing of his panel. Any objective analysis of events since his last panel hearing which I purposefully set out in some detail above would indicate that (i) any delay was unexceptional and due to a number of factors which include the Applicant's unwillingness at times to participate in the process; and (ii) no unfairness – procedural or otherwise – has, in any event, arisen from it.

27. The decision letter of the 2 August 2019 is a clearly set out and well-reasoned document, following on from the decision letter of 2016. It adequately summarises the contents of the dossier where it was relevant to do so, it summarises in good detail the evidence which was given at the panel hearing (not least the evidence given by the Applicant). It applies the correct test for release and makes a recommendation consistent with the evidence, a recommendation which is in fact favourable to the Applicant, and, if adopted by the Secretary of State, should be to his considerable advantage and provide him with a route by which he may secure his release.

Decision

28. It follows from all that I have rehearsed above that I do not consider that the decision was either irrational or procedurally unfair. Accordingly, the application for reconsideration in the case of Mr Mottram is dismissed.

Martin Beddoe
12 September 2019