

[2019] PBRA 33

APPLICATION FOR RECONSIDERATION BY BROWN

Introduction

1. This is an application by Brown (the Applicant) a recalled indeterminate sentence prisoner for reconsideration of the decision of a panel of the Board not to direct his re-release on licence. The decision was made after an oral hearing on 15 August 2019.

Background

2. The Applicant is serving a sentence of imprisonment for public protection for conspiracy to wound with intent. His tariff was set at 4 years and 181 days, and expired on 28 February 2015. He spent a period in open conditions but absconded and was returned to closed conditions, from which he has since been released on licence twice and recalled twice.
3. His case has been reviewed by a Reconsideration Assessment Panel which has considered the following material:
 - Dossier which includes the decision letter of which reconsideration is sought;
 - Representations dated 17 September 2019 submitted by the Applicant's solicitor;
 - Representations dated 2 October 2019 on behalf of the Secretary of State; and
 - Various e-mails provided at the request of the Reconsideration Assessment Panel.

The Relevant Law

4. This decision, being a decision not to direct the re-release on licence of a recalled indeterminate sentence prisoner, is eligible for reconsideration under Rule 28(1) of the Parole Board Rules 2019.
5. The only two grounds for reconsideration under that Rule are irrationality and procedural unfairness.
6. Irrationality is a concept well known in judicial review proceedings in the High Court. **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 paragraph 116 of its judgment: *'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 was the test set out in a different context by Lord Diplock in the House of Lords in **CCSU -v- Minister for the Civil Service [1985] AC 374.**

7. 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.
8. The fact that Rule 28 uses the same word as is used in Judicial Review cases clearly demonstrates that the same test should be applied when considering an application for reconsideration of a panel's decision.
9. Procedural unfairness may result from a variety of procedural irregularities. Not all such irregularities will affect the fairness of the proceedings.

Solicitors' Representations

10. The solicitors for the Applicant submit that the panel's decision was both irrational and procedurally unfair. Under the heading of irrationality they make a number of criticisms of the decision letter. Under the heading of procedural unfairness they say two things:
 - (a) That the panel received (and appear to have attached some weight to) a piece of evidence which was never disclosed to the Applicant or his solicitors and to which they therefore had no opportunity to respond, and
 - (b) That the Applicant's daughter, who had given conflicting accounts of a particular incident, should have been called to give oral evidence to confirm the account most favourable to the prisoner.

Representations on behalf of the Secretary of State

11. The Secretary of State's representations are confined to:
 - (a) Responding to a particular point raised by the solicitors on the irrationality issue and
 - (b) Confirming the solicitors' statement that (by an administrative failure of communications) the piece of evidence in question was not disclosed to the Applicant or his solicitors.



Discussion

12. At the request of the Reconsideration Assessment Panel, enquiries were made to establish the position in relation to the piece of evidence which, it is now agreed, was not disclosed to the Applicant or his solicitors. What emerged is as follows.
13. At the hearing on 15 August 2019 it was agreed that further information was required by the panel in relation to the risk management plan and that the case should be adjourned for that purpose.
14. On 16 August 2019 the Offender Manager (OM) forwarded to the Board's case manager, who passed it to the panel, correspondence from the social worker involved in the Applicant's daughter's case. This correspondence was potentially damaging to the Applicant's case. It should of course have been sent to Public Protection Casework Section (PPCS) for inclusion in the dossier (thus disclosing it to the Applicant and his solicitors). It was not disclosed by anybody to the Applicant or his solicitors.
15. Further information was provided by the OM to the Board on 27 August 2019, concerning the risk management plan, and that too was passed to the panel. It was also disclosed to the Applicant's solicitors who duly submitted written representations about it.
16. On 3 September 2019 further information about the risk management plan and a request for further licence conditions were provided by the OM to the Board and disclosed to the Applicant's solicitors, who again responded to it.
17. On 6 September 2019 the panel chair e-mailed the Board's case manager asking him to make sure that the various documents received since the hearing (including the OM's e-mail of 16 August 2019) were uploaded to the dossier.
18. On 9 September 2019 the decision letter was issued.
19. On 10 September 2019 the Board's case manager e-mailed the PPCS case manager asking him to upload to the dossier the various documents received since the hearing, and offering to do it himself if they could not be located. That did not happen, and the PPCS case manager has said that he was not aware of the OM's e-mail of 16 August 2016 until 1 October 2019 when he was asked about it as a result of the Reconsideration Assessment Panel's request for further information.
20. It is clear from all this that the correspondence from the social worker "*slipped through the net*" and was not disclosed to the Applicant and his solicitors.
21. This was clearly a procedural irregularity. It was also a significant one as the panel appears to have attached some weight to the correspondence. Whether the panel's decision might have been different if the correspondence had been disclosed and representations in response submitted on the Applicant's behalf it is



impossible to say. However, the principle that justice must not only be done but be seen to be done means that the panel's decision cannot be allowed to stand.

22. In the circumstances it is unnecessary to go into any detail about the other grounds for reconsideration advanced by the solicitors, save to say that (a) the Reconsideration Assessment Panel is not persuaded that the absence of oral evidence from the Applicant's daughter was procedurally unfair or would have made any difference to the panel's decision and (b) it is not persuaded that the complaints about the decision pass the very high threshold for a finding of irrationality.

Decision

23. For the reasons set out above there was (albeit inadvertently) procedural unfairness requiring reconsideration of the panel's decision. Therefore, the Reconsideration Assessment Panel has decided that this application must be granted. The other complaints raised by the solicitors are not upheld.

Directions

24. The Reconsideration Assessment Panel has given careful consideration to the question whether this case should be reconsidered by the original panel (with the benefit of representations by the Applicant's solicitors about the information from the social worker) or whether it should be considered afresh by another panel.
25. The Reconsideration panel has no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, the question of justice being seen to be done arises again. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was wrong. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as the Reconsideration Assessment Panel now does) that the case should be reheard by a fresh panel.
26. The following further directions are now made:
- (a) The re-hearing should be expedited.
 - (b) The original decision must be removed from the dossier and must not be seen by the new panel.
 - (c) The new panel should be told that this is a reconsideration but not made aware of the reasons why it was ordered.
 - (d) The new panel should also be advised that the fact that this is a reconsideration should not in any way affect their decision. It is a complete re-hearing.

Jeremy Roberts
4 October 2019

