

[2019] PBRA 81

Application for Reconsideration by Wright

Application

1. This is an application by Wright (the Applicant) for reconsideration of a decision of the Parole Board not to direct release of the Applicant dated 10th November 2019 but not circulated until 20th November 2019.
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 an Indeterminate sentence of imprisonment (IPP) with a minimum period of 3 years in December 2007 for offences of robbery. The minimum period expired in October 2010. The Applicant was first released in August 2015 and recalled in December 2015. He was further released on 7th May 2019 and recalled on 23 May 2019.

Request for Reconsideration

5. The application for reconsideration is dated 4th December 2019.
6. The grounds for seeking a reconsideration are that the decision was irrational in that there were errors of law in the decision letter. It is further argued that the decision was unfair in that there was bias or apparent bias and the panel relied on the report of a psychologist in circumstances when the psychologist should have been required to give evidence.

Current parole review

7. The Applicant's case was referred to the Board to consider whether to direct his release on 10th June 2019.
8. An Oral Hearing took place on 7th November 2019. One of the panel members had sat on a panel which considered the Applicant's case on a previous occasion. The panel heard oral evidence from the Offender Supervisor, the Offender Manager and the Applicant. The Offender Supervisor supported release and the Offender



Manager considered the Applicant should remain in closed conditions. The panel considered the dossier which included a report from a psychologist who carried out a risk assessment of the Applicant.

The Relevant Law

Parole Board Rules 2019

9. **28.**— (1) Subject to paragraph (2), where a decision has been made under rule 19(1)(a) or (b), 21(7) or 25(1), a party may apply to the Board for the case to be reconsidered on the grounds that the decision is—
(a) irrational, or
(b) procedurally unfair.

10. Irrationality: 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."

11. 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.

12. In this case the Applicant contends that the decision contains errors of law. Errors of law are a ground for judicial review and as the grounds for reconsideration are intended to reflect the grounds for judicial review then an error of law is a ground on which reconsideration can be ordered.

13. *Procedural unfairness*: 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. In this case the Applicant argues that the procedure was unfair because of the bias of one of the panel members and because a witness was not called to give oral evidence in circumstances where she should have been. I accept that in an appropriate case, depending on the facts, both assertions are capable of amounting to procedural unfairness.

14. It is for me to decide whether what happened in this case was unfair to the Applicant.

15. The Secretary of State has made no response to this application.

Discussion

16. The first ground for reconsideration is that there was bias by one of the members of the panel or an appearance of bias. This is based on the fact that the member that had sat on a previous panel for this Applicant did not disclose so at the outset of the hearing and had asked most of the questions of the witnesses.
17. The fact of sitting on a previous panel does not in my judgment provide any evidence of actual bias. The basis for alleging actual bias comes from the questioning of the witnesses or a combination of that and sitting on a previous panel. Panel members decide between themselves before the hearing who is going to lead the questioning of each witness. These hearings are largely inquisitorial, so all the necessary evidence is adduced by the panel. Panel members have different styles. Some only ask few questions, others ask a great number; some are relatively forceful in asking questions others are not forceful at all. Panels will sometimes deliberately adopt different styles of questioning in order to arrive at an accurate assessment of risk. These are all matters for the discretion of the panel and, unlike criminal trials which are adversarial, the mere fact that one or more of the panel ask a great number of questions does not indicate bias or undue interference in the process. There is no basis for any suggestion of actual bias from the facts relied on. Alleging actual bias is a serious allegation and to establish it would require compelling evidence which does not exist here. In a case like this where compelling evidence of actual does not exist, it may be possible to establish apparent bias. If that is established, then that would render the hearing unfair. I accept that the test for apparent bias is set out in **Porter -v- Magill [2001] UKHL**, as set out in the application, namely would a fair-minded observer who was aware of all the relevant facts conclude that there was a real possibility that the tribunal was biased. The relevant facts in this case are that one of the panel members had sat on one of the Applicant's previous panels and did not declare that fact until part way through the proceedings. The relevant Parole Board guidance suggests what the appropriate steps for a panel member to take when this arises.

Para 5.3 reads *'You are not precluded from participating in cases in which you have had previous personal involvement. However, you must notify the relevant Panel Chair when such involvement might give rise to a presumption of a conflict of interest.'*

Para 7.9 reads *'In your conduct as a Parole Board member, you should consider the perception of a fair-minded and informed observer. If circumstances are present in a particular case which may give rise to a suggestion of bias, or appearance of bias, they should be disclosed to the parties in good time before a hearing so that appropriate action can be taken.'*

The mere fact that a member has sat on a previous panel considering the case of the Applicant cannot of itself give an appearance of bias. It happens often and can be helpful for the same person to be able to sit and be able to judge whether there has been a change in the prisoner's behaviour and attitude between parole hearings. The requirement to notify only arises where the involvement in a previous hearing might give rise to a presumption of a conflict of interest. There is no evidence that that was the situation in this case. Further the previous

involvement was disclosed part way through the hearing. If any objection was to be taken to that panel member continuing it should have been taken then. It is not appropriate to wait for the decision and then allege bias on the basis of matters which were known during the hearing. In my judgment this ground fails.

18. The second ground is that it was unfair to rely on evidence from a psychological report without calling the psychologist to give evidence when that report was not accepted in its entirety by a previous panel which had contained a specialist psychologist member.
19. Both the decision of the previous panel and the psychological report were in the dossier. It was inevitable and known to the Applicant and his representative that the psychological report would be considered by the panel and it was open to them to ask that the psychologist should attend. It is within the discretion of the panel to decide which evidence they wished to consider orally. The panel were aware of the findings of the previous panel on the psychologist's conclusions as is evident from the decision letter and there is no basis for suggesting that they had not taken the views of the previous panel into account. They would be considering those findings in the light of what had happened after the Applicant had been released.
20. The third ground is that the panel failed to apply the relevant law correctly when considering the justification for recall.
21. The Applicant relies on the case of **Goldsworthy [2017] EWHC Admin 2822** to support the suggestion that when the panel considered whether the recall was justified it misapplied the relevant law. Goldsworthy was an application for judicial review of the decision of the Secretary of State to recall a prisoner. On the facts in that case, which were very different, the Deputy Judge quashed the recall and ordered the prisoner's release from custody. More relevant to the duties of the Parole Board are the cases of **Gulliver 2007 EWCA Civ 1386** and **Calder 2015 EWCA Civ 1050**. The Parole Board, as part of its duties, must review the decision of the Secretary of State to recall, taking into account all the facts leading to the recall as they decide them to be after considering all the evidence given at the hearing. Whether or not the panel finds the recall justified, it then has to go on to consider the statutory test of whether it is satisfied it is no longer necessary for the safety of the public that the prisoner remains confined. In this case the panel found that the recall was justified. The Applicant argues that it was not demonstrated that there was any causal link between the behaviour which led to recall and the index offence and accordingly the recall was not justified.

The risk factors of the Applicant which have remained consistent from when the Judge passed sentence are consumption of drugs; criminal associates and a chaotic lifestyle. The previous panel had found that the Applicant's risk of re-offending was not imminent and that there would be probable warning signs of any escalation of risk. The factors which would suggest that risk was escalating would be disengagement from supervision and return to taking Class A drugs. At the time of his release the Applicant was assessed as being a high risk of causing serious bodily harm, but the panel took the view that with the implementation of the Risk Management Plan, which included residence at designated accommodation, that risk could be contained. Conditions of the designated

accommodation included a condition against excessive alcohol consumption. The Applicant missed a reporting time and failed to comply with his curfew. The Applicant's explanation was that he had been attending a memorial for a family member and had a quantity of drinks which, combined with his medication, caused him to black out and then sleep off the effects. He told the panel that he had consumed 4 to 5 drinks of Brandy and Port and passed out so that he was unable to return to the hostel until the morning. The Applicant made no contact with his Offender Manager or the hostel to explain what had happened and why he could not comply with the curfew.

In my judgment the panel were perfectly entitled to reach the conclusion that they did. The Applicant was exhibiting signs that his risk was becoming imminent and accordingly the decision to recall was justified. It could be argued that ignoring those warning signs by not recalling would have been entirely wrong, particularly if he had gone on to commit a serious offence. Whatever view the panel took on the recall, they had to reach a decision on whether or not they were satisfied it was no longer necessary for the safety of the public that the applicant should remain confined. Their decision on the justification for the recall would be a factor in that decision but not decisive as the decisions in **Gulliver and Calder** make clear.

22. The final ground for reconsideration is that the panel has misinterpreted the test for release by failing to focus on the requirement for detention to be justified by the risk of serious harm and conflates concerns about his working relationship with his Offender Manager with his risk of serious harm.
23. The evidence at the hearing and the Decision of the Board was that the Applicant presented a high risk of serious harm and that the level of risk would not reduce until he had demonstrated his compliance with rules in the community over a period of some time. All the professionals and both the previous and present panel considered that co-operation with the Offender Manager, as demonstrated in their working relationship, was necessary to manage his risk in the community. When released, the Applicant failed to demonstrate a proper working relationship with the Offender Manager. Part of the justification for the Offender Manager's opinion that the Applicant should not be released, was concern about the Applicant's ability to develop a proper relationship with them. Without a proper relationship, the panel was entitled on the evidence to conclude, in my judgment, that there would be a significant risk that the Applicant would cause serious harm to the public by committing offences similar to his index offences. There was material on which the panel was entitled to come to that conclusion and accordingly this ground for reconsideration also fails.

Decision:

24. The application for reconsideration is refused for the reasons that I have given. I am grateful for the clarity and the care with which this application has been put forward. The matters were well argued even though they have ultimately failed.

Sir John Saunders

16 December 2019

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