

[2020] PBRA 107

Application for Reconsideration by Knight

Application

1. This is an application by Knight (the Applicant) for reconsideration of a decision of the Parole Board made under rule 25(1) of the Parole Board Rules 2019 (the 2019 Rules) that the Applicant was unsuitable for release (the Decision).
2. Rule 28(1) of the 2019 Rules 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, comprising a dossier of 547 numbered pages, the decision letter dated 20 July 2020 and written submissions by the Applicant dated 3 August 2020.

Background

4. The Applicant is serving an indeterminate (Life) sentence for Murder. The minimum tariff was set at 14 years and expired in August 2012.

Request for Reconsideration

5. The application for reconsideration was received by the Board on 3 August 2020.
6. The grounds for seeking a reconsideration are that the Decision is irrational with regard to the assessment by the Board of various areas of concern, and that release and a move to open conditions had been recommended, respectively, by the two professional witnesses.

Current parole review

7. The Decision was made on the Secretary of State's referral of the Applicant's case to the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release, and if not and if relevant to advise on suitability for open conditions.
8. The Decision was made by a panel that considered the Applicant's case at an oral hearing on 16 June 2020 that was conducted remotely due to restrictions on social contact due to the COVID-19 pandemic.

Relevant Law



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9. Rule 28 of the Parole Board Rules 2019 provides that a party may apply to the Board for the case of a prisoner who is serving a sentence of a type that is specified by the rule to be reconsidered on the grounds that a decision on the prisoner's suitability for release is irrational or procedurally unfair.

Irrationality

10. 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 review 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.
12. The application of this test in applications for reconsideration under rule 28 has been confirmed in previous decisions, such as **Preston [2019] PBRA 1**.

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

The reply on behalf of the Secretary of State

14. On 5 August 2020, the Board was informed by the Public Protection Casework Section, on behalf of the Secretary of State, that no representations were offered in response to the Applicant's reconsideration application.

Discussion

15. The Applicant's Prison Offender Manager recommended his suitability for release, whereas the Applicant's Community Offender Manager did not recommend his suitability for release but did recommend his suitability for open conditions.
16. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is important that a panel should explain clearly a decision that is contrary to the opinions and recommendations of all the professional witnesses: **R (Wells) v Parole Board 2019 EWHC 2710**. However, it is a panel's responsibility to make its own risk assessment and to evaluate the likely effectiveness of any risk management plan proposed on the



totality of the evidence, which it may be expected to perform with the benefit of its expertise in the realm of risk assessment; see **DSD**, for example.

17. In the Applicant's case, the Decision not to direct release is contrary to the opinion and recommendation of one of the two professional witnesses. It was, nevertheless, important that clear reasons were given for the rejection of that opinion and recommendation.
18. The reasons for departing from the recommendation given by the Prison Offender Manager were, in outline, that the panel had serious concerns about the Applicant's "*behavioural variations*" in custody and consequently doubted that he would comply with the regime in approved premises and "*follow-on from there*", which I consider was a tolerably clear reference to compliance with the terms of the proposed risk management plan after the placement in approved premises had come to an end.
19. The Decision letter expressly acknowledged the positive relationship that the Prison Offender Manager had built with the Applicant and the Prison Offender Manager's view that the Applicant was demonstrating a more social approach to resolving his difficulties. The panel however expressed concern that the Applicant had been inconsistent about his willingness to engage with interventions that had been suggested for him in open conditions, and that he had been resistant to psychological assessment in custody and the panel referred to the Applicant's wish to record any new assessment.
20. It is recorded in the Decision letter that the Community Offender Manager considered that core risk reduction work remained outstanding and the panel considered that the Community Offender Manager's recommendation of suitability for open conditions was predominantly influenced by the Applicant's self-imposed barriers to progression, rather than the manageability of his risk. The Decision letter recorded that the Community Offender Manager had stated that, had the Applicant been willing to engage in risk reduction work at the current establishment, he would have recommended that the Applicant remained in closed conditions, and that the Applicant's custodial behaviour caused him concern but that he could not see any prospect of change while the Applicant remained in closed conditions.
21. The Applicant's grounds state that the Applicant's last adjudication for violence was recorded on 11 December 2000, and that many other adjudications have been recorded over the years, the vast majority for refusing to move location and general non-compliance. It is also stated that many adjudications are on file but were not proceeded with or dismissed. However, the Decision letter acknowledges the report by the Prison Offender Manager that there had been no actual violence in custody, as opposed to damage to property, and the letter refers to only one adjudication received by the Applicant since October 2019. The Decision letter does not specify the outcome of the adjudication, but it is also noted that the Prison Offender Manager reported that the Applicant had received positive comments and write-ups during that period, but that there had also been negative reports including report of a threat of non-compliance.



22. The grounds refer to an incident that was discussed when the Applicant was said to have made threats to female staff when holding a pool cue. However, the Decision letter refers to the Applicant being placed on report for the threats to damage an office where female staff were working, which is the behaviour that is admitted in the grounds.
23. The grounds state that the last time the Applicant had any "*Alcohol/Hooch*" in December 2008, but while the Decision letter refers to alcohol as a risk factor, it is not part of the reasons that that factor has been active more recently.
24. The grounds state that the Applicant has never resorted to revenge thinking when imprisoned. Again, the Decision letter refers to such thinking as a risk factor as opposed to a factor has been active more recently, although the incident with the pool cue could be described as an example of seeking revenge for perceived unfairness of staff allegedly frustrating the Applicant's access to his property.
25. The grounds refer to "*lack of emotional/anger control*" and appear to seek to argue that the Applicant's admitted frustration, being "*vocal*" and refusal to "*toe the party line*" are an understandable reaction to "*the system*" and his continued incarceration, but there is no valid criticism of the rationality of the panel's reasoning in that statement: the expert panel would certainly have borne in mind the frustrations that are inherent in being subject to indeterminate imprisonment.
26. The grounds argue that the Applicant's challenges to staff and the regime are necessary ("*I wouldn't need to*") because staff do not do "*as they are paid to do*". Again, there is no valid criticism of the rationality of the panel's reasoning in that statement.
27. The grounds refer to the Applicant having helped residents and staff, but there is no valid criticism of the rationality of the panel's reasoning in that statement.
28. The grounds refer to unspecified evidence that the Applicant did not have any issues within his relationships. However, it is stated in the Decision that allegations of serious intimidation towards a partner by the Applicant and other complaints of being violent towards a partner have always been denied by him and have not been tested, and it is stated that the allegations should not therefore be held against him.
29. The grounds also refer to damaged cell contents in June 2019 and assert that the adjudication was heard and that the Applicant was found not guilty because he was moved into a cell that had been damaged beforehand. I can find no reference in the Decision letter to an allegation that the Applicant had caused damage to items in his cell in June 2019. The Decision letter does refer to an incident on 10 August 2019 when the Applicant is said to have caused damage to furniture in his cell, and the November 2019 Conduct Report also refers to such an incident and the matter of the threats to damage an office being remanded for legal advice and remaining outstanding at the time. The Applicant has not provided any evidence that he received a not guilty verdict on adjudication of those matters. However, the 10 August 2019 matter is one of several examples of poor behaviour that the panel saw fit to include in the section of the Decision letter addressing the evidence of change since last review and/or progress in custody, which led the panel to the



view that the Applicant's behavioural variations whilst in custody were of serious concern. That assessment of the Applicant's progress in custody is adequately supported by the evidence, whether or not the August 2019 matter ought to be disregarded.

30. I consider that the reasons stated in the Decision letter for the decision not to direct release are satisfactorily clear and adequately justified by the panel's consideration of the evidence of change since last review and/or progress in custody, and of the effectiveness of plans to manage the Applicant's risk.
31. Reconsideration under rule 28 of the 2019 Rules applies only to decisions made by the Board under rule 19(1)(a) or (b), 21(7) or 25(1) of those Rules, which are decisions on suitability for release. Recommendations as to suitability for a move to open conditions are outside of the scope of rule 28, so reconsideration could not be directed on the grounds that the Board has erred in its consideration of a request by the Secretary of State to advise on that matter. See also **Barclay [2019] PBRA 6**.

Decision

32. The application for reconsideration is accordingly refused.

Timothy Lawrence
12 August 2020

