

[2020] PBRA 74

Application for Reconsideration by Davies

Application

1. This is an application by Davies (the Applicant) for reconsideration of a decision of an oral hearing dated the 23 March 2020 not to direct his release.
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:
 - (a) A dossier now running to 789 pages (including the decision under review);
 - (b) The application for reconsideration submitted on the Applicant's behalf and the Secretary of State's response; and
 - (c) Undisclosed material and correspondence/directions concerning it.

Background

4. The Applicant was convicted of rape in 2007. He was sentenced to Imprisonment for Public Protection. His tariff was set at 5 years and his earliest release date was in March 2012. Following a Parole Board (PB) recommendation he was transferred to open conditions in 2013. He was returned to closed conditions later that year. In 2014 he was transferred again to open conditions following a PB recommendation. In December 2015 he was again returned to closed conditions.

Request for Reconsideration

5. The application for reconsideration is dated 11 May 2020.
6. The grounds for seeking a reconsideration are, in summary, as follows:
 - (a) Material which had been disclosed to the panel and to the Applicant's legal representative, was not disclosed to the Applicant. The Applicant was therefore unfairly prejudiced by his inability to deal with the material before the panel. The time – more than a year – taken to deal with the material is a clear indication that it must have played a significant part in the reasoning of the panel.

(b) One of the panel members had sat on a previous panel in the Applicant's case and that panel had not directed release.

(c) On their own or together, the grounds render the conduct of the hearing so procedurally defective that a fresh panel should be convened to hear the case.

Current parole review

7. The hearing at which the decision now under review was made was first scheduled for October 2018. The possible existence of material which might be of relevance to the PB decision was revealed at that hearing.

8. After a number of adjournments and abortive hearings, the PB panel finally convened on 21 February 2020 for a substantive hearing. Following the receipt, after the hearing, of final submissions from the Applicant and his then legal representative the panel issued its decision on 23 March 2020. The dossier by then ran to some 768 pages. It contained *inter alia*:

- (a) Documents concerning the index offence – sentencing remarks, Pre-Sentence Report, Psychiatric report, etc.
- (b) Seven psychological reports totalling some 152 pages,
- (c) Eight Offender Supervisor and seven Offender Manager Reports totalling some 40 and 45 pages respectively,
- (d) Three reports on assessment of risks and their origin totalling some 189 pages,
- (e) Eight Security reports,
- (f) Legal representations, and representations from the Applicant.
- (g) Accredited programme reports from 2010 to date.
- (h) Statements from prison staff – keyworkers, chaplain etc.
- (i) The previous PB decision letters and many other documents.

Evidence was heard from the Applicant, a Security Officer, a Prison psychologist, an Independent psychologist, the Offender supervisor, and the Offender Manager.

The Relevant Law

Parole Board Rules 2019

9. Under Rule 28(1) of the Parole Board Rules 2019 the only type of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. This is such a decision.

Procedural unfairness

10. 'Procedural unfairness' means a procedural impropriety or unfairness which resulted in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result.



11. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:
- (a) express procedures laid down by law were not followed in the making of the relevant decision; and/or
 - (b) the applicant was not given a fair hearing; and/or
 - (c) the applicant was not properly informed of the case against him/her; and/or
 - (d) the applicant was prevented from putting his/her case properly; and/or
 - (e) the panel was not impartial.

The overriding objective is to ensure that the Applicant's case was dealt with justly.

The reply on behalf of the Secretary of State/the prisoner

12. The Secretary of State has indicated that he does not wish to make representations in respect of this Application.

Discussion

13. The lengthy submissions submitted by the Applicant's new legal representative fully, accurately and helpfully set out the relevant factual background, the law, and the way in which it is submitted, the decision was flawed because the hearing fell short of 4 ((b)-(e)) of the standards set out above at 12 (b)-(e) above.
14. As to the first ground and subparagraphs (b)-(d) above, the information which, at one stage, may have been of relevance to the Board's consideration was fully disclosed to the Applicant's then legal representative. The concern was that the identity of the source of the information, if disclosed, might endanger the safety of that person. In the result, as would have been clear to the then legal representative who took part in the closed hearings at which the information was discussed, the information itself was erroneous and therefore could have had no bearing what so ever on the panel's assessment of risk. It is clear that the decision, as set out in the decision letter, focused on the disagreement between the two psychologists, as to whether the Applicant's risk had reduced sufficiently for his release to be directed. The time it took, first for the information to be fully disclosed to the panel and the legal representative, and second for the panel and the legal representative to be told that the information was groundless, seems on the face of it to have been excessive and to have deprived the Applicant of a hearing for well over a year. However, that delay, though regrettable, is not, and could not be, the subject of an application for reconsideration.
15. As to the second ground and subparagraph (e) above. One member of the panel had indeed sat on the PB panel in 2017 which did not direct release. That fact was known to the Applicant and his legal representative before the hearing and, on instructions, the legal representative applied by email dated 7 August 2018 to the PB for the panel member concerned to be recused. No ground was put forward then, or has been in the current application, apart from the fact that the said member had been on the previous panel. There is no principle which requires



a person in a judicial capacity to stand down if he or she has had an accused person or, in these situations, an offender, before him/her in earlier proceedings, save and except if it is clear that the person objected to had previously been privy to information which is not and could not be part of the evidence before the instant hearing. The reality in this case, as in most cases in which there has been a history of earlier parole hearings and the prisoner is some years past tariff, is that every previous decision, and many previous reports by professionals – see para 8 above – and other ‘historical’ documents are inserted in the dossier so that the panel can see the whole history of the sentence as well as of the conviction for the index offence and, any previous criminal record or other relevant background and make a balanced assessment of the degree of risk now posed by the offender to the public or particular sections of the public.

Decision

16. For these reasons, while I have considerable sympathy for the Applicant and the, at least in retrospect, unnecessary delay to which his hearing was subjected, I do not consider that this decision was procedurally unfair on either of the two grounds suggested. Accordingly, the application for reconsideration is refused.

Sir David Calvert-Smith
04 June 2020

