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[2020] PBRA 80

Application for Reconsideration by Dennis-Dormer

Application

1. This is an application by Dennis-Dormer (the Applicant) for reconsideration of a decision of the Parole Board dated 12 May 2020 made following an Oral Hearing held on 11 May 2020 which decided not to direct his release on licence.

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 dossier, the Decision Letter dated 12 May 2020 and the application for reconsideration itself dated 29 May 2020 from solicitors acting on behalf of the Applicant.

Background

4. The Applicant is serving an extended determinate sentence for three offences of wounding with intent to inflict grievous bodily harm. The sentence was of seven years custody and two years extended licence for one of the offences, with the other two offences each receiving a seven year concurrent sentence. The Sentence Expiry Date is 26 July 2024, with the Conditional Release Date being 27 August 2022. The oral hearing on 11 May 2020 was the Applicant's first review.

Request for Reconsideration

5. The application for reconsideration is dated 29 May 2020. The application was not made on the published reconsideration application form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints and, reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made.

6. The grounds for seeking a reconsideration are not entirely coherently identified within the application but appear to me to be on the basis that the decision of the panel was irrational on six grounds (grounds (i) – (vi) below), and procedurally unfair on one ground (ground vii). These grounds are:

   (i) The panel gave excess weight and preference to unproven allegations, contrary to the Parole Board guidance on allegations;
   (ii) The panel failed to properly take into account and balance factors militating in the Applicant's favour regarding his manageability on parole licence;
   (iii) The decision appears to ignore the Applicant's evidence relating to his enjoyment of positions of trust and other jobs;
   (iv) The panel failed to explain why they found that the Applicant would be unable to comply with any conditions imposed upon him;
   (v) The panel failed to explain why the Applicant's risks could not be managed in the community;
   (vi) The decision did not acknowledge the fact that the Offender Supervisor (OS) and Offender Manager (OM) had not had a reasonable amount of communication with the Applicant;
   (vii) The panel failed to properly conduct a proper and fair review of the evidence.

Current parole review

7. The case was referred to the Parole Board on 1 April 2019. The referral was for the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release. If after considering the case, the Board decided to direct the Applicant's release on licence, the referral invited the Board to make a recommendation in relation to any condition which it considered should be included in the licence. The referral was considered by a Member Case Assessment panel on 28 October 2019 which referred the Applicant's case to oral hearing.

8. The oral hearing was heard remotely by Skype / telephone conference on 11 May 2020 by a three member panel. It was not possible to hold the scheduled oral hearing face to face at the prison due to restrictions imposed by the COVID-19 pandemic. Oral evidence was heard from the OM, OS and the Applicant. The Applicant was legally represented throughout and representations were made on his behalf.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 12 May 2020 the test for release.

Parole Board Rules 2019

10. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b)), or by an oral hearing panel after an oral hearing (Rule 25(1)), or by an oral hearing panel which makes the decision on the papers (Rule 21(7)). In my view the application made falls within these rules.

Irrationality

11. 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."

12. 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.

13. The application of this test has been confirmed in previous decisions on applications for reconsideration under Rule 28: **Preston [2019] PBRA 1** and others.

Procedural unfairness

14. 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.

15. 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;
(b) they were not given a fair hearing;
(c) they were not properly informed of the case against them;
(d) they were prevented from putting their 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.

16. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

The reply on behalf of the Secretary of State

17. The Secretary of State has not submitted any representations to the application.

Discussion

18. There is some overlap between the grounds that have been submitted which as stated, are not entirely coherently defined within the application itself.

19. The oral hearing panel had an extensive dossier of reports and other material. They had the advantage of hearing from the Applicant as well as the OS and OM. The Applicant was also legally represented, and submissions were made on his behalf. A panel must make up their own minds on the totality of the evidence that they have before them, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the Applicant from unnecessary incarceration) if they failed to do just that. As the Divisional Court noted in **DSD** [at 117] "*The individual members of a panel, through their training and experience, possess or have acquired particular skills and expertise in the complex realm of risk assessment.*"

20. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.

21. As **Stanley Burnton J** set out in **(Alvey) v Parole Board [2008] EWHC 311 (Admin)**, at [26]

> "*It is for the Parole Board, not for the court, to weigh the various considerations it must take into account in deciding whether or not early release is appropriate. The weight it gives to relevant considerations is a matter for the Board, as is, in particular, its assessment of risk, that is to say the risk of re-offending and the risk of harm to the public if an offender is released early, and the extent to which that risk outweighs benefits which otherwise may result from early release, such as a long period of support in the community, and in some cases damages and pressures caused by a custodial environment.*"

22. It is my task to determine whether the panel have provided clear and justifiable reasons based on their analysis of all of the evidence before them. I should not substitute my view of any facts as found by the panel and should not direct that a decision be reconsidered in such circumstances unless it is manifestly obvious there was an error of fact which was taken into account in making their decision.

23. With those matters in mind I turn to address the seven grounds:

Ground (i)

(a) The Applicant had been transferred to open prison conditions in January 2018. In January 2019 he was returned to closed conditions. A notification of 11 January 2019 that he had been recategorized to a lower security prison stated that "you have on multiple occasions refused to comply with staff instructions and demonstrated an unacceptable attitude for a [lower category] prisoner with threats to assault night staff being the most recent issue".

(b) On 24 January 2019 the Applicant transferred to a closed prison location. His OS there prepared the sentence planning report dated 20 September 2019. Within his report he noted that the Applicant's behaviour had raised slight concerns at the prison with reports of manipulative, rude and abusive behaviour towards staff. The report also acknowledged that the Applicant's behaviour had not resulted in any proven adjudication or downgrade under the Incentive and Earned Privileges scheme. Following the Applicant's transfer on 8 November 2019 to another closed prison location his new OS, from whom the panel heard at the oral hearing, catalogued positive and negative behaviour entries on the National Offender Management Information System (NOMIS).

The Applicant's OM in their probation officer's report of 20 September 2019 also catalogued positive and negative NOMIS entries. The probation officer's report of 3 April 2020 repeated the concerns raised by the negative entries.

(c) It is submitted that the Panel treated the allegations raised in the negative entries set out above and in the oral evidence as true on the basis that entries were recorded. Furthermore, it is said that the panel were predisposed towards the official version of events, not being prepared to consider the Applicant's application for parole impartially or independently.

(d) The Applicant had the opportunity at the oral hearing of dealing with the content of the negative reports and the re-categorisation notification. He did so in his evidence to the panel, offering explanations for the entries. As recorded in the decision letter the Applicant explained to the panel "I have no problem with authority only if a decision is incorrect or has no merit". The panel considered that the explanation demonstrated some insight by the Applicant into his current risks. They also noted his evidence that the incorrect procedure had been followed in his re-categorisation and that he had successfully challenged the re-categorisation decision. Having considered all of the evidence, they concluded that there was ample evidence to indicate the Applicant could be threatening and abusive when he perceived his goals had been thwarted or that those in authority were making decisions which were disadvantageous to him.

(e) The panel noted in the Applicant's favour that it had not been alleged that during his sentence he had engaged in violence. They also recorded that his OS had stated there was no evidence during the Applicant's time at his current closed prison location that he could be manipulative. Additionally, having considered the evidence of the Applicant, the panel did not make a finding that an incident which led to a negative entry from September 2019, where the Applicant interfered in a situation between a member of staff and another prisoner, had necessarily occurred as had been described in the entry but they did conclude that they were satisfied that the way in which he spoke to the officer carried an implied threat.

(f) The application states that the panel had in error apparently assumed that the Applicant had been found guilty on an adjudication arising from an incident of 31 October 2019. This submission is not well founded, the decision letter does not demonstrate any such erroneous assumption, setting out in fact that the Applicant had been subject to an adjudication for this incident and had gone on to receive a negative entry which led to his downgrading on the IEP scheme.

(g) The panel observed in its judgement that if there had only been the occasional reference to the Applicant behaving in an intimidating or aggressive manner towards staff, the panel would not have attached a great deal of significance to such concerns. However, they concluded that the evidence was that consistently within different environments, there had been staff concerns that when the Applicant did not get what he wanted he could be aggressive and manipulative. In my view this shows a clear and fair weighing of the evidence presented to it.

(h) In my judgement there is nothing in this ground. The decision letter sets out clearly how the panel balanced the evidence that it had, which included that of the Applicant, and came to a justifiable and entirely reasonable conclusion which was open to them to reach. The decision reached was carefully and well set out in their decision.

24. Ground (ii)

(a) The panel noted that the behaviour of the Applicant in custody had generally been acceptable save for when he came into conflict with staff when he formed the view that they were in the wrong.

(b) It was acknowledged that he had successfully completed a training course addressing the tendency to use violence, thereby showing a willingness to address his offending behaviour.

(c) Whilst the panel noted that the Applicant had a poor record of compliance in the community, they did accept that he was likely to comply with supervision, but this was subject to the caveat of him agreeing with the constraints placed upon him.

(d) In my judgment there is nothing in this ground. The panel did conclude that there were factors militating in the Applicant's favour of his manageability on parole licence but having balanced the evidence they heard, they ultimately reached a decision which was open to them that he could not safely be so managed at present.

25. Ground (iii)

(a) The panel did not specifically identify in its decision letter the other evidence said to have been given by the Applicant as to positions of trust he had held in the prison.

(b) The Applicant made representations to the panel at his oral hearing both personally and through his legal representative.

(c) The decision letter is not and should not be a recital of the entire evidence given at oral hearing over several hours and set out in the dossier which contained well over 200 pages. The letter correctly focuses on risk, with an overriding concern being the protection of the public. In the decision letter the panel acknowledged that the Applicant had on occasion gone above his work requirement and had helped staff, but balanced the positive reports as it must do with the negative ones, giving them such weight as they considered appropriate having heard from the witnesses.

26. Grounds (iv) and (v)

(a) There is nothing in these grounds. The Applicant's own evidence was that he had "no problem with authority only if a decision is incorrect or has no merit". The large number of references to poor compliance with supervision in custody and previously in the community that were presented to the panel gave substantial evidence to support their conclusion that the Applicant was highly unlikely to comply with supervision if he considered the constraints placed upon him were onerous or unreasonable.

(b) In particular, the panel identified clearly that a lack of early warning signs if there was an escalation of risk would affect his manageability, making it very difficult for the OM to take appropriate early action.

(c) Having considered this, the panel's conclusion that the Applicant's risks could not be managed in the community and that he would be unable to comply with conditions with which he did not agree is not therefore surprising. Such a reasoned and clear view cannot be characterised as irrational.

27. Ground (vi)

(a) The decision noted that as a consequence of the COVID-19 pandemic, the OS allocated to the Applicant's case on 28 February 2020 had not had the opportunity to have contact with him. This was apparent from the written report of the OS.

(b) The OM is also acknowledged in the decision as having only recently taken over the Applicant's case, with her preparation of a risk management plan being affected by this and by the impacts of COVID-19. The probation

officer's report spelt out that the OM had not met the Applicant and that she did not know him.

(c) There is absolutely nothing in this ground, it being apparent that the panel were well aware of the limits of the communication between the Applicant and his OS and OM.

28. Ground (vii)

(a) The decision of a panel must be read as a whole. The decision plainly identifies the matters adjudged by the panel to militate towards and against a continuing risk of reoffending, setting out the positives and negatives of the Applicant's case that it considered relevant to the assessment of risk and, its reasons for striking the balance in the way that it did. The evidence before the panel included that of the current professional witnesses responsible for the Applicant, who did not support release and held the opinion that further risk reduction work would be appropriate before he was released.

(b) I note in particular, that the 'Evidence of change and progress in custody' and the 'Assessment of current risk' sections of the decision letter summarised the considerations of the panel which led to the conclusions and, neatly assessed in the 'Conclusion and decision of the panel'. I find no basis upon which I can be satisfied that there has been some procedural impropriety or unfairness in these proceedings.

(c) If, it not being entirely clear from the application, that grounds (i) – (vi) are also said by the Applicant to demonstrate procedural unfairness as well as irrationality I make it clear that I am also unsatisfied that any of these grounds, taken individually or as a whole, meet the test of procedural unfairness, for the reasons set out above in this paragraph.

Decision

29. For the reasons I have given, whether the grounds are taken in their entirety, the application not distinguishing between the grounds as I have done, or individually, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

Angharad Davies
21 June 2020