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[2022] PBRA 125

Application for Reconsideration by Cross

Application

1. This is an application by Cross (the Applicant) for reconsideration of a decision of the Parole Board dated the 10 August 2022 not to direct 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 consist of the application for reconsideration; the decision letter of the panel and the contents of the dossier.

Background

4. On 11 October 2015 the Applicant was sentenced to an extended sentence of 14 years with a custodial period of 10 years and an extended licence of 4 years for an offence of wounding with intent. The Applicant along with a female accomplice had gone to the house of a man over a drug debt. The Applicant was armed with a machete and was masked. The man received multiple serious injuries. The Judge found that it was a planned attack which took place in the victim's own home. The offence was drug related. Most of the Applicant's sentence had been served in closed conditions. In March 2021 the Applicant was transferred to open conditions. He was returned to closed conditions in July 2021 after he was shown to have been involved with mobile phones and drugs.

Request for Reconsideration

5. The application for reconsideration is dated 26 August 2022.

6. The grounds for seeking a reconsideration, which I have attempted to summarise are as follows:

    a) Procedural unfairness - It is said that the hearing was unfair as allegations relating to mobile phone use and drugs were brought up at the hearing for the first time when the Applicant did not have a proper opportunity to dispute them. It was therefore unfair to rely on them. Other matters came up at the hearing which are said to have been sprung on the Applicant in particular that a new area of risk was revealed during the hearing.

b) Irrationality - It is further argued that the decision is irrational as it was in disagreement with the views of the witnesses who considered that with a detailed Risk Management Plan (RMP) the Applicant could be safely released.

Current parole review

7. This was the Applicant's first parole review.

8. The panel heard evidence from the Prison Offender Manager (POM); the Community Offender Manager (COM) and a psychologist. The panel heard submissions from a legal representative for the Applicant.

9. The Secretary of State's referral was to consider release only.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 10 August 2022 the test for release.

Parole Board Rules 2019 (as amended)

11. 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)).

Irrationality

12. [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."*

13. 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.

14. 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

15. 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.

16. 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.

The reply on behalf of the Secretary of State.

17. The Secretary of State has made no submissions in response to the application.

Discussion

18. The grounds for reconsideration are discursive which makes it difficult to isolate particular grounds. A number of the grounds are simply the legal representative disagreeing with the panel and do not approach the threshold for a claim of irrationality. The panel having heard the evidence including from the Applicant were concerned that he would return to taking drugs if released and there were insufficient measures in place to prevent this happening. Drugs were the principal risk factor for re-offending and, in the view of the panel, meant that the Applicant did not reach the high bar for release.

19. I have been concerned by the suggestion that the Applicant did not receive sufficient notice of allegations that he had been involved with mobile phones and drugs at Prison X (closed) where he had been returned to closed after similar behaviour at an open prison.

20. Having considered the matter in detail I am satisfied that the panel specifically did not find that these allegations were proved. They found surprising that there was no further investigation into those allegations as, if proved, they could demonstrate a recurring pattern connected with drug use. They were right to be surprised but that does not mean they relied on the facts of the allegations in any way which was unfair to the Applicant.

21. If the Applicant or his representative considered that something has been raised at such short notice that they could not adequately deal with it, it was for one of them, and in particular the legal representative , to raise the matter and for the panel to indicate whether it would adjourn the hearing for further enquiries, or to give the Applicant a chance to prepare a response or whether they would attach any weight to the allegations.

22. It has not been demonstrated to me that the panel attached any weight to any recurrence of use of mobile phones in Prison X in making their decision. It was a matter of concern, but the panel appreciated that the matter had not been made subject of an adjudication.

23. Complaint is made of the way the panel dealt in their decision with the evidence of the psychologist and in particular the assertion that she changed her mind having heard the evidence. The psychologist did change her view after hearing the evidence given by the Applicant. She still supported release but thought that more stringent licence conditions should be imposed. There can be no sensible suggestion that the panel considered the effect of her evidence in any other way. One of the things that concerned the psychologist was that the Applicant's account of the index offence was significantly different and did raise a new risk factor which had not previously been considered. The panel cannot be properly criticised for that. It can and does happen that those giving opinions on release will change their minds when they have heard the evidence of the Applicant. This is particularly the case when the account of the index offence at the hearing is different from what had previously been understood by the psychologist.

24. The panel were well aware that all the witnesses supported release, but they had to make up their own minds on the evidence and particularly their view of the Applicant. Parole Boards are not there to rubber stamp the views of the witnesses. If they do differ from their views then they need to set out clearly why they disagree. In my view this panel have done that. They had concerns about the Applicant's ongoing risk related in particular to his drug taking. Everyone agreed that if he returned to taking drugs on release then his risk would increase to an unacceptable level. The panel were not satisfied that the release plan provided sufficient reassurance particularly in light of what happened when the Applicant was in open conditions. It was not an option for the panel to recommend a further period in opening to provide a further period of testing.

25. Having considered all the evidence and the various criticisms of the panel's decision I do not consider the decision of the panel to be irrational.

Decision

26. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

John Saunders
15 September 2022