

[2020] PBRA 11

Application for Reconsideration by Walker

Application

1. This is an application by Walker (the Applicant). The Applicant is now aged 55 and applies through his solicitors for reconsideration of the decision of a panel of the board dated 7 December 2019 not to recommend that he should be released following an oral hearing.
2. I have considered the application on the papers. These comprise of the dossier, the provisional decision letter, the application for reconsideration dated 24 December 2019.
3. The Secretary of State did not make any formal representations in response to the application.

Background

4. The Applicant is serving a sentence of life imprisonment for the offence of murder. The minimum tariff set by the judge was 12 years one month and 16 days. The tariff expired on 7 December 2016.

Request for Reconsideration

5. The Applicant's solicitor raises the following issues:
 - (a) That the process was unfair because reliance was placed upon the contents of a psychological report in circumstances where the psychologist was not called to give evidence at the oral hearing; and
 - (b) That the decision was irrational in that the panel came to a decision that the Applicant should remain in closed conditions despite the fact that the Offender Manager and Offender Supervisor were recommending progression.

The Relevant Law

6. Rule 25 and rule 28 of the Parole Board Rules 2019 apply in this case.
7. Rule 28 (1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case.



8. In **R (on the application of 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 paragraph 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."

9. 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 Board in making decisions relating to risk. The Board when considering whether or not to direct a reconsideration will adopt the same high standard for establishing 'irrationality'.
10. Procedural unfairness has a similar meaning as procedural irregularity does in Judicial review. It is for me to decide whether I consider the procedure adopted by the panel in conducting the parole hearing was unfair to either of the parties.

The Applicant's Representations

11. The Applicant represents that the process was unfair because of reference to a psychological report written one year before the hearing. The unfairness is said to arise because the psychologist was not present to be cross-examined upon her current view. The complaint is that the psychologist was not required to be called as a witness by either the MCA panel member or by the chair. As a result it is argued that the Applicant was not given an opportunity to challenge the assessment of risk within that report.
12. Allied with the complaint relating to the failure to call a psychologist is a complaint that the panel acted irrationally in failing to take account of the fact that both the Offender Manager and Offender Supervisor were supporting progression and that no further offending behaviour work was being suggested at the hearing.

Discussion

13. The panel addressed the correct test is to apply in considering whether release should be ordered. The panel also addressed the correct test to apply in considering whether the Applicant should be progress to open conditions.
14. The panel carefully considered the fact that the Applicant had completed the period of time on a regime designed and supported by psychologists to help people recognise and deal with their problems. The panel acknowledged that the Offender Manager and Offender Supervisor were supporting progression.
15. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of any particular professional witness. It is their responsibility to make their own risk assessment and to evaluate the likely effectiveness of any risk management plan proposed. They would be failing in their duty to protect the public from serious harm they failed to do just that. As was observed in **DSD** they have the expertise to do it.



16. If the panel were to make a decision contrary to the opinions of professional witnesses without giving any reasons for doing so, that might be a ground for saying that the decision was irrational. Similarly, if it were to give reasons which were flawed or which did not on proper analysis support their conclusion that might also be a ground for saying that the decision was irrational.
17. The panel in its reasons made clear that it found little or no evidence of improvement or progress in the area of openness, honesty and compliance and a willingness to sincerely take responsibility for the effects of the Applicant's actions on others. The panel found evidence of minimisation and blame relating to the index offence.
18. The panel's conclusions were supported by the evidence within the dossier itself.
19. The panel however did not specifically address the basis upon which it rejected the recommendations of both the Offender Supervisor and the Offender Manager.
20. The Applicant's Offender Supervisor recommended a progression to open conditions. This was based on the fact that the Applicant had conducted himself well in custody and that open conditions would assist with reintegrating into the community. No reference was made by the Offender Supervisor of the outstanding treatment concerns which were raised in a psychological risk assessment in 2017.
21. The Applicant's Offender Manager produced two reports for the panel. The Applicant had completed a period of time on a programme designed and supported by psychologists to help people recognise and deal with their problems and a post treatment report was available. The Offender Manager was recommending a move to open conditions.
22. The second Offender Manager report addressed an issue which the Panel indicated was important. Whilst on the relevant regime the Applicant had made frequent telephone calls (over a period of months) to a member of the public in the community. The Applicant had failed to disclose, to his Offender Manager, this relationship and the telephone calls. In light of the index offence, and the need for openness and honesty in dealing with professionals, the relationship and the failure to disclose raised a concern.
23. The Offender Manager indicated in the report that the issue had been addressed. In the report, the Offender Manager indicated that having reflected upon the conduct, and having had the benefit of a telephone conversation with the person in the community, the conclusion had been reached that this issue "*no longer significantly impacted on the current risk management plan*".
24. In the light of the fact that the Applicant had been untruthful about the frequency of contact, and the nature of contact it is surprising that no detailed explanation was offered as to why this issue did not raise concerns. The Panel certainly took the view that this was a serious matter and that it linked directly to the Applicant's personality.
25. Further, despite a recommendation by a psychologist that the Applicant remained a risk and that further intervention, possibly in the form of a Therapeutic Community or a programme was necessary in order to address that risk, the Offender Manager



failed to address the basis upon which it was felt that these recommendations could be ignored and the Applicant safely progress to open conditions.

26. No reference appears in the panel's decision letter of these matters being put to the Offender Manager or the Offender Supervisor. It is therefore unclear both why the Offender Supervisor and the Offender Manager concluded that interventions suggested by the psychologist were no longer appropriate or apposite. It is also unclear why these matters were not addressed either by the panel or indeed by the Applicant's solicitor.
27. As indicated, the Applicant had completed a period of time on the relevant programme (detailed in paragraph 13), however the psychological risk assessment had specifically indicated that it was unlikely that a period of time on this particular programme would address the serious outstanding issues in relation to the Applicant's risk. The Offender Manager indicated in the second report that the Applicant had completed "*core reduction work, most crucially the recent [treatment]*". It is clear therefore that the Offender Manager concluded that the Applicant's period of time on the relevant programme had addressed the issues raised in the psychological risk assessment. However, neither the Offender Manager (in the report), nor the parties explained why a period of time on the relevant programme was able to adequately address the risk related issues raised in the psychological risk assessment.
28. In the preceding parole decision in this case (October 2018) a Parole Board member had concluded by indicating that a subsequent Parole Board would benefit from a post programme report and a psychological report completed following the period of time on the programme including an assessment of personality disorder if deemed appropriate.
29. In the first Offender Manager report of June 2019, the Offender Manager indicated that a request had been made to complete a further risk assessment following the Applicant's period of time on the relevant programme.
30. A note on the dossier dated May 2019 from the prison psychology service indicates that having reviewed the Applicant's case the Prison Psychology Service were proposing not to produce a psychological risk assessment for his forthcoming parole review. No reason is given for this decision, neither is it addressed in the decision letter of the panel or by the Applicant's solicitor. The issue is not addressed by the Offender Manager in the second report.
31. In written representations made by the Applicant's solicitor relating to the Review, the Applicant's solicitors indicated "*that this case should be granted an oral hearing in line with the Parole Board Rules, or review adjourned for a short period to allow time to obtain an updated psychological report*". It is unclear whether the solicitors were suggesting that the Parole Board should commission a psychological risk assessment or whether the solicitors themselves were contemplating an independent report, however this representation seems not to have been pursued.
32. In the Parole Board decision letter, the representation by the solicitors (relating to psychological risk assessment) was referred to in the introduction, however, again no indication is given as to why (if that was the decision) it had been concluded that an updated or full risk assessment was not required.



33. The absence of an independent and full psychological risk assessment following the period of time on the relevant programme left the parties relying upon a post treatment report and the earlier psychological risk assessment. It has been said on a number of occasions that it is not appropriate for the reports of treatment providers to be used in the context of risk assessment. The earlier psychological risk assessment did not address the work that the Applicant had completed on the programme and therefore had limitations.
34. No indication was given in the panel's decision letter or indeed in the dossier itself as to why a further risk assessment had not been commissioned. The earlier psychological report was a perfectly valid assessment of treatment needs and risk. However in the context of a further intervention it was necessary to ascertain whether the real concerns raised in that earlier psychological report had been addressed.

Decision

35. I have therefore concluded that the process in this case was procedurally unfair in that neither the panel itself nor the solicitors acting for the Applicant had commissioned a psychological risk assessment to consider the position of the Applicant at the time of the hearing.
36. The panel were perfectly entitled to reject the recommendations of the Offender Supervisor and Offender Manager in this case, however in doing so it was important that the reasons why the recommendations were being rejected were clearly recorded within the decision letter. It can be assumed that the recommendations were being rejected by the panel because the panel took a serious view of the conduct of the Applicant in contacting a person in the community without giving appropriate notice. It is also likely that the panel felt that not all the risk factors had been addressed in the light of the earlier psychological report. However, these views were not clearly set out in the letter.
37. Accordingly, the application for reconsideration is granted and I set out the following directions.

Stephen Dawson
10 January 2020

