[2020] PBRA 43

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Application for Reconsideration by Piovesana

Application

1. This is an application by Piovesana (the Applicant) for reconsideration of a decision of an Oral Hearing Panel dated 22 January 2020 not to direct his release or recommend Open Conditions.

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;
    - The Application for Reconsideration; and
    - Various emails including an attached statement provided at the request of the Reconsideration Assessment Panel.

Background

4. The Applicant was sentenced to Imprisonment for Public Protection (often referred to as an IPP sentence) on 12 October 2006 for an offence of s18 grievous bodily harm with intent.

5. The index offence involved the Applicant, having consumed alcohol, assaulting a police officer. The Judge concluded that a weapon, possibly a hammer or metal pole, had been used to strike the victim once. The Applicant maintained it was a punch.

6. At the time of the offence, the Applicant was also awaiting trial for other offences. He received a 4 year custodial sentence for assault occasioning actual bodily harm and 4 months imprisonment to run consecutively to the 4 years for an offence of battery.

7. The minimum term on the IPP sentence expired on 22 February 2012.

8. The Applicant has been released twice on this sentence and recalled on both occasions. The first recall in 2015 was due to him being convicted of further offences. He was then re-released on direction of the Parole board in June 2016.

9. The Applicant spent almost 3 years back in the community but was recalled again in April 2019. He had been arrested for two offences of common assault and received a 16 week custodial sentence for those offences on 11 April 2019.

Request for Reconsideration

10. The Application for Reconsideration is dated 13 February 2020 and has been submitted by Solicitors acting for the Applicant.

11. The grounds for seeking a reconsideration are as follows:

    a. Ground 1. Irrationality - That the Panel failed to give appropriate weight to the Applicant's learning as a result of the recall and how this would impact on his future alcohol consumption.

    b. Ground 2. Procedural unfairness – That the Psychologist's opinion and recommendation regarding further work did not take into account the counselling already undertaken, as the Psychologist gave evidence to the Panel that there had been liaison between her and the Counsellor but the Applicant has since discovered that this was not the case.

12. I requested further particulars of the Applicant's second ground, in particular how he had become aware that his Counsellor and the Prison Psychologist had not spoken. The Applicant's Solicitor confirmed that the Applicant said that he 'had engaged in a conversation with [the Counsellor] where it had been confirmed that no liaison had taken place between [the Counsellor] and [the Psychologist].'

Current parole review

13. The Applicant's case was referred to the Parole Board by the Secretary of State in April 2019 to consider whether or not it would be appropriate to direct his release and, if release was not directed, to advise the Secretary of State on whether he should be transferred to open conditions.

14. The case was directed to oral hearing by a single member MCA panel.

15. The hearing was convened at the relevant prison on 10 September 2019.

16. On that date, the Panel heard evidence from the Applicant, his Offender supervisor and his Offender Manager. The Panel concluded that there was insufficient evidence to reach a decision and adjourned the hearing for a psychological risk assessment to be prepared and, for updates from the Applicant's Offender Supervisor and Offender Manager.

17. The hearing was reconvened before the same panel on 15 January 2020.

18. The Panel heard evidence from the Applicant, his Prison Offender Manager, his Community Offender Manager and the Prison Psychologist who had completed the psychological risk assessment directed by the panel following the earlier hearing.

19. None of the professional witnesses supported release or a move to Open Conditions.

20. The Panel concluded that the Applicant did not meet the test for release and therefore did not direct release.

21. The Panel did not recommend transfer to Open Conditions either.

The Relevant Law

22. The panel correctly sets out in its Decision Letter dated 22 January 2019 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019

23. 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)).

24. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

25. 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."*

26. 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.

27. 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

28. 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.

29. 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

30. The Secretary of State has submitted no representations in response to this application.

Discussion

31. The Application for Reconsideration refers to 'the decision' in general terms. It is of course only the decision not to release which is amenable to reconsideration so I will only discuss that aspect of the Panel's decision-making. I will deal with each ground in turn.

Ground 1: Irrationality

32. The Applicant submitted that, *'the Panel acknowledge that he has developed skills to manage himself, used skills in the community and in custody in highly emotive situations. The Panel accept that the instance of failure to implement skills arose when alcohol was present and that [the Applicant] recognised his use of alcohol was a mistake'.*

33. The Applicant goes on to submit that it is therefore irrational that the Panel concluded that he did not meet the test for release as the Panel had failed to give

appropriate weight to the Applicant's learning as a result of the recall and how this would impact on his future alcohol consumption.

34. I am reminded that, where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and 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.

35. Whilst the Applicant is correct that the Panel acknowledged that he had developed skills to manage himself in highly emotive situations, it is also important to note that the Panel stated in the conclusion section of the Decision Letter that 'you [the Applicant] have the skills and knowledge to manage your behaviour and use those skills to good effect but not with consistency'.

36. The Panel went on to say that 'further work to help [you] manage heightened emotions without resorting to violence is necessary'. This was in agreement with the assessment by the Prison Psychologist.

37. The Panel decided not to release the Applicant. None of the professional witnesses were supporting release. The Panel explained their reasons sufficiently in the Decision Letter. The Panel therefore could in no way be considered to have acted irrationally.

38. Accordingly, this ground fails.

Ground 2: Procedural Unfairness

39. The Applicant submitted that there had been no liaison between his counsellor, with whom he had been undertaking treatment, and the Prison Psychologist who completed the assessment and gave evidence to the panel.

40. Given the weight that the Panel attached to the Psychologist's assessment and evidence, this ground was carefully looked into.

41. Directions were made so that I could have sight of emails between the Psychologist and the Counsellor. I was provided with the following;

- Email from Psychologist to Counsellor dated 24.10.19
- Email response by Counsellor with an attached statement entitled 'ISMT Counselling Statement' and dated 29.10.19
- Further emails acknowledging replies and discussing when the psychological report would be disclosed so that the Applicant could be supported.

42. I am satisfied on what I have seen that there was email contact between the Psychologist and the Counsellor. I am further satisfied that the details of their communication were accurately relayed to the Panel during the hearing as this can be seen by the summary of the Psychologist's evidence with section 5 of the Decision Letter.

43. I am therefore satisfied that the Applicant is entirely incorrect in his submission regarding the contact between the two professionals. Consequently, there is no reason at all to doubt that the Psychologist took into account all that was said to her within those emails when making her assessment and giving her recommendation to the panel.

44. The Applicant was legally represented at the hearing and, was given adequate opportunity to challenge the assessment of the Psychologist through his representative.

45. Accordingly, this ground also fails.

Decision

46. For the reasons I have given, I do not consider that the decision was irrational nor procedurally unfair and accordingly the application for reconsideration is refused.

Cassie Williams
23 March 2020