[2019] PBRA 31

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Application for Reconsideration by Forbes

Introduction

1. This is an application by (a recalled prisoner) for reconsideration of the decision of a panel of the Board, after an oral hearing on 29 July 2019, not to direct his re-release on licence.

2. The original decision was issued on 13 August 2019: however due to an administrative oversight it did not contain the usual explanation about the possibility of reconsideration. An amended decision including that explanation was therefore issued on 2 September 2019.

3. Mr Forbes (the Applicant) is serving an extended sentence for a knifepoint robbery in a shop. His custodial term is 5 years and his extended licence period another 5 years.

The Relevant Law

4. This decision, being a decision not to direct the re-release on licence of a recalled prisoner serving an extended sentence, is eligible for reconsideration under Rule 28(1) of the Parole Board Rules 2019.

5. The only two grounds for reconsideration under that Rule are irrationality and procedural unfairness.

6. Irrationality is a concept well known in judicial review proceedings in the High Court. 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 of its judgment:

> "*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".*

This was the test set out in a different context by Lord Diplock in the House of Lords in **CCSU -v- Minister for the Civil Service [1985] AC 374**.

7. 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.

8. The fact that Rule 28 uses the same word as is used in judicial review cases clearly demonstrates that the same test should be applied when considering an application for reconsideration of a panel's decision.

Solicitors' representations

9. The Applicant's solicitors submitted written representations on 23 September 2019 and amended representations on 27 September 2019. The solicitors submit both that the decision was irrational and that it was procedurally unfair. The basis of those submissions is set out in the discussion below.

Observations on behalf of the Secretary of State

10. None have been received.

Discussion

Irrationality

11. In submitting that the decision was irrational, the solicitors suggest that it was unbalanced and contained errors of fact. In support of that suggestion they make a number of points.

12. The Reconsideration Assessment Panel has been unable to find any significant errors of fact in what was clearly a thoughtful and detailed decision letter.

    (a) The solicitors suggest that the panel made an error in relation to the fact that the Applicant had failed a mandatory drug test. They refer to his own evidence about that matter, which amounted to a denial of having knowingly used the drug in question. However, the disciplinary charge relating to that matter was found by an independent adjudicator to have been proved, and the panel was entitled to rely on that finding.

    (b) The solicitors also suggest that the panel made an error in relation to the Applicant's work with the chaplaincy, in that the decision letter refers to the fact that he had completed such work at two separate prisons before his recall. However, a careful reading of the decision letter shows that, whilst it refers to the work as having started at those two prisons, it also refers to work since recall with the chaplaincy at his present location.

13. Equally the Reconsideration Assessment Panel does not find the suggestion of lack of balance to be substantiated. A decision letter does not have to refer to every piece of evidence given to the panel, and this decision letter covered all the matters relevant to the panel's conclusions. In particular:

    (a) The positive factors were referred to as well as the negative ones.

    (b) There was not, as the solicitors suggest, an over-reliance on historical factors. Historical factors are always significant in any risk assessment and need to be taken into account (as they were by the panel) alongside the circumstances of recall and the Applicant's custodial behaviour and other matters.

(c) It is submitted that the panel "*failed to add sufficient weight to the fact that during the prisoner's previous periods in the community, there had been no anger aggression or use of weapons or violence*". The panel was clearly mindful of that fact as it was referred to the Applicant's legal representative's argument based on it. The panel was entitled to conclude that that fact was outweighed by the other matters to which it referred.

(d) Complaint is made that the decision letter does not refer to the Applicant's role in peer mentoring. However, the panel must have been well aware of that: its reasonable concern was that, although in many respects the prisoner was capable of engaging well in prison or in designated accommodation, he had demonstrated an inability to continue that compliance into the community when living elsewhere.

(e) Complaint is further made that in dealing with the Applicant's family relationships the panel observed that he "*seemed to be a divisive figure*". That observation was supported by the evidence in that the prisoner's family were divided in their attitudes to him: that was a fact relevant to risk in that family support was not as great as might otherwise have been the case.

(f) The panel's concern that the Applicant was unlikely to comply (beyond the relatively short period in designated accommodation) was not over-emphasised, as is suggested, but was a crucial part of the panel's decision that the test for re-release on licence was not met.

Procedural unfairness

14. Complaint is made that it was unfair for the panel not to adjourn the hearing so that a more detailed and effective Risk Management Plan could be put together.

15. Some panels might have adjourned, but the decision whether or not to do so was one well within the discretion of the panel and its decision not to adjourn cannot be categorised as unfair. There was likely to be considerable difficulty and delay in formulating an effective Plan, and the panel was entitled to conclude, as it did, that:

> *"…in supporting the development of an achievable Risk Management Plan, you will need to evidence engagement in further assessment and suitable risk and offence-focussed interventions. It is clear that suitable accommodation, and a fuller, longer-term Risk Management Plan would need to be developed with greater certainty about community support agencies and the work to be done."*

Decision

16. For the reasons set out above the test of irrationality is not met, and there was no procedural unfairness. This application must therefore be refused.

Jeremy Roberts
8 October 2019