[2019] PBRA 45

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Application for Reconsideration by Shields-McKinley

Application

1. This is an application by Shields-McKinley (the Applicant) for reconsideration of a decision by a duty member not to direct his case an oral hearing on the basis that the decision was irrational or that it was procedurally unfair.

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 that (a) the decision is irrational or (b) it is procedurally unfair.

Background

3. On the 31 January 2014, the Applicant was sentenced to 4 years imprisonment with a four-year extended licence for causing or inciting a child under 16 to engage in sexual activity, together with lesser, concurrent sentences of imprisonment for three offences of sexual activity with a child and an offence of sexual activity in the presence of a child.

4. The Applicant has previous convictions dating from October 1997, involving sexual offences against children.

5. The Applicant has always denied committing both the 1997 and the 2004 offences.

Request for Reconsideration

6. The application for reconsideration is dated 7 October 2019. The form does not set out the grounds but refers to the attached representations, paragraph 1.2 of which states *"We submit that the decision of the MCA member is both irrational and procedurally unfair. Mr Shields-McKinley's case should be directed to an oral hearing to consider his application for release."*

7. The submissions in support of the application for reconsideration have attached a letter, dated 18 November 2016, detailing that the Applicant had accessed their One to One Emotional Support Service for anxiety and other matters.

Current parole review

8. On the 26 August 2016, the Applicant was released on licence; he was recalled on the 5 January 2018. The reasons for his recall was his failure to undergo polygraph testing.

9. The reasons the Appellant gave for refusing differed on the three occasions when the test should have been administered. On the 7 November 2016, he insisted the facilitator signed a handwritten statement which he had prepared, saying that he was doing this on the advice of his solicitors and that he believed the test was illegal. The Applicant received a formal written letter sent that day in respect of this refusal. On the 22 November 2016, he stated that he would not answer any questions about his conviction, offence or licence as he was appealing his conviction; he also failed to sign the Polygraph Examination - Statement of Understanding. A final written warning letter was sent that day. On the 3 January 2017, during supervision, the Applicant handed his Offender Manager paperwork stating that he was unable to attend the following day's polygraph test because he was depressed. However, the paperwork included no medical evidence. On the 4 January 2017 the Applicant failed to attend the polygraph test.

10. On the 27 March 2017, the Applicant's case was considered on the papers and his release was refused.

11. On the 1 May 2018, a panel member directed an oral hearing should be listed. The Applicant's request for an oral hearing date of the 5 April 2018 claimed he had not complied with the condition to undergo polygraph testing because he had been under the care of a psychiatrist for anxiety who had advised him not to engage with the testing procedure. The submissions identified this as the central issue requiring exploration at an oral hearing. The direction for an oral hearing identified as the issues, the index offences, previous sexual offending, the time spent in the community (without offending) and the Applicant's attitude to polygraph testing and licence conditions (and how they impacted on risk).

12. The oral hearing took place on the 1 August 2018. The panel had a letter dated the 18 November 2016, which is presumably the letter attached to the submissions for the application for reconsideration.

13. At the hearing the Offender Manager told the panel there was core work available which was necessary in order to reduce the Applicant's risk. She said the Applicant took the view that his release to the relevant area infringed his human rights and that after his release, although there had been some engagement, the Applicant would not talk about his offending or rehabilitation, disputed his licence conditions and frequently wanted to talk about deportation. The Offender Manager said that the Applicant had spent five months in the

community without offending or engaging in inappropriate behaviour but still considered his risk of reoffending was high because he had failed to engage with supervision or comply with licence conditions.

14. The Applicant said he had no ties in the United Kingdom or the relevant area and would not go there on licence. He said he had mental health problems which had not been taken into consideration in respect of the polygraph testing. The panel decided there had been no direct evidence that these problems rendered polygraph testing unsuitable in his case. The Applicant in his evidence to the panel, put forward a number of conditions: he would not undertake offending behaviour programmes, polygraph testing, any psychological assessment initiated or recommended by the probation service and he would not live in any designated accommodation outside the relevant area and would not engage with his allocated Offender Manager.

15. The panel found the risk of serious harm was high and imminent if the Applicant were released into the community; it decided that the release management plan did not address sufficiently the identified risks and refused to direct the Applicant's release.

16. On the 3 September 2019, an MCA member of the Parole Board carried out a review of the Applicant's case. The panel on this occasion did not find there were any reasons for an oral hearing and noted the Applicant had neither requested an oral hearing nor had submitted representations. The panel refused to direct the Applicant's release.

17. The panel concentrated on developments since the previous review. The panel recorded that the Applicant had refused to discuss his offending or the circumstances that led to his recall; he had told the panel he was appealing his conviction and taking legal action against the Probation Service and that the Offender Manager had been issued with a restraining order to prevent her contacting him in any circumstance. The panel noted the positive aspects of the Applicant's behaviour in custody since recall. The panel also noted that the Applicant had said he did not care about his recall and that it was irrelevant because he did not want to be released to the UK but rather to another country. He said he would not comply with his licence conditions if he were released to the relevant area. The panel considered that the Applicant posed a high risk of serious harm to children, basing that on the existing assessments.

18. The panel's conclusion was *"taking into account your previous non-compliance and your repeated statement that you refuse to be managed in…*[local probation area]*, together with your stated intention not to comply with aspects of your licence, the only conclusion to be drawn is that you cannot be managed in the community and would pose a high risk of absconding. The panel*

concludes that it is necessary for the protection of the public that you are confined and makes no direction regarding release."

19. On the 13 September 2019, the solicitors for the Applicant submitted submissions for an oral hearing. The topics the solicitors wished to raise at such a hearing were (i) the panel had failed to take sufficiently into account that the Applicant had mental health problems, that these had manifested themselves some two months prior to his release and that they may have affected his ability to undertake a polygraph test; (ii) a RM 2000 assessment, carried out in 2018, showed the Applicant to be a medium risk; (iii) the "significant issues" between the Applicant and Probation Service and (iv) the desirability of the Applicant being released on licence in the relevant area.

20. On the 23 September 2019, a MCA duty member refused the application for an oral hearing. Essentially the duty member considered that the matters raised in the written submissions had been explored and adjudicated on at the oral hearing in 2017 and by the single-member panel on the 3 September 2019, and that the high risk assessment was recent and justified.

21. The application for reconsideration arises from that decision of the 23 September 2019.

The Relevant Law

22. In **R (on the application of DSD and others) – v – the Parole Board [2018] EW 8694 (Admin**), the Divisional Court set out the tests for irrationality to be applied in judicial reviews of Parole Board decisions. It said at paragraph 416 "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".

23. Due deference is to be given to the expertise of the Parole Board in making decisions relating to parole and the test for irrationality is not limited to decisions whether to release: it applies to all Parole Board decisions.

24. In the cases of **Osborn and Booth – v – the Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgement. The Supreme Court did not decide that there should always be an oral hearing but said there should be if the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to put his case properly. When deciding whether to direct an

oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

Discussion

25. Dealing with the alleged failures to consider adequately the question of risk, the Panel stated in the Directions of the 23 September *"a risk assessment has been carried out recently by the Parole Board which accurately reflects your continued attitude to licence supervision and the boundaries of licence conditions."* In my view, it cannot be said sensibly that the Parole Board was not able to come to that conclusion on all of the material before it, simply because of the result of a single assessment.

26. As to the question of risk in general, the Panel concentrated, as it was entitled to, on the lack of progress since recall and the Applicant's, by now entrenched, attitude to licence conditions.

27. It is worth remembering some of the evidence before the Panel. The Offender Supervisor reported that the Applicant was refusing to discuss the index offences (whether or not he was maintaining his innocence); he had not done any offending behaviour programmes "because he is maintaining his innocence and doesn't have to do any course." As a consequence, he had not addressed the triggers and risk factors which he might face on release on licence. The Offender Manager described the Applicant as steadfast in his refusal to engage in any community risk management strategies, regardless of the location where he was going to be supervised.

28. In addition, the Applicant was showing an increased tendency to dictate to the Parole Board in an attempt to persuade it to enter into areas outside, or at least on the very periphery, of its jurisdiction, for example, the location where the Applicant should be released and the identity of the persons who were to manage his licence. The Applicant had shown similar conduct towards the Offender Manager during supervision when on licence.

29. The Panel was also entitled to bear in mind, that prior to the 3 September, the Applicant had made no request for an oral hearing and had not put before it any written representations. With so little progress and so much resistance to licence management conditions, it is difficult to see objectively what the Panel could have achieved in an oral hearing which it had not achieved in a review of the papers. Clearly the Panel would want to bear in mind the Applicant's legitimate interest in having an oral hearing but the emphasis has to be placed

on "legitimate"; the tenor of what the Applicant has written (as opposed to what has been drafted on his behalf by his solicitors) suggests that he had a very strong desire to promote his own personal objectives, many of which were outside the ambit of the work carried out firstly by the Probation Service and secondly by the Parole Board.

30. The last point is that it is suggested that Panel failed to apply the test correctly as to whether an oral hearing should be granted and instead "focused on prospects of a release which were not a factor". What Lord Reed actually said was "The question whether fairness requires a prisoner to be given an oral hearing is different from the question whether he has a particular likelihood of being released or transferred to open conditions, and cannot be answered by assessing that likelihood." If one looks at the Panel's decision dated the 23 September, it is plain that the factors raised by the Applicant's solicitors were being considered and only at the very end of the decision does this sentence appear "Even a period of four months (as suggested by the legal representations) will be unmanageable without your absolute cooperation." This is simply not evidence of the panel focusing on the prospects of release; it is the Panel answering a point raised by the solicitors.

Decision

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.

James Orrell
23 October 2019