[2019] PBRA 55

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Application for Reconsideration by Moorhead

Application

1. This is an application by Moorhead (the Applicant) for reconsideration of a decision of the Parole Board not to release him on the basis that the decision was irrational and 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 the decision was irrational or that it was procedurally unfair.

Background

3. The Applicant is now aged 30. He is serving an extended determinate sentence imposed in February 2014 comprising of a custodial term of four years and six months with an extended licence period of three years and six months. He was automatically released in February 2018 and recalled approximately eight months later in October 2018. His sentence expires in August 2021. The panel was therefore considering a risk period of approximately 23 months.
4. The Applicant is serving his sentence for sexual offending and breaches of a Sexual Offences Prevention Order.
5. The index offending was committed in November 2013 when he approached several girls in school uniform and attempted to engage them in conversation by asking them their ages and if they had boyfriends. He then asked them to engage in sexual activity for which he offered to pay. They were between the ages of 12 and 14. These offences were committed just four weeks after he had been convicted of causing or inciting a female child under 16 to engage in sexual activity for which he was made the subject of a Community Order and a Sexual Offences Prevention Order.
6. The Applicant's sexual offending constituted an escalation in offending behaviour. He has seven previous convictions relating to 19 offences, none of them of a

sexual nature. He consistently denied having a sexual interest in young girls and minimised his sexual offending attributing it to the misuse of drugs. The most significant risk factor identified by the panel was his distorted thinking about sexual offending and his targeting of young and vulnerable female children and teenagers.

7. The subject matter of this application arises out of the third review of the Applicant's sentence. The review was heard by the panel on 24 July 2019. Oral evidence was given by the Offender Supervisor, the Offender Manager, a prison Psychologist and the Applicant. Submissions were made on the Applicant's behalf by his legal representative. The application was for release and was supported by all three professionals. At the conclusion of all the oral evidence and submissions the panel concluded that further information was needed to assist in making an informed risk assessment. Directions were given for production of an earlier panel decision and two reports. The proceedings were adjourned. In so doing the panel indicated that upon receipt of the requested material they would endeavour to conclude the review on the papers without the need for a further hearing. It specifically invited further legal representations. I have not been made aware of any.

8. Following the adjournment of the oral hearing, detailed Panel Chair Directions were issued and uploaded into the Dossier. In some considerable detail they summarised the evidence that had been heard under three headings: (i*)"The Psychologist's evidence",(*ii) *"Progress in the community and the circumstances of Mr. Moorhead's recall"* and (iii) *"Mr Moorhead's progress and behaviour in custody".*

9. As they had anticipated, the panel felt able to conclude the review on the papers. The Oral Hearing Decision Letter dated 1 October 2019 set out in full all the matters upon which the panel relied and which is now the subject of this application.

Request for Reconsideration

10. The application for reconsideration is dated 18 October 2019. The Secretary of State did not wish to make representations in response to the application, the grounds of which, in summary, are that the panel acted irrationally and that the

proceedings were procedurally unfair. It is submitted that the panel acted irrationally in three ways:

(i)That the decision letter incorrectly stated that the panel were informed that the Applicant would be suitable for a specified training course addressing the use of violence and sex offending, when in fact it is submitted he was not.
(ii)That the decision letter *"inaccurately recorded the evidence of professionals"* (it is not clear whether anything other than (i) above is relied upon).
(iii)That the panel place insufficient weight upon the evidence of the professionals and favoured *"the views of previous report writers".*

11.Procedural unfairness is said to arise because the panel did not direct when it adjourned the oral hearing that a copy of a sexual offending report should be provided.

The Relevant Law

12.**Rule 25** (decision by a panel at an oral hearing) and **Rule 28** (reconsideration of decisions) of the **Parole Board Rules 2019** apply to this case.

13.**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.

14.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 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."*

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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

Discussion

15. The solicitors acting on the Applicant's behalf have expanded upon their essential complaints in their document dated 18 October 2019 and I have of course considered their submissions with care.

16.In this case because of its procedural history the parties are, in my judgment, in the advantageous position of having not just the Decision Letter of 1 October 2019 but also the Panel Chair Directions of 5 August 2019, which taken together represent a careful, thorough and detailed analysis of every relevant aspect of the Applicant's case.

17.Panels of the Parole Board are under no obligation to accept the evidence of professional witnesses. It is the duty of the panel individually and then collectively to rigorously assess and evaluate the information and material before it. It is for the panel to make its own risk assessment and to evaluate the effectiveness of any proposed plan. When adjourning cases, it is routinely necessary and helpful for panels to indicate possible avenues of investigation and inquiry in anticipation of further consideration by it or indeed by another panel altogether.

18. I am not persuaded that the Decision Letter necessarily intimates (as is submitted) that the panel were (incorrectly) informed that the Applicant would be suitable for the training course addressing violence and sex offending. That is not how I read the final six lines at the conclusion, which in summary, states that since the Applicant was assessed as presenting a very high risk of re-offending, the training courses addressing violence and sex offending would be considered to be the most suitable course for him to undertake. An assessment by a psychologist would be necessary before a referral for this training course; but there was currently a six month waiting list for this.

The provenance of that statement is unknown. On one view it reads as no more than a statement of principle. However, it should not have taken anyone who read it entirely by surprise. It also appears verbatim in the Panel Chair Directions (in the Dossier) and was therefore available to be read and commented upon in the submissions that the Applicant's solicitors were directed to make by the panel at the adjournment of the Oral Hearing on the 24 July 2019

19. No material has been placed before me to either support or justify the complaint that the Decision Letter has in any sense inaccurately recorded the evidence of professionals or that the panel failed to place sufficient weight upon the evidence of those witnesses in favour of other evidence. It is for the panel and the panel alone to test and assess the evidence it receives.

20. As for the claim of procedural unfairness. I can find no evidence that any submission was made to the panel at any stage for a copy of the sexual offending treatment report to be provided. Again, I refer to the fact that the Applicant's solicitors were invited to make any further submissions at the adjournment of the Oral Hearing and as far as I am aware there were none. In fact, this sexual offending treatment programme was referred to in the psychologist report, for example in paragraph 3.3.2 on page 183 of the Dossier and in an earlier panel decision of 2017 at page 241. Given what appears to be at best the mixed nature of the Applicant's response to this programme, I am unable to accept that even if seen, it would necessarily have impacted on the outcome in any way one way or the other.

21. One of the purposes of an oral hearing is to examine and challenge assertions made. The fact that all the professionals agree that the risk is or is not manageable does not mean that the panel are bound to agree. The panel are a tribunal who are regarded as expert in carrying out the task of assessing risk. In this case the panel did not agree with the professionals and they provided detailed and clear reasons why they did not agree. That does not provide a ground for reconsideration.

22. Where a panel arrives at a conclusion having seen and heard all the material and the witnesses it would be inappropriate to direct that their decision be reconsidered unless it was manifestly obvious that there was a compelling reason to do so.

23. I have reached the clear conclusion that there are no grounds for interfering with the conclusion reached by the panel. It was a decision that was in my judgment neither procedurally unfair nor irrational.

Decision

24. The application is accordingly dismissed.

Michael Topolski
11 November 2019