

[2019] PBRA 69

Application for Reconsideration by McNicholas

Application

1. This is an application by McNicholas (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 14 November 2019 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 or (b) that it is procedurally unfair.

Background

3. On the 30 November 2012, the Applicant was sentenced to an extended sentence for two offences of robbery, an offence of attempted robbery and an offence of possessing a knife blade. The custodial part of the sentence was 66 months and the licence period was 36 months.
4. The Applicant has been released on licence four times during the sentence. On the fourth occasion he was released on the 20 March 2019 and recalled on the 3 May 2019.

Request for Reconsideration

5. The request for reconsideration is dated the 20 November 2019.
6. The grounds for requesting reconsideration were substantially as follows:

'(a) Irrationality: The Panel Member noted that the Applicant's offending is becoming more serious over time which is disputed.

(b) Procedural unfairness: The panel did not have the benefit of sight of the oral hearing decision letter issued [in January 2019] as this had not been added to the dossier.'

The Relevant Law

7. 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,

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"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. It follows that irrationality is difficult to establish

Discussion

8. Dealing with the first ground, the panel dealt with the Applicant's offending in section 3 of the Decision Letter. The panel noted that his offending started in 2004 and set out the categories of offences he had committed. There was then a serious escalation in March 2009 when the Applicant was sentenced for two robberies. The panel also noted that he had been on licence for those offences and had been recalled but was unlawfully at large when he committed the index offences.
9. That is a correct description of the Applicant's offending up to the point he received his present sentence. It is extremely unlikely that the panel intended to say his offending during the current licence represented an increase in gravity. In the conclusion section, the panel said, *"Your most serious offences were committed while unlawfully at large, having been recalled on licence for previous serious offences."* This is entirely consistent with the panel taking the view that the offences committed during the current licence were not more serious than the index offences. In addition, the Applicant's static and dynamic risk assessments had remained constant.
10. There is no indication that the panel came to its decision on the basis that the Applicant's offending had become more serious since November 2012; on the contrary, it is plain the panel considered that the Applicant's offending had become more serious before November 2012.
11. The second ground lacks particularity. It is unclear whether it is being submitted that the Applicant had asked for the Decision Letter dated January 2019 to be included in the dossier; I am not told if the letter was referred to at any stage during the hearing and there is no reference to any part of the letter which might support the argument made on behalf of the Applicant. It has been submitted on behalf of the Secretary of State that the existence of this document was known to all parties and to the Panel.
12. In the absence of the above information, the presumption is that the panel considered all the evidence before it and, in particular, considered any document

any interested party required it to consider. In those circumstances, the process by which the panel came to its decision was procedurally fair.

13. Out of an abundance of caution, I obtained and read the Decision Letter and, in my view, it contains nothing which, had it been before the panel, would have led to a different decision.
14. Although not a separate ground, the helpful, written representations includes the suggestion that the Applicant would be ineligible for the specified programmes and would not be able to access intensive alcohol prevention work if he remained in custody.
15. Of course, the panel did not have jurisdiction to direct that the Applicant should do that work and the panel did not make its decision not to direct release simply because the specific work had not been done. The panel came to its decision, among other matters, because it considered the Applicant's alcohol dependency remained, that he had shown only limited insight into why his offending had become so serious and that the panel, in the light of his recent history, did not think that he would abstain from alcohol, in which circumstances his risk of committing serious harm remained high.

Decision

16. 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
03 December 2019