[2019] PBRA 79

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Application for Reconsideration by Elms

Application

1. This is an application by Elms (the Applicant) for reconsideration of a decision made by an Oral Hearing Panel not to direct his release. The Hearing took place on 8th November 2019. The Decision Letter is dated 13th November 2019.

Background

2. The Applicant is serving a sentence of life imprisonment with a minimum term of 7 years. His tariff expired in December 2002.

Request for Reconsideration

3. The application for reconsideration is dated 4th December 2019. The Secretary of State has offered no representations in response.

Current parole review

4. In November 2018 the Secretary of State referred the Applicant's case to the Parole Board for his ninth review.

The Relevant Law

5. 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.

6. 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.

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,

> *"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

8. The Applicant submits that the hearing was procedurally unfair in that "the Applicant believes that the Panel Chair has previously heard his case". The submission is further developed thus: "in the event that the Panel Chair had previously heard this case, but did not mention this at the outset of the oral hearing of this case on 08.11.19, this would make this oral hearing 'procedurally unfair'."

9. The first question which arises is: Is there any adequate evidential basis upon which this Reconsideration Assessment Panel can conclude that the Panel Chair had in fact previously heard his case? As to this, it is important to note that Reconsideration Assessment Panels are required to consider an application for reconsideration on the papers. They are not empowered to gather further evidence (see Parole Board Rules 2019 r28 (5)).

10. The representations made on behalf of the Applicant recite no more than a belief that the Panel Chair had had previous involvement in the case and acknowledge the Applicant's lack of certainty on the matter. The Chair had ample opportunity to recall any previous engagement with the Applicant, whether while reading the dossier in preparation for the hearing or at the hearing itself during which the Applicant gave evidence. If he had had previous involvement with the Applicant, it is overwhelmingly likely that he would (a) have realised this at some stage of the proceedings and (b) have said something about it, if only as a matter of courtesy. Further, it seems that the Applicant himself said nothing during the hearing to suggest that he recognised the Chair.

11. In those circumstances and in light of the above matters, all of which appear on the face of the papers, a finding that there is an adequate evidential basis for the suggestion that the Panel Chair had previous involvement with the Applicant is unsustainable.

12. Although this disposes of the current application, nonetheless and for completeness this Panel will address the further, albeit hypothetical, question: Would it have been procedurally unfair in itself for the Chair to have sat on this

Panel if he/she had been a member of a previous panel dealing with the Applicant at a previous review?

13. This question has at its heart the topic of actual or apparent bias, the test for which, formulated in familiar case law, is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

14. So far as the present application is concerned, the sole matter alleged to give rise to an appearance of bias, hence procedural unfairness, is the asserted previous involvement of the Panel Chair.

15. The argument on behalf of the Applicant must be to the effect that previous involvement might (a) give a panellist inappropriate knowledge of the case and/or (b) make a panellist unwilling to depart from his/her previous decision.

16. As to (a), it is normal and appropriate for any Oral Hearing Panel (OHP) to have considerable knowledge of previous decisions. Previous Decision Letters are routinely included in the dossier together with the materials, or some of them, upon which the earlier decisions were made. Such knowledge is in general of assistance to the OHP as it develops a full understanding of the prisoner and his historic behaviour, good and bad. It is also necessary in particular to enable the OHP to assess change in risk or risk manageability since the previous hearings. There may be circumstances in which a panellist with previous involvement should not sit on a later hearing (for example when the panellist had been privy to undisclosed material at an earlier hearing which was not before the new OHP) but in the absence of such unlikely circumstances, there is no logical reason why a panellist with previous experience of the prisoner should be disqualified from sitting on a later hearing.

17. As to (b), it is to be assumed, in the absence of any clear evidence to the contrary in any particular case, that OHP panellists will fulfil the obligation of their positions by giving fair and balanced consideration to the cases before them. There is no such evidence in the present case. In any event, unwillingness to depart from previous decisions would impact on the rationality of the decision rather than the fairness of the proceedings.

18. It follows from the above (and on the hypothetical basis that the Chair had previous involvement in the case) that no reason has been shown why in all of the circumstances he/she should not have participated in the present OHP.

19. The further question as to what, if anything, the Applicant should have been told only arises on the basis of two unestablished hypotheses, namely that the Chair had previous involvement and that there was some further disclosure which it was

necessary for him to make to the Applicant. On the contrary, the Decision Letter expressly states that the OHP had not had access to any papers which had not been disclosed to the Applicant. There is simply no evidence that the Chair was in any way conflicted and thus required to make disclosure to the Applicant.

20. It is sufficient for the purposes of this Reconsideration to record that the matter in those circumstances does not arise for realistic consideration in this case.

Decision

21. For the reasons I have given, I do not consider that the decision was procedurally unfair and accordingly the application for reconsideration is refused.

Alistair McCreath
12th December 2019