[2020] PBRA 175

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Application for Reconsideration by Colwell

Application

1. This is an application by Colwell (the Applicant) for reconsideration of a decision of a two-member panel, dated the 23 September 2020, not to direct his release following an oral hearing.

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 and/or (b) that it is procedurally unfair.

3. I have considered the application on the papers. These consisted of the dossier running to 303 pages, the decision letter and the representations for reconsideration.

4. In light of the issues raised, I issued a direction to clarify the evidence that was called and received a copy of the notes made by the Applicant's representative as well as further representations.

Background

5. The Applicant is now aged 39 years old. He was sentenced to Imprisonment for Public Protection on 24 November 2006 for an offence of robbery, when he was aged 25. The tariff was set at two years and expired on 24 November 2008.

6. The Applicant was released on licence on 31 December 2014 but was recalled on 24 August 2016.

7. He was re-released again on 27 January 2017 and recalled on this occasion on 15 April 2017. On another occasion, he was released on 19 March 2018 and recalled on 9 April 2019 due to concerns over his lack of accommodation and substance misuse.

8. This was his first review following that recall.

Request for Reconsideration

9. The application for reconsideration is dated 6 October 2020.

10. The grounds for seeking a reconsideration are that the Panel have reached a decision that is an irrational one, and that it was reached in a manner that was procedurally unfair.

11. There are a number of complaints that are raised, that can be summarised as follows:

    (a) The Panel placed undue weight on, and mischaracterised, the Applicant's relationship with his community probation officer; and

    (b) The Panel failed to properly apply the test for release

12. Further submissions are made in relation to the above, raising specific points.

Current parole review

13. The Secretary of State referred the Applicant's case to the Parole Board in June 2019 following his recall to consider whether he should be released.

14. An oral hearing was directed in July 2019 which was listed on 27 November 2019. The hearing was adjourned part-heard on the day for further information (including a psychological report), as well as to allow the Applicant to obtain legal representations and have a copy of the dossier (which he had not brought with him to the hearing).

15. The case was re-listed on 8 April 2020, but this had to be adjourned due to the Covid-19 pandemic. The Panel reconvened on 21 September 2020 via video link due to the restrictions imposed by Covid-19.

16. On that day, the Panel heard oral evidence from the Applicant, as well as from his prison probation officer, a prison psychologist and his two community probation officers.

17. The dossier contained evidence of risk reduction work completed, as well as evidence leading to the recall, details of the Applicant's custodial behaviour and work around his substance misuse issues.

18. Both the current prison probation officer and community probation officer, as well as the prison psychologist, recommended that the Applicant remain in closed conditions.

19. In the decision letter, the Panel agreed with the recommendations of the professionals, considering that the Applicant did not show sufficient understanding and insight into his risk factors to mean that he could be safely released.

20. In light of that, no direction for release was made.

The Relevant Law

21. The panel correctly sets out in its decision letter the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019

22. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. This is such a case.

23. Such a decision is eligible for reconsideration on the basis that (a) the decision is irrational and/or (b) that the decision is procedurally unfair.

Irrationality

24. In **R (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."

25. 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.

26. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28 (see **Preston [2019] PBRA 1** and others).

Procedural unfairness

27. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.

28. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:
    (a) express procedures laid down by law were not followed in the making of the relevant decision;
    (b) they were not given a fair hearing;
    (c) they were not properly informed of the case against them;
    (d) they were prevented from putting their case properly; and/or
    (e) the panel was not impartial.

The overriding objective is to ensure that the Applicant's case was dealt with justly.

The reply on behalf of the Secretary of State

29. The Secretary of State submitted representations on 15 October 2020 that drew attention to specific parts of the Panel's decision letter in response to the grounds of appeal.

Discussion

30. The key issues are whether it was open to the Panel to conclude that the test for release was not met and, if so, whether sufficient reasons were given in doing so.

31. I remind myself that the grounds have to be considered as a whole and that a series of issues that may not, of themselves, be a material error of law may, when taken together, show that the conclusion of the Panel was flawed.

32. With that in mind, I shall consider the individual points raised in turn before returning to the question of whether the decision contained a legal error.

33. Prior to the grounds, the submissions make several points about the content of the decision letter.

34. At paragraph 4 of the grounds it is said that the panel failed to properly consider the evidence relating to an allegation that led to a previous recall, with the error being that the panel said no action was taken on it, whereas in fact the matter was taken to Court, but not proceeded with. I do not consider that, especially as this relates to a previous recall, that distinction could make any difference.

35. At paragraph 7 the grounds suggest that the decision letter refers to the Applicant using heroin, but that there is no evidence that he had done so. In fact, the dossier contains a number of references to the fact that he had used heroin previously, including a positive test for heroin as recently as December 2019.

36. At paragraph 8 of the grounds it is said that the decision letter took conversations about his drug use out of context, with reference to other parts of the evidence. In fact, the Panel have set these points out in the decision letter, so it is clear that they had them in mind.

37. There are further submissions in paragraphs 3, 5-6 and 9-10 that make submissions on the evidence which I will not set out here.

Ground (a) – Relationship with the community probation officer

38. It is said that the relationship with the community probation officer has been given disproportionate weight, although it is not clear in the submissions in what way this alleged error arose.

39. It is clear that the relationship between a prisoner and his community probation officer is always an important one. The Panel stated that the Applicant had expressed a reluctance to disclose some matters for fear of action being taken against him.

40. Although it is said that that was taken out of context, it is not said that the above statement is incorrect. Whilst the Applicant has disclosed substance misuse when it was not known about, that does not undermine the Panel's statement of the evidence.

41. It is noticeable the conclusions at paragraph 8 of the decision letter do not refer to the Applicant's relationship with his community probation officer.

42. In those circumstances, this ground is not made out.

Ground (b) – Over-reliance on previous recall and the panel's failure to apply the test for release

43. This is the main focus of the submissions. It is said that the Panel failed to apply the proper test for release on the basis that the witnesses all concluded that the Applicant would have to relapse into substance misuse before his risk became imminent.

44. In fact, the Panel had given reasons for conclusions why, in their view, the risk was imminent (in paras 6). This is on the basis that the risk of substance misuse was imminent and, once the Applicant misused substances, behaviour causing serious harm could happen at any time.

45. I see no reason why that is not a permissible chain of reasoning for the Panel to have followed. It was not the view of the psychologist or the community probation officer, but the Panel have explained why they considered that, at the time of the hearing, the risk of serious harm was imminent.

46. In this case the Panel concluded that the Applicant lacked the internal measures or insight that would be an essential pre-requisite from refraining from causing serious harm in the community. Given especially that this was the third recall and that there were continuing issues with substance misuse which was identified as a highly significant risk factor, that was a decision that was open to them on the evidence that they had.

47. It seems to me that the grounds are essentially a rationality challenge but, in my view, the same conclusion is reached if the question is considered through the prism of fairness.

Decision

48. For the reasons I have given, I do not consider that the decision was irrational, nor was it procedurally unfair.

49. Accordingly, the application for reconsideration is refused.

Daniel Bunting
16 November 2020

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