[2020] PBRA 198

Application for Reconsideration by O'Neil

Application

1. This is an application by O'Neil (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 23rd November 2020 not to direct release or recommend transfer to 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 and/or (b) that it is procedurally unfair.

3. I have considered the application on the papers. These are; the dosser of 380 pages which includes the decision letter and the application.

Background

4. On 6th May 2011 the Applicant was sentenced to Imprisonment for Public Protection following conviction for two offences of rape. He was 48 years old when he committed the offences.

5. The offence involved a female victim aged 26 who had recently arrived in England in order to pursue her studies. She was not known to the Applicant until the night he committed the offences.

6. The Applicant had previous convictions prior to the index offences which included convictions for indecent assault and rape.

7. His minimum term was set at 6 years less time served on remand and expired on 1st September 2016.

Request for Reconsideration

8. The application for reconsideration is dated 14th December 2020. It is in the form of written submissions from his legal representative and runs to 8 pages. There were 3 grounds set out within that application, although I have noticed an additional ground is set out by the Applicant within the narrative under 'Ground 1' and therefore deal with that separately as 'Ground 4' in fairness to him.

9. The grounds for seeking a reconsideration are as follows:

   Ground 1. That the decision not to recommend progression to open conditions was irrational as all 3 witnesses recommended a transfer and none of them assessed that there was core risk reduction work outstanding which needed to be completed in closed conditions.

   Ground 2. That the decision to remain in closed conditions is irrational or procedurally unfair because the panel relied heavily on the conclusion that the Applicant had not completed any intervention which is inaccurate and not supported by evidence.

   Ground 3. That the decision was irrational in that the panel placed disproportionate weight on the need for the Applicant to demonstrate a reduction in risk by the completion of an accredited offending behaviour programme or completion of therapy.

   Ground 4. That the decision was irrational or procedurally unfair as the panel gave disproportionate weight to a mistaken interpretation from the sentencing remarks.

Current parole review

10. The Applicant is now 58 years of age. His case was referred to the Parole Board in August 2019. This is the second review of his case.

11. His case was sent to an oral hearing. The hearing went ahead on 9th November 2020 via video link due to restrictions in force as a result of the Coronavirus pandemic.

12. The panel heard evidence from the Applicant's Offender Manager (OM), his Offender Supervisor (OS) and a psychologist. The Applicant also gave evidence to the panel. He was legally represented throughout.

The Relevant Law

13. The panel correctly sets out in its decision letter dated 23rd November 2020 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

14. 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.

15. A decision to recommend or not to recommend a move to open conditions is **not eligible for reconsideration under Rule 28**. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

16. 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."

17. 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.

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

19. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."* See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

Procedural unfairness

20. 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.

21. 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

22. The Secretary of State had no representation to make in response to this application for reconsideration.

Discussion

Ground 1

23. All three witnesses in this case recommended transfer to open conditions. The Applicant submits therefore that the decision not to recommend progression to open conditions was irrational as the panel did not adopt the unanimous recommendations from witnesses.

24. However, as set out in paragraphs 14 and 15 above, a decision not to recommend a move to open conditions is not eligible for reconsideration under Rule 28.

25. I can therefore deal quickly with this ground in saying that it is not within my remit and accordingly the ground fails.

Ground 2

26. Again, within this ground, the Applicant has set out that his submission related to the decision not to recommend a transfer to open conditions which is not eligible for reconsideration under Rule 28. However, the narrative underneath does refer to the 'decision' and so may well also mean the decision not to direct release which is within the remit of the reconsideration mechanism and so I will deal with that submission.

27. The Applicant submits that the panel relied heavily on the conclusion that he had not completed any intervention which is inaccurate and not supported by evidence. I am unclear as to the basis for this submission. The panel in its decision letter made reference to work either completed or partially completed including accredited offending behaviour programmes as well as time spent in therapeutic regimes, commenting that he spent a 'number of years' in the same.

28. The panel had access within the dossier to the previous panel's decision which conducted the first review and exit reports from the regimes. The panel specifically referred to evidence of progress in one particular regime and also the opinion of the OM that, although interventions were not fully completed, the Applicant had '*taken a lot from what he had done*'. The Applicant in his submission accepts that he had not remained in those environments which the panel is entitled to consider when making its decision.

29. I therefore do not accept or see any basis for the submission that the panel relied on a matter that was inaccurate with regards to this issue. Accordingly, this ground fails.

Ground 3

30. The Applicant submits that the panel placed disproportionate weight on the need for him to demonstrate a reduction in risk by the completion of an accredited offending behaviour programme or completion of therapy. The Applicant submits that the panel relied on one accredited programme as being the 'only way to reduce risk of serious harm' which is irrational. Furthermore, the Applicant highlights his good behaviour in custody and the work that he has completed.

31. Again, the Applicant argues that the panel should have adopted the opinions of the witnesses who all recommend open conditions. I repeat the points made in paragraphs 14 and 15 and the Grounds 1 and 2.

32. The panel specifically mentions the Applicant's good custodial behaviour for many years in custody within its decision letter. It is therefore clear that the panel considered this when making its decision.

33. I will not repeat the matters already set out in Ground 2 other than to say that the panel does detail structured offending behaviour work completed and periods spent in particular types of regime. The panel also relies on the fact that none of the therapeutic regimes were fully completed and the Applicant accepts he did not remain there. The panel had access to detailed reports and assessments regarding the interventions completed and attempted. It had the advantage, too, of seeing and hearing the Applicant as well as the OM, OS and psychologist.

34. The panel concluded that there were outstanding treatment needs and sets out the detail of those within section 6 of its letter. The panel set out the views of all witnesses who also agreed that further work to address risk was needed but suggested that the work could be done in open conditions, although they could not guarantee its availability there.

35. The panel discussed a particular regime designed by psychologists which was included on the Applicant's sentence plan and referenced the evidence from the OS that it would be their recommendation as a way forward if the Applicant had been suitable for that regime, but he has been found unsuitable due to lack of motivation. The panel did not suggest that this must be completed.

36. There is no suggestion in the decision letter that the panel has identified any specific accredited programme or therapeutic regime that must be completed before progression. Such a suggestion would be outside the terms of the referral from the Secretary of State.

37. I see no basis for the submission that the panel have relied on the completion of one accredited programme. Accordingly, this ground fails.

Ground 4

38. The Applicant submits that the decision was irrational or procedurally unfair as the panel gave disproportionate weight to a mistaken interpretation from the sentencing remarks.

39. The dossier contains the sentencing remarks in which the learned Judge states at the very end, when addressing Trial Counsel for the Applicant,

    'Can I publicly commend you for your services to the court and indeed the criminal justice system. The prospect of the defendant cross-examining or being allowed to give me questions to cross-examine [the victim] filled me with deep horror. It is only due to your deep-rooted professionalism that this trial managed to stay on track'.

40. The panel within section 3 of its decision letter have interpreted this as, '*the Sentencing Judge noted that you wanted to cross-examine the victim in person at trial'*. The panel has gone on to say that '*this could indicate a desire to control the victim or to replay the rape and revictimize{sic} the victim'*. The panel seems to have adopted the same interpretation as also appears within reports from the OM.

41. The Applicant argues that this quote from the Judge does not demonstrate that he requested to cross-examine the victim and has been 'taken out of context and misrepresented'. He denies that he ever made such a request. The Applicant submits that he had a legal representative throughout his trial. He submits that this interpretation has been given disproportionate weight.

42. It is fair to say that the Learned Sentencing Judge does not specify that this was a request from the Applicant, nor that the Applicant had expressed a desire to do so. The Judge suggests that there was a point at some stage of the trial process where there was a chance that the victim may have to be cross-examined by the Applicant or by way of him being allowed to submit questions to the Judge to ask on his behalf. There are a number of possible reasons why this could have occurred which do not allow for the interpretation the panel placed upon it. This can happen in cases where a Court appoints an advocate to cross-examine or an advocate remains in a case where they may not normally feel able to in order to carry out a duty to the Court. It may well have been through no fault of the Applicant that this situation occurred. The panel has not identified any other evidence that assists with this point, other than the words used in the sentencing remarks. Whilst the Judge refers to the Applicant being 'allowed to', it is not clear to me that this stems from a request or simply the fact that a defendant is entitled to put their case in a criminal trial and the Judge has the power to control how that is done.

43. The panel may of course form the view, as the Judge clearly did from his sentencing remarks, that denying the offences and suggesting the victim lied in her evidence is an aggravating feature of this case. But that is a different issue to deliberately asking to (or manipulating the situation so that he can) cross-examine the victim himself rather than through Counsel.

44. It is not clear from the decision letter how much weight the panel did attach to this interpretation. The panel makes reference to other behaviours from the Applicant upon which they rely in concluding that he both minimised his offending and caused

needless suffering to the victim. It is also not repeated again within the letter nor highlighted within the panel's conclusion.

45. Given the lack of clarity about how the panel reached its interpretation, how much weight the panel attached to the same, and therefore its impact on the decision as a whole, I am left with the situation where a panel does not appear to have considered the possibility that the Applicant was telling the truth about this particular issue. It may well have done so, but it is not clear that it did.

Decision

46. Accordingly, whilst I do not find there to have been any merit in Grounds 1-3 and the application in the most part has been based on matters which are not eligible for reconsideration, I do allow the application solely on Ground 4.

47. It appears to me that, in fairness to the Applicant, there ought to be clarity as to why the panel reached that interpretation of the sentencing remarks and the weight it attached to the interpretation. The Applicant must be given an opportunity to set out what he says about the matter and the panel given an opportunity to consider other interpretations (if it has not already done so) and to reconsider its decision. I therefore grant the application and direct that the case should be reviewed by the original panel. This should be by way of paper review, unless the panel considers it necessary to reconvene at an oral hearing.

48. The following further directions are now made:

(a) The panel should have sight of the full dossier again and this reconsideration decision so that it can consider the points raised under Ground 4.
(b) The Applicant must make any further written representations regarding the sentencing remarks only by 13th January 2021.
(c) This review is to be further considered by the original panel on the papers and a decision issued within 14 days of being provided with all papers and representations.
(d) The Panel Chair may wish to add to these directions upon receipt of the papers and any request from the Applicant.

Cassie Williams
22nd December 2020