

[2020] PBRA 66

Application for Reconsideration by Odeyemi

Application

1. This is an application by Odeyemi (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 31 March 2020 not to direct his release or to recommend a 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 review dossier running to 815 pages, the Provisional Decision Letter, the application for reconsideration and the Applicant's personal representations.

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Background

4. The Applicant, who is now 35, was sentenced to an Indeterminate Sentence for Public Protection with a tariff of five and a half years less time spent in custody on remand. The Applicant was sentenced for offences of robbery and aggravated robbery.
5. The tariff expired on the 15 April 2014. The Applicant was released on licence (for a second time) on the 16 January 2017 but recalled on the 8 September 2017 for poor compliance and further offending. He remained unlawfully at large until he was returned to prison on the 9 January 2018.

Current parole review

6. On the 19 March 2018, this case was referred to the Parole Board to decide whether to direct release or if that was not so directed, to consider whether to recommend that the Applicant was ready to move to open prison conditions.
7. Following a procedurally defective hearing, this oral hearing took place on the 5 November 2019 when the panel received evidence from the Offender Supervisor, from both Offender Managers and from the Applicant and heard representations from his legal representative.

Request for Reconsideration

8. The application for reconsideration is dated the 21 April 2020.



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

- (a) *'The Panel acted irrationally in coming to the conclusion that core risk reduction work remains outstanding, both around coping within relationships and in his thinking and problem-solving skills.*
- (b) *The Panel failed to follow their own Guidance on Allegations when considering unsubstantiated allegations of misconduct in custody and subsequent security moves.*
- (c) *The Panel failed to give proper consideration as to whether they should have adjourned for further oral hearing as they did not have sufficient information to conclude on the papers.'*

10. In his personal representations, the Applicant frankly accepted complete responsibility for the period when he was unlawfully at large and also accepted that whilst in custody his behaviour has not been consistently up to standard.

11. He recounts his understandable frustration at being moved twice, with the result he was not only not able to start offending behaviour work which both he and the panel anticipated he would complete, but was not able to start an alternative course.

12. He says he was aggrieved that neither his Offender Supervisor nor his present Offender Manager supported his release.

13. He also complains of ill-treatment in prison following the adjournment which is something the panel would not have known about and which would have been outside their jurisdiction to consider.

The Relevant Law

14. 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."

15. 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.

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16. 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.
17. The panel correctly set out in its Provisional 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.
18. In the legal representative's clear and helpful representations, there is a lengthy passage from the judgement in **Gill v Secretary of State for Justice [2010] EWHC 364 (Admin)**. This is a case where a prisoner with a significant learning disability had not been provided with any means of addressing his offending behaviour. Mr Gill sought and obtained a Declaration that the Secretary of State had breached his duties towards him by failing to take steps towards providing him with offending behaviour work suitably adapted to his intellectual difficulties. The Court observed that offending behaviour programmes are neither a necessary nor a sufficient condition for release from prison, but accepted that in Mr Gill's case, one such programme had been identified as a way of reducing offending and so achieving his release. In those circumstances, the Secretary of State was under a duty to take steps to provide such a programme. Apart from stating the self-evidently correct proposition that such programmes are not a necessary condition for release, the decision perhaps provides limited assistance in this case.

The reply on behalf of the Secretary of State

19. The Secretary of State made no representations in response to the application for reconsideration.

Discussion

20. Turning to the first ground for reconsideration, on the 5 November 2019, the Applicant agreed to do the particular course. It was anticipated that he would do it at the prison where he was being detained. By the 20 February 2020, the panel had become aware that the Applicant had been moved to a second prison. The panel asked for further reports.
21. A security report dated the 4 March 2020, provided 16 specific instances of poor behaviour. On the other side of the picture, the report from the Offender Supervisor dated the 11 March 2020 said the Applicant had started the programme and had engaged well. Unfortunately, the Applicant was moved to a third prison which did not provide the particular programme. The Offender Supervisor described the Applicant is intentionally giving up prison employment and refusing to engage in offending behaviour work.
22. The Offender Supervisor reported that the Applicant consistently presented in a volatile, aggressive and occasionally threatening manner and indicated he did not wish to engage with Probation and the Prison Services.



23. The Offender Manager provided a report dated the 9 March 2020. She did not know the reason for the moves between prisons and very properly did not try to assess if they were linked to an increase in risk. She described a very similar situation to that told by the Offender Supervisor. The Offender Manager spoke personally with the Applicant on 17 February 2020 and subsequently by telephone; he was consistent in his decision to disengage from probation.
24. To suggest that the panel lacked the material to decide that the Applicant's present conduct put into question whether his risk could be managed in the community is simply unrealistic. The panel was entitled both to say that and to say the Applicant needed to do further work before his risk could be managed safely. It is unlikely but not impossible that a different panel might have come to a somewhat different view but a reconsideration panel is not entitled to adjudicate between different outcomes but to decide whether there is clear evidence to support the very high test of irrationality.
25. As to the second ground, the legal representation set out very clearly and correctly the Parole Board's Guidelines on how panels should deal with allegations. There is some substance in the suggestion that a precise and comprehensive evaluation has not been set out in the Provisional Decision Letter. However, as has been remarked judicially, the panel should identify in broad terms the matters judged by it as pointing towards and against a continuing risk of offending and the panel's reasons for striking the balance that it does but it would be wrong to require elaborate or impeccable standards of draftsmanship.
26. The panel had been presented with direct evidence from the Offender Supervisor and the Offender Manager and concessions from the Applicant which when taken cumulatively indicated his behaviour was deteriorating and that he was evincing attitudes which would jeopardise a successful release on licence. As the panel observed in section 8 of the Provisional Decision Letter, although there did not seem to have been many proven allegations of late, there was evidence the Applicant had been aggressive and uncooperative and had displayed poor compliance in custody.
27. As to the third ground, on the 5 November 2019, the panel had indicated it would in all probability conclude the case on the papers. The panel did not indicate that release was the only outcome. The panel had already heard extensive oral evidence and they took the necessary precaution to seek further submissions from the Applicant's legal representative once the recent reports were in. The panel was in a position to make an evidence based decision on the papers notwithstanding that some matters were in dispute.
28. The panel is criticised for finding that the Applicant's evidence on the 5 November 2019 showed signs of grievance thinking. It is submitted that the issue should not have been raised at this late stage and if the panel wanted to raise it, it ought to have been addressed at a further oral hearing.
29. This is a novel submission: if the panel having heard evidence decides that that evidence reveals a certain trait of character then the panel is entitled to make that finding. There is no duty on the panel in effect to give notice to a witness that they are proposing to make a particular finding and to seek representations from



the witness. The universal rule is that the witnesses give evidence and the court or tribunal then makes its findings on that evidence.

30. One can have considerable sympathy for the Applicant; this review was beset with mishaps and delay and he has been subjected to considerable stress. Unhappily, the situation has revealed deficiencies in his capacity to cope with the difficulties and he has perhaps not been his own best advocate. Be that as it may, the evidence falls short of meeting the high test for irrationality or procedural irregularity.

Decision

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

James Orrell
15 May 2020