the Parole Board

working with others to protect the public

[2020] PBRA 78

Application for Reconsideration by McMeckan

Application

1. This is an application by McMeckan (the Applicant) for reconsideration of a decision by a Panel, following a hearing on 29 April 2020, that his recall to prison had been appropriate and refusing to direct his release nor to recommend that he be transferred to open conditions. This was conducted as a remote hearing, by telephone link, due to current health restrictions as a result of COVID-19.

2. I have considered this application on the papers. These comprise of the dossier, the provisional decision of the Panel dated 1 May 2020 and the application for reconsideration comprising two handwritten documents prepared by the Applicant in person. The first, dated 11 May 2020, was submitted, by the Applicant's Legal Representatives, as an attachment to a formal application proforma, and the second, dated 1 June 2020, was submitted by the Applicant personally. The Reconsideration Assessment Panel further considered the Response of the Secretary of State by e-mail dated 10 June 2020.

Background

3. On 14 October 2004, the Applicant, having pleaded guilty to a charge of manslaughter, was sentenced to imprisonment for life with a minimum term of three years and five months (the tariff) before he was eligible to apply for parole. The tariff term expired 14 March 2008.

4. Following two earlier releases and recalls, he was released on 2 November 2015 but recalled on 5 June 2018 for breaches of his licence conditions requiring him to be of good behaviour and to reside permanently in designated accommodation approved by his supervising officer.

Request for Reconsideration

5. The application for reconsideration, made by the Applicant in person, consists of two separate handwritten documents, the first containing 18 and the second, 20 paragraphs of submissions. It is not necessary to reproduce the application in full, but all sections have been considered and the aspects relevant to the issues of irrationality or procedural unfairness are dealt with below. The first document does not distinguish between the statutory limbs of challenge to irrationality and

procedural unfairness and the second speaks only of grounds relating to procedural unfairness. The Reconsideration Assessment Panel has, however, considered the application on the basis that both are challenged. In general terms the application submits:

(a) It was procedurally unfair to admit what the Applicant described as *"unsubstantiated Police intelligence"* in circumstances in which no non-disclosure application had been made;

(b) It was procedurally unfair to conduct the oral hearing, where the task required of the Panel was *"a heavy one",* as a two Member Panel and not a three Member Panel, despite a Panel Chair Direction dated 12 December 2018 which assessed that there should be a three Member Panel;

(c) The Applicant was unable *"to properly challenge"* the Police intelligence in the absence of full disclosure and that, if *"proper attention"* had been paid to the veracity of information, different recommendations might have been made by professional witnesses;

(d) Having regard to the nature of the evidence given, it was difficult to see how the Panel had assessed the review on the balance of probabilities;

(e) In the knowledge that the Applicant maintained his innocence of the index offence, it was unfair to require completion of offending behaviour work although he was willing to engage in 1:1 work; and

(f) His recent custodial behaviour had been good.

6. The Secretary of State indicated that no further representations were made in response to the application by e-mail dated 10 June 2020.

Current parole review

7. Although not specifically confirmed in the formal decision, it appears that the Applicant, through his Legal Representative, made an application for release or, in the alternative, for a recommendation for transfer to open conditions.

8. Any progression to open conditions or release was not supported by the professional witnesses (the Applicant's Offender Manager, his Offender Supervisor and a Prison Psychologist), all of whom gave evidence and were questioned by the Applicant's Legal Representative.

9. The Panel considered the Applicant's admissions significant that, whilst last on licence, he had associated with people who condone crime and that the Applicant had regularly driven vehicles illegally. It found that the Applicant's recall, on suspicions of being involved in serious crime and to have made threats to others, was appropriate and proportionate.

10. The Panel also considered the evidence of each witness, and of the Applicant, in detail.

11. The Applicant's Legal Representative was able to question all witnesses. The Panel concluded that, despite general good conduct and behaviour in custody, the Applicant's risk factors had not been reduced and that significant core risk reduction work remained outstanding.

12. In relation to the issue of the Police intelligence, the dossier contained extremely detailed Police reports spanning 2014 to 2019, relating to the Applicant and his alleged associates, together with detailed contact logs. Oral evidence was given by a Detective Inspector. In assessing the value of that evidence, the Panel was careful to disregard any intelligence assessed as untested and without validation and to consider only evidence classed as, at least, *"reliable".*

The Relevant Law

13. Rule 28(1) of the Parole Board Rules provides that applications for reconsideration may be made in eligible cases either on the basis that the decision was (a) irrational or that it is (b) procedurally unfair. This is an eligible case.

14. 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".*

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 uses the same word as is used in judicial review demonstrates that the same test should be applied. This test for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.

16. Procedural unfairness under the Parole Board Rules relates to the making of the decision by the Parole Board and an assessment is required as to whether the procedure followed by the Panel was unfair.

Discussion

17. In my judgment, the decision to refuse release cannot be said, in any way, to meet the test of irrationality. The Panel, having clearly considered with care the documents in the dossier and the oral evidence, gave a clear and reasoned decision and adopted a correct test for its decision.

18. In refusing release, it made findings of fact which it was clearly entitled to do.

19. In dealing with the issue of release, it placed emphasis on:

(a) A conviction, after a guilty plea, to possession of an illegal drug within the prison and found the Applicant's explanation for a claim of innocence not to be convincing, and

(b) The need for core risk reduction work.

20. I find that the detailed complaints made in the Applicant's reconsideration applications, do not, at their highest, affect the basis issues to be addressed by the Panel and cannot be said, in any way, to affect the rationality of the decision.

Procedural Unfairness

21. I find the submission that, in the absence of a non-disclosure application, the Panel ought to have conducted a detailed further investigation as to the Police intelligence, to be without merit. The Panel is under a duty to decide a review on the evidence presented to it and need only seek additional information if it considers that it has insufficient to enable a just decision to be made.

22. The constitution of the Panel will normally follow recommendations made in Duty Member Directions. In this case, the original Member Case Assessment recommended a two Member Panel but that recommendation was reconsidered in the Duty Member Directions on 12 December 2018, referred to by the Applicant, which said, *"the MCA member assesses that this should be a 3 member panel."* Ultimately, the constitution of the Panel is a matter for the Panel Chair which consisted of an Independent Member and a Psychologist Member.

23. I find nothing to suggest there was any procedural unfairness in the Panel's review. The Applicant, both personally and through his Legal Representative, was able to give evidence, challenge witnesses and to make both written and final submissions. There is no indication that any objection was taken to the constitution of the Panel.

24. In his first application, the Applicant sought, also, reconsideration of the decision to reject a move to open conditions. In his second application, he acknowledged that the question of open conditions is not a matter for a reconsideration application. For the avoidance, of doubt, however, it is noted that this issue, also, was fully considered by the Panel. The Applicant correctly acknowledged that applications relating to the Parole Board's recommendation for open conditions are not within the scope of the Reconsideration Mechanism (see **Panasuik [2019] PBRA 2**).

Decision

25. 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.

Edward Slinger
25 June 2020