[2021] PBRA 20

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Application for Reconsideration by BRITTON

Application

1. This is an application by Britton (the Applicant) for reconsideration of a decision of the Parole Board that the Applicant was unsuitable for release (the Decision).

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 comprise a dossier of 306 numbered pages, written submissions from the solicitors for the Applicant dated 14 January 2021 and an email representation from the Secretary of State dated 28 January 2021.

Background

4. On 20 April 2009, the Applicant received an indeterminate sentence for public protection, with a minimum tariff of six years (less time served) for offences of section 18 grievous bodily harm, attempted robbery, and assault by penetration. He was also convicted of attempting to pervert the course of justice. The minimum tariff expired on 7 December 2014. The Applicant was aged 36 at the time of sentencing. He is now aged 47.

5. On 21 July 2020 the Applicant's case was referred to the Secretary of State, for the consideration of the Applicant's suitability for release. On 14 December 2020 a single member of the board decided on consideration of the papers that the Applicant was unsuitable for release (the Decision).

6. The Applicant subsequently applied for a panel at oral hearing to determine his case. Written representations by the Applicant's solicitors supporting that application are included in the dossier and are dated 18 December 2020. In a decision dated 31 December 2020, another single member of the board decided to refuse to direct the case to an oral hearing.

7. The Applicant subsequently applied for reconsideration.

Request for Reconsideration

8. The application for reconsideration is dated 14 January 2021.

9. The grounds for seeking a reconsideration are set out in the application as follows:

   "on the basis of procedural unfairness relating to the decision not to grant release and the unfairness of the consideration particularly given the subsequent decision not to grant an oral hearing."

The Relevant Law

10. Rule 28 of the Parole Board Rules 2019 provides that a party may apply to the board for the decision that a prisoner serving in an eligible sentence is or is not suitable for release on licence to be reconsidered. The grounds for reconsideration are that a decision on the prisoner's suitability for release is irrational or procedurally unfair.

Irrationality

11. 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."

12. 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.

Procedural unfairness

13. 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.

14. In the cases of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner

in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

The reply on behalf of the Secretary of State

15. The Secretary of State has replied to the application in an email of 28 January 2021 and does not offer any representations.

Discussion

16. The submissions made on behalf of the Applicant by his solicitors state that the application is based on procedural unfairness. The submissions conflate what they describe as the '*fairness principles'* contained within the decision of the Supreme Court in **Osborn** and procedural unfairness.

17. 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.

18. The representations set out no details of any procedural unfairness. I find nothing to uphold this claim of procedural unfairness.

19. The focus of the representations are really on the actual decision and I therefore construe the application as seeking reconsideration on the basis that the Decision is irrational.

20. Mr Justice Pushpinder Saini in **R (on the Application of Wells) v Parole Board [2019] EWHC 2710 (Admin)** set out a modern approach that he adopted in applying Lord Greene MR's famous dictum in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223 (CA)** (at 230 "*no reasonable body could have come to* [the decision]") "*to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the Panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied.*"

21. The evidence before the Panel from all professional witnesses concluded the Applicant should remain in closed conditions until he had engaged in risk reduction work via a regime to help people recognise and deal with their problems. The reconsideration representations refer to the Applicant's positive custodial behaviour and claim that the dossier contained no evidence to suggest that the

personality traits assessed as present in 2019 remained active in 2021 and that it would have been appropriate for an updated psychological assessment to take place.

22. The Prison Offender Manager set out their view that the Applicant needs continuing cognitive behavioural interventions to develop problem solving skills, challenge attitudes and raise self-esteem before the Applicant will be able to manage his risk in the community. Development of the skills learnt by the Applicant were identified as particularly important.

23. The Community Offender Manager concurred with this view. She took note of the Applicant's progress in custody and on the basis of this had reduced her assessment of his risk of serious physical and sexual violence from very high to high. Alongside that however the Offender Manager concluded that due to his need to address emotional regulation and understanding with further risk reduction work there was a risk of these risks of serious harm escalating to very high/imminent if released without this.

24. The psychology report from April 2019 within the dossier concluded that the Applicant's risks were high and the author did not believe he could be managed in the community or in less secure conditions. A psychology case advice note from September 2020 explained the up to date position from the psychological perspective, concluding that there had been no evidence of risk or the recommendations being made changing. It was noted that an assessment had been made in February 2020 that the Applicant was unsuitable for one programme, and the recommendation remained that he engage with the suggested regime.

25. It is further claimed in the representations that "*The current PBR [Parole Board Rules] does not provide prisoners sufficient time especially given the pandemic to obtain independent expert reports pre-MCA stage*".

26. In my judgment there is nothing in these grounds. The submissions do not reflect the totality of the evidence that the panel had before it. The panel properly considered all the evidence that was before it to reach their decision. Given the wealth of information that the panel had to assess risk and the clear evidence based determinations made in the Decision that core risk reduction work needed to be undertaken the judgment reached was logical, as well as being well reasoned.

27. In relation to the submission about the lack of time provided by the Parole Board Rules, no detail is given of which rule it is that limits the instruction of an independent expert, a course open to the Applicant at any time. There is no evidence of any attempt by the Applicant to obtain an independent expert report prior to the Decision. No representations were made by the Applicant to delay (by adjourning or deferring the making of the decision) prior to the Decision for such a report to be prepared and disclosed. I find there is nothing meritorious in this ground and reject it.

28. The application for reconsideration makes criticism of the wording of the decision of the duty member of 31 December 2020. It is not that decision which is being

challenged in this application and for that reason I do not consider this point further.

Decision

29. 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.

Angharad Davies
24 February 2021