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[2020] PBRA 201

Application for Reconsideration by O'Keefe

Application

1. This is an application by O'Keefe (the Applicant) for reconsideration of a decision of an oral hearing panel dated 9 November 2020 not to direct release or recommend progression 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 dossier amounting to 806 pages, the decision letter, the written representations on behalf of the Applicant, dated 8 December 2020, the written representations on behalf of the Secretary of State, dated 16 December 2020 and the reply to those representations, dated 21 December 2020.

Background

4. On 1 February 2010, the Applicant who was then aged 22, was sentenced to an indeterminate sentence of imprisonment for public protection with a minimum tariff of 4 years (less time spent on remand) for offences of rape, unlawful wounding and having a dangerous dog. The minimum tariff expired on the 1 November 2012.

5. The Applicant has previous convictions included robbery when he was aged 12 and acquisitive offences to fund a drug habit.

6. Since the index offences and whilst in custody, the Applicant has been convicted of nine offences of battery between 2013 and 2017; in February 2018, he assaulted a prison officer and in October 2018, he assaulted a prisoner. In October 2018 and again in February 2020, the Applicant set fire to his cell on three separate occasions.

7. The Applicant has been diagnosed with personality disorders and serious mental illness.

Request for Reconsideration

8. The application for reconsideration is dated 8 December 2020. The grounds for seeking a reconsideration are based on irrationality and, from the narrative, the submissions, appear to be as follows:

(a) The panel erred when it proceeded in the absence of a Local Authority Care Assessment, dealing, in particular, with accommodation;

(b) The panel erred when it proceeded in the absence of a completed risk management plan;

(c) The panel acted unfairly by admitting security evidence at the commencement of the hearing;

(d) The panel failed to consider the Secretary of State had carried out his duties as set out in "Adult Social Care" Prison Service Instruction 03/2016;

(e) The panel failed to place sufficient weight on the Secretary of State's statutory duties under the Human Rights Act 1998 and the Equality Act 2010 to consider how his policies or decisions affect people who are protected under the Equality Act;

(f) The panel gave little or no consideration in terms of the material impact the Applicant's disability likely to have on his custodial behaviour;

(g) The panel ought to have placed weight on the fact that the Applicant had been attacked whilst in custody and is aggrieved that following the incident he was subjected to disciplinary procedures;

(h) The Applicant had wanted to explain to the panel his reasons for setting fire to his pillowcase; and

(i) In all the circumstances the oral hearing was grossly unfair.

Current parole review

9. In April 2018, the Secretary of State referred the Applicant's case to the Parole Board to consider whether it would be appropriate to direct his release or, if that was not appropriate, to consider recommending progression to open conditions.

10. On 4 May 2020, the Panel Chair conducted a case conference to ensure the oral hearing was effective.

11. Due to the Covid-19 restrictions, the oral hearing took place remotely, on 8 July 2020. The panel (which included a psychiatrist member) heard from the Applicant, his Prison Offender Manager, his Community Offender Manager, a mental health nurse and a social worker. The panel heard submissions from the Applicant's legal representative. By agreement, a psychiatrist who had been available, did not give evidence.

12. The panel then adjourned for further information and, after giving the Applicant's legal representative adequate time to file written submissions concluded the case on or immediately before 9 November 2020.

13. At the time of the hearing, the Applicant was aged 33.

The Relevant Law

14. 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. The submissions made on behalf of the Applicant, in places, suggest the correct test is whether the Applicant's continued custody is arguably fair. This is not the correct test.

Parole Board Rules 2019

15. 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. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).

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.

The reply on behalf of the Secretary of State (the Respondent)

19. The Respondent filed a reply on 16 December 2020 in which he submits, first, the Local Authority Care Assessment is to be found at page 689 of the dossier; secondly, the panel was aware of the Applicant's ill health and his poor management of his medication; third, the panel came to its decision not because of accommodation difficulties or the risk management plan but because the panel found the Applicant needed to complete further offending behaviour work before he could be considered for progression.

Discussion

20. The Applicant is eight years over tariff. His difficult and complex case is, therefore, one to which Lord Reed's observations in **Osborn (2013) UKSC 61** apply,

    "When dealing with cases concerning post-tariff indeterminate sentence prisoners, it should scrutinise ever more anxiously whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff".

21. It appears the Applicant has not completed any offending behaviour work since he was sentenced, either in prison or during a period in a secure hospital. The reason for this was stated to be largely because the Applicant had been reluctant to do such work.

22. The dossier and the decision letter demonstrate how conscientiously this panel went about its task, considering as it did, not just whether the Applicant had made sufficient progress in closed conditions, but also considering whether there was any possibility of the Applicant's high levels of risk being managed in the community. The panel concluded that on the evidence, even if suitable accommodation had been available, the Applicant's risks could not be managed in the community.

23. The panel had before it a proposed risk management plan. Unfortunately, the management plan lacked suitable accommodation. It was self-evident that the Applicant needed to move from prison to suitable, supportive accommodation.

24. Three different residential units had been approached, but sadly, all had rejected the Applicant as unsuitable because he had not completed any offending behaviour work and so his risk was, in each case, assessed as unmanageable.

25. On approximately the 6 April 2020, the Prison Offender Manager wrote to the panel quoting the Senior Registered Forensic Psychologist in the Applicant's prison who said *"If the Parole Board need to understand the individual's possible intervention trajectory, they could request a 'Programme Suitability Summary'".*

26. The panel took that advice, and on the 1 July 2020, the newly commissioned Programme Suitability Summary recommended the Applicant went on a training course addressing sex offending.

27. Also in July 2020, the Community Offender Manager recommended *"I am afraid that if the panel were minded to direct release there is currently no suitable accommodation that is willing to accept [the Applicant]... [they] are not willing to accommodate him until he has completed the relevant offence focused work in order to reduce his risk".*

28. Subsequently, the Community Offender Manager, the former Prison Offender Manager and the present Prison Offender Manager declined to support release or progress to open conditions on the ground the Applicant needed to do more to reduce his high levels of risk.

29. The legal submissions are in the form of narrative and, occasionally discursive, letters and it is not been easy to extract the individual grounds for making the application. It would have been helpful if the grounds had been set out in succinct numbered paragraphs.

30. This decision sets out in paragraph 15, Rule 28 (1) of the Parole Board Rules 2019. It can be seen that the jurisdiction of the reconsideration panel is limited and, although the panel follows, as far as possible, the jurisprudence of the Divisional Court, it does not share the extent of that Court's jurisdiction.

31. Occasionally, the Applicant's legal representative has expected the panel to investigate or rule on matters outside its jurisdiction. At page 672 of the dossier, the Panel Chair, in answer to a request from the legal representative, had to say

    "The change in Offender Supervisor at [the prison], although frustrating to [the Applicant], is not a matter for the panel and it is for the [the Applicant] to pursue with [Prison and Probation Services] or [the prison]".

32. Likewise, Grounds (d) and (e) if justiciable, are matters for the High Court and not the Parole Board. Grounds (f) and (g) do not seem to me to have any connection with the question whether the Applicant should have been released not.

33. I turn to the allegation the panel proceeded without a Local Authority Care Assessment. The Respondent submits one existed and is to be found at page 689. The document appears to be a recent assessment; complaints are made about the document, including its author was insufficiently qualified and it was conducted by telephone, although it is difficult to see how it could have been done otherwise, given the restrictions imposed by the pandemic.

34. The submissions made on behalf of the Applicant do not identify any information necessary to the panel's decision-making process that was not dealt with either in that document or in the evidence of the social worker.

35. The subsequent submission on behalf of the Respondent goes to the heart of the matter: the panel did not refuse to direct release because of a lack of suitable accommodation but because the panel found the Applicant needed to complete the suggested risk reduction work before he could be considered for a move to the community.

36. The Applicant's submissions dated 8 December, by implication, seem to recognize this problem in the third paragraph: *"It is perhaps axiomatic he is highly likely to require (inter alia) 'accommodation' needs in the community (in the event the Parole Panel was persuaded to Direct his release from custody)".* (Emphasis supplied).

37. There was an abundance of evidence to support the panel's decision that the Applicant's risk was not manageable; it cannot be stigmatized as irrational.

38. The Applicant complains that the risk management plan was incomplete. I accept entirely the submission that the dossier must contain a risk management plan. However, if the plan is incomplete because suitable accommodation is unavailable, that is the situation the panel must deal with. In the present case, the absence of suitable accommodation was said to be because the Applicant had not completed the necessary risk reduction work.

39. The panel would have to choose between an adjournment to find the accommodation or conclude the case. The former would have been a futile exercise because, first, the panel had already adjourned the oral hearing to find accommodation without success and second, the panel had decided the Applicant was not ready to progress to the community.

40. It is clear there is a vicious circle and it is possible it will be broken only by the Applicant actually completing the suggested risk reduction work.

41. The Applicant complains the panel admitted security information on the day of the hearing. However undesirable, late evidence is a daily occurrence in panel hearings. In order to act fairly, the panel must first give the Applicant adequate time to consider the new evidence and, secondly, must give him the opportunity to deal with it in the hearing. On occasions, the panel will be under a duty to adjourn to allow rebuttal evidence to be called.

42. The submissions do not suggest the evidence was irrelevant or the panel failed to put in place the necessary safeguards but argues the correct test is to ask if the admission of the evidence was fair. This scarcely takes the matter further because, provided the evidence is relevant, the usual test of fairness is to ask if the above safeguards were put in place.

43. The submissions are silent as to why letting in the evidence was unfair, save to suggest the information was prejudicial; I understand this to mean the information did not assist the Applicant's application for release. This is simply another way of saying the information, although inconvenient to the Applicant, was relevant to the application and, as such, was admissible.

44. The submissions on behalf of the Applicant note that the dossier contains no report from a medically qualified practitioner about the Applicant's medical problems. It is contended that in those circumstances (a) the proceedings were unfair and (b) *"it is less than clear how it could be said without reservation '…the flare ups and issues that occur **are linked to the offender's poor management of his medication for his medical problems**…' are linked to his poor management of his medication **exclusively".*** (Emphasis as in the original).

45. The single reference to the Applicant's condition and its treatment appears at page 3 of the decision letter, where it is stated,

    "You also accepted that you have not always taken your medication because it led to an increase in weight. You said that you are now taking the medication but if you put on weight you will stop taking it. The panel, with a specialist in its number, noted that if you are inconsistent in taking the medication it can lead to aggression and irritability. You said that you were unaware of this and said that you would take the medication in future".

46. There is nothing in that passage to justify the use in the Applicant's submissions of the phrase "without reservation" or the word "exclusively". Given the panel contained a medically qualified member (a psychiatrist), the passage is entirely unobjectionable. It is not explained how the absence of a doctor's report in the

dossier is unfair or how it affects whether the Applicant's risk could be managed in the community.

47. Ground (h) also takes the application no further and is manifestly not made out.

48. At the risk of being repetitious, I remind myself of the salient findings of the panel. The panel found (a) the Applicant's failure to undertake risk reduction work, without more, meant his risk remained too high to be managed in the community; (b) there was no suitable accommodation for the Applicant in the community because he had not completed risk reduction work; (c) even if suitable accommodation existed, his needs were too high and his risks were too great for him to be managed safely in the community.

49. The panel's findings were consistent with the evidence before it; the test for irrationality is a high one. The arguments put forward ingeniously and at length on behalf of the Applicant either involve matters which are the exclusive preserve of the High Court or, taken individually or collectively, merely suggest disagreement with, not the irrationality of, the panel's decision.

50. I have searched in vain not only for a hint of irrationality in the decision-making process, but any reason why this decision cannot be described as meticulously careful and scrupulously fair.

Decision

51. For the reasons I have given, I do not consider that the decision was irrational; the application for reconsideration is refused.

James Orrell
05 January 2021