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[2021] PBRA 26

Application for Reconsideration by Worden

Application

1. This is an application by Worden (the Applicant) for reconsideration of a decision of a three-member panel, dated 11 February 2021, not to direct his release, or recommend a move to open conditions, following an oral hearing.

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 consisted of the dossier running to 576 pages (including the decision letter) and the representations for reconsideration from both parties.

Background

4. The Applicant was sentenced to Imprisonment for Public Protection on 12 July 2012 for an offence of attempted robbery. The tariff was set at 3 years, with allowance for time on remand. The Tariff Expiry Date was 20 April 2015.

5. He has been in custody since being sentenced. He was 25 years old at the time of sentencing and is now 33 years old.

Request for Reconsideration

6. The application for reconsideration is dated 24 February 2021.

7. The grounds submit that the decision is an irrational one. Further, it is said that it was a decision that was reached in a procedurally unfair way.

8. In brief, it is said that the Panel did not accurately or fairly summarise the evidence that had been heard at the hearing (procedural unfairness).

9. Further, it is said that all witnesses were recommending a move to open conditions and that there was nothing further that could be achieved in closed. In light of that, the decision to not recommend a move to open was not reasonably open to the Panel (irrationality).

10. The representations make various assertions in the application as to what the oral evidence at the hearing was. This is not supported by anything such as the representative's notes of the hearing or a witness statement.

11. Generally, it seems to me that a bare assertion is not sufficient. However, in the circumstances of this case it does not seem to me necessary to resolve this matter as it would not make any difference to the outcome.

Current parole review

12. The Secretary of State originally referred the Applicant's case to the Parole Board in July 2018.

13. After an initial deferral for further information, an oral hearing was directed in April 2020. It was originally to be heard at a face to face hearing, but due to the delays caused by the Covid-19 pandemic, the case proceeded as a video hearing at the Applicant's request.

14. The Panel heard oral evidence from the Applicant, as well as his Offender Supervisor (the official supervising his case in custody) and his Offender Manager (community probation officer).

15. In addition, a psychologist and a psychiatrist instructed on the direction of the Parole Board wrote reports and gave evidence.

16. At the hearing, both the prison and community probation officers, as well as the psychologist and psychiatrist, were recommending a move to open conditions, although there was an element of reservation in relation to the psychologist's recommendation at least.

17. The Panel noted the recommendations and stated that the decision was a 'finely balanced one'. It accepted the evidence of the prison psychologist that the Applicant did not have sufficient insight into his risk. It further concluded that the Applicant had not made sufficient progress for a recommendation for a move to open conditions to be made.

18. It is important to note that at the hearing, the Applicant made an application for a transfer to open conditions, and not for release.

19. The application for reconsideration also does not take any issue with the decision not to direct release. Further, the application requests that the case be re-panelled "*so our application for open conditions can be adequately considered*".

The Relevant Law

20. The Panel correctly sets out in its decision letter dated 11 February 2021 the test for release.

Parole Board Rules 2019

21. 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.

22. Such a decision is eligible for reconsideration on the basis that (a) the decision is irrational and/or (b) that the decision is procedurally unfair.

Procedural unfairness

23. 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.

24. 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 properly informed of the case against them;
    (c) they were prevented from putting their case properly; and/or
    (d) the panel was not impartial.

25. The overriding objective is to ensure that the Applicant's case was dealt with justly

Irrationality

26. 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."

27. 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.

28. The application of this test has been confirmed in previous decisions on applications for reconsideration under Rule 28 (see **Preston [2019] PBRA 1** and others).

The reply on behalf of the Secretary of State

29. The Secretary of State has submitted representations dated 5 March 2021.

30. This is confined to commenting on the assertion in the representations that all the professional witness considered that the Applicant has a sufficient level of insight in his personality traits and risks.

31. The Secretary of State submits that this is wrong, although it appears that he is basing this on the summary of evidence as set out in the decision letter itself, rather than from any other sources.

Discussion

32. As noted above, under 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.

33. The decision letter contained such a decision, as will every decision (other than a pre-tariff sift in indeterminate sentence cases). As is the case with many hearings, there were two different decisions to make; the decision as to release or not, and the decision (if release is not directed) whether or not to recommend a move to open conditions.

34. The 'decision' that I can consider under rule 28 is the decision whether or not to direct release. The question of whether or not to recommend open conditions is outside the scope of the reconsideration mechanism.

35. Whilst the Panel is bound by the referral from the Secretary of State to consider the question of release, where the application is for a transfer to open conditions only, it is unsurprising that that is the focus of the hearing.

36. In this case, no professional was recommending that the Applicant be released and the Panel gave reasons as to why release was not directed. These are in short form, but that would be inevitable in light of the application. Importantly, they are not challenged.

37. That is, it seems to me, a complete answer to the application. There may be cases where errors (which I am not saying did occur in this case) in relation to the consideration of a recommendation of a move to open would 'infect' the decision to not direct release, but this is not such a case.

38. The Applicant himself stated, in effect, that he was not ready for release and needed a staged reintegration into the community. That is perhaps the best evidence that the decision not to direct release was correct.

39. In this case the Applicant seeks to challenge the recommendation for a move to open conditions. As stated, that is outside the scope of the mechanism. It was open to the Secretary of State to have included recommendations for transfer to open conditions within rule 28, but he chose not to do so.

Decision

40. For the reasons I have given, I do not consider that the decision (namely the decision to not direct release) was irrational or procedurally unfair.

41. Accordingly, the application for reconsideration is refused.

Daniel Bunting
8 March 2021