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[2022] PBRA 63

Application for Reconsideration by Brown

Application

1. This is an application by Brown (the Applicant) for reconsideration of a decision of an Oral Hearing Panel (OHP) dated the 7 April 2022. The oral hearing took place on the 28 March 2022. The OHP declined to direct the release of the Applicant.

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 consisting of 261 pages, the OHP decision letter, the representations of the Applicant and the response of the Secretary of State (The Respondent).;

Background

4. The Applicant is 37 years old. He was aged 33 years at the date of sentence. The Applicant is serving an extended sentence of imprisonment. The custodial period is five years and four months. The extension period is four years. He was eligible for parole on 29 October 2021. His sentence expires on 9 August 2027. He was convicted of 3 sexual offences, namely an attempt to meet a child following grooming, attempted sexual communication with a child and breach of a Sexual Harm Prevention Order (SHPO).

5. The facts of the index offence were that the Applicant made contact with a child and attempted to meet the child following the contact.

Request for Reconsideration

6. The application for reconsideration is dated 17 April 2022. The application was made by the Applicant in person and was by way of a written letter.

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

    a. That the Applicant's Risk Management Plan (RMP) had not been seen or discussed with him and that the offender assessment system had not been updated;
    b. That the Applicant was unfairly penalised because he did not know his Community Offender Manager (COM) and that the COM was passing over responsibility to another supervisor on release;

c. That the reports about the Applicant were written after a short telephone call;
d. That the Applicant had met all the requirements of his sentence plan;
e. That the Applicant had completed one-to-one work in 2020 and none of the professionals believed he required further intervention;
f. That there was evidence of progress that was not reflected in the evidence given at the hearing by the Prison Offender Manager (POM) and the COM;
g. That the Applicant was let down by his COM and his case was mismanaged;
h. That his exemplary behaviour in prison was not recognised by the panel.

Current parole review

8. The oral hearing took place on the date indicated above. The oral hearing panel consisted of a judicial chair and an independent member. The oral hearing was held by way of video link. The Applicant was not legally represented. The panel investigated the fact that the Applicant was not represented and was told that the Applicant had made an "informed" decision not to be represented. The Applicant was given a further opportunity to seek representation before the oral hearing. The Applicant made it clear that he did not wish to be legally represented.

The Relevant Law

9. The panel correctly sets out in its decision letter the test for release. The test for open prison conditions did not apply in this case.

Parole Board Rules 2019

10. 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 when made by an oral hearing panel after an oral hearing (Rule 25(1)).

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.

13. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

Procedural unfairness

14. 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.

15. 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.

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

17. All Justice must not only be done but be seen to be done and so procedural unfairness includes not only an unfairness of process, but also the perception of unfairness (for example, failure to deal with the arguments or evidence advanced in an appropriate manner or not at all).

18. It is for me to decide whether I consider the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties.

19. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

20. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

The reply on behalf of the Secretary of State

21. The Secretary of State had no comment to make upon the application.

Discussion

22. The Applicant has not indicated in his application letter whether he is relying upon irrationality or procedural unfairness. I have attempted to apply both criteria to the grounds of the appeal as set out in the Applicant's letter.

23. I deal with each of the grounds individually as follows.

That the Applicant's risk management plan had not been seen or discussed with him and that the offender assessment system had not been updated.

24. The risk management plan in this case was set out in the two reports written by the COM. The term "Risk Management Plan" can be confusing. In essence it consists of the arrangements suggested by the Applicant's probation officer for managing risk in the community. In the initial probation report the probation officer sets out a detailed schedule of the plans for managing the Applicant's release in the event of the Parole Board panel ordering his release. These plans include residence in a probation hostel, a referral to a specialist support team, help with employment, help with move on accommodation, the requirements of the Sexual Harm Prevention Order (SHPO), behavioural work in the community and detailed licence conditions. The Applicant himself sent in final submissions in writing to the OHP after the hearing. In those submissions the Applicant refers to matters which are in the probation officer's report in particular residence in a probation hostel and licence conditions. There is no mention in the Applicant's submission of not having seen or discussed the RMP. I am therefore not persuaded that this ground has merit.

25. So far as the offender assessment system is concerned, the assessment uploaded to the dossier in this case was dated February 2022 and the hearing took place in March 2022. The offender assessment system was therefore updated appropriately. I therefore reject this ground as having merit.

That the Applicant was unfairly penalised because he did not know his COM and that she was passing over responsibility to another supervisor on release.

That the reports about the Applicant were written after a short telephone call

26. I deal with both these grounds together. Both grounds refer to the relationship between the Applicant and his COM and POM. In the decision letter the oral hearing panel accept that the Applicant had only met his COM on the day of the oral hearing and 12 months before. The panel accepted that the assessment by the Applicant's COM was not based upon recent conversations or personal knowledge of the Applicant. The oral hearing panel also noted in the decision letter that the Applicant's case would be taken over by a specialist support team within the

probation service. The team specialised in supporting those on licence with a similar background to the Applicant's.

27. The decision letter notes that "*had the panel been presented with evidence of a Community Offender Manager who knew you, and your risks and triggers well, and who was to be supervising you on any release, a different picture may have emerged. But the evidence of your current COM was that she did not know you well at all and would not be your supervisor*." It is understandable that the Applicant feels aggrieved by the fact that the contact and support that he was able to receive from the probation service was extremely limited. That lack of contact inevitably meant that the oral hearing panel were concerned about the Applicant's risk management and the knowledge and understanding that both the Applicant and his probation officer might have of the risks and triggers behind the Applicant's offending.

28. Whilst I sympathise with the complaint of the Applicant, in terms of the decision-making process in this case the complaint has no merit. The role of the OHP was to assess risk and apply the statutory test as it was presented to them at the hearing. The fact that there may or may not have been failings in the support that the Applicant was able to receive from the probation service would not be a matter which the OHP could take into account.

29. The OHP made it clear that contrary to the views of the COM and POM they took the view that the risks posed by the Applicant were not understood by the Applicant himself or indeed by those professionals supporting him. The OHP took the view that neither the Applicant himself nor those professionals who were supporting him had a clear understanding of the motivation behind the offending. The panel took the view that the Applicant had very little insight into the reasons for his offending. Accordingly, the panel were applying the statutory test appropriately. For the reasons I set out above I do not find that this complaint is maintained. The oral hearing panel were neither irrational nor procedurally unfair in dealing with this aspect of the evidence.

That the Applicant had met all the requirements of his sentence plan
That the Applicant had completed one-to-one work in 2020 and none of the professionals believed he required further intervention

30. Again, I deal with these two grounds together. Both relate to the behavioural and intervention work which had been completed by the Applicant. Within the oral hearing decision letter, the panel made clear that the position had been that the Applicant had completed a relevant programme relating to offending. He had also completed individual work with the POM. The individual work had been recommended because of concerns that the Applicant, despite completing an intervention programme, continued to lack an understanding of the triggers in relation to the index offending. The decision letter notes that the individual work was completed. The view taken by both the COM and POM was that the Applicant had been able to demonstrate a good understanding of his triggers and motivations following that intervention. On that basis the Applicant is correct in arguing that the professionals took the view that no further intervention work was required. However, the panel clearly addressed this point. The panel's conclusion having heard the Applicant in evidence and having closely questioned the professionals,

was that the Applicant did not in fact understand the triggers and motivators which brought about the offending. For that reason, the panel took the view that despite the interventions that had taken place up to the date of the panel hearing, the Applicant's motivation and triggers were unclear and accordingly his risk remained unmanageable. The hearing panel decision letter noted that both professionals were in support of a release decision. Accordingly, from the point of view of the professionals no further work in custody was required. The oral hearing panel members disagreed with this view on the basis of their assessment of all the evidence and accordingly declined to order release.

31. The oral hearing panel indicated in their decision that they were not bound by the views of the professionals and that they were required to take account of the entirety of the evidence - which they did. Accordingly, I do not find that the decision of the oral hearing panel to decline to release in the face of the recommendations of the professionals was a matter which can amount to procedural irregularity or irrationality. Had the oral hearing panel failed to explain, in detail, the reasons why they were not supporting the views of the professionals then a complaint might well have been upheld. However, the panel carefully explained and acknowledged that they were not supporting the views of professionals. The panel gave clear reasons why they came to their conclusions. I determine that the conclusions could not amount to irrationality as defined above.

That there was evidence of progress that was not reflected in the evidence given at the hearing by the Prison Offender Manager (POM) and the Community Offender Manager (COM)

32. This ground can be taken shortly. In the light of the extensive reports in the dossier, it appears unlikely that there was evidence which related to risk which had not been placed before the panel. However even if such evidence existed it is clear that the panel are obliged to take account of the evidence which is before them at the hearing. Reconsideration will not apply to evidence which was never before a panel and about which the panel had no information. Accordingly, I reject this as a ground for procedural irregularity or irrationality.

That the Applicant was let down by his COM and his case was mismanaged

33. This ground can also be taken shortly. The role of the OHP is to assess the evidence at the oral hearing and to apply the statutory test. Any complaints relating to the probation service, or the prison service are not remediable within the reconsideration process.

That exemplary behaviour in prison was not recognised by the panel

34. Within the decision letter the OHP indicated as follows "*the panel acknowledges that you have been a model prisoner and there have been no concerns as regards your custodial behaviour or engagement with the prison regime. It acknowledges that while in custody you have manifested no inappropriate behaviour as regards children.*" The OHP therefore fully acknowledged that the Applicant had demonstrated exemplary behaviour in prison. The OHP made it clear throughout their decision that their major concern was the fact that the Applicant and those

who supported him had insufficient understanding of the triggers and motivations which led to the offending. The OHP made it clear that without an understanding of those triggers and motivations the Applicant's risk remained at a level which necessitated remaining in detention. Again, there is no evidence of the OHP acting irrationally or procedurally unfairly, within the meaning set out above.

35. I have considered the totality of the grounds of appeal in this case. I am satisfied that there is no evidence of procedural irregularity or irrationality in the decision of the oral hearing panel.

Decision

36. 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.

HH S Dawson
17 May 2022