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[2019] PBRA 40

Application for Reconsideration by Nightingale

Application

1. This is an application by Nightingale (the Applicant) for reconsideration of a decision made by a Duty Member of the Parole Board on the 23 August 2019. The Duty Member declined to accede to an application to review an MCA Member's first instance decision which refused the Applicant's request for 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 that the decision is (a) irrational or that it is (b) procedurally unfair.

Background

3. The Applicant is now 36 years old. He is serving a sentence of Imprisonment for Public Protection. The index offence is Arson being Reckless as to whether Life was Endangered. He was sentenced on the 8 May 2009. The minimum term he was required to serve was 1 year and 193 days. His tariff expiry date was the 17 November 2010. He has now served nearly 11 years.

4. The chronology before me indicates that on the 19 July 2019 a Parole Board MCA member determined that the Applicant's case did not merit an oral hearing. The Member concluded the case on the papers and decided that the Applicant should neither be released nor should he be transferred to the open estate.

5. I have considered the dossier and the decision of the single MCA member. No representations were lodged at this point in the chronology. The single Member reviewed the evidence. Core risk reduction work had not been completed. There was no support for progression. The single Member applied the appropriate test and concluded that the Applicant should not be granted an oral hearing. The test laid down in the case of **Osborn and Booth** (see below), was correctly applied. In my judgement, on the evidence then available to the MCA member, the decision cannot be faulted.

6. Thereafter the Applicant lodged personal representations in support of his application to have the MCA decision reviewed. They are dated the 5 August 2019. He states: "*…in recent months I have been more fully engaged…".*

7. Following the Applicant's handwritten request to have the MCA decision reviewed, his legal representatives also lodged representations. I have seen the

representations. I note that they are referred to in the decision of the Duty Member.

8. The legal representations are dated the 16 August 2019.

9. On the 23 August 2019 the Parole Board Duty Member declined to accede to the Applicant's request and refused his application to have the MCA decision revoked and grant an oral hearing.

10. Subsequently the Applicant's legal representatives lodged an application for the decision of the Duty Member to be reconsidered under Rule 28(1) of the Parole Board Rules 2019. Legal representations were submitted. They are dated the 13 September 2019. I have considered those submissions. I have also reviewed the dossier.

Request for Reconsideration

11. The request for reconsideration is based upon two premises: firstly, that the Duty Member arrived at his decision on a flawed basis, namely that the he concluded that the Applicant had not carried out all core risk reduction work and he should therefore be required to carry out the relevant training course. It is argued in the application, that because the course is "*no longer available to him*" the decision is irrational.

12. The second basis for the application is that it was procedurally irregular. It is asserted that: "*unfortunately, when the original representations were submitted, and a decision was being made by the Duty Member about an oral hearing, Mr Nightingale was in the process of being assessed by an organisation".* I note that this organisation was independent of the prison.

13. **Ground 1: Irrationality: the training course**. In April 2017 the Applicant was present at an oral hearing held by the Board. I have considered the full decision. The Applicant was told that he was expected to engage in recommended treatment pathways.

14. On the 23 March 2018 the Applicant was transferred to another prison. The reason for the transfer is not entirely clear.

15. It is reported that one of the Applicant's sentence plan targets following his transfer was to complete the required training course. However, as the Applicant's Offender Supervisor points out: "*…this training course was not available at the prison …."*; referring to the prison where he now resides.

16. There is no evidence it is not an available course. I am aware that it is available to a detained prisoner within the prison system.

17. The decision of the Duty Member refers to this training course. No reference is made to the existence, availability or otherwise of the programme although this is a matter referred to in the dossier by the Offender Supervisor.

18. **Ground 2: Procedural Irregularity: the independent offending behaviour programme**. I have received under separate cover an undated report from a Service Manager at an organisation which had agreed to assess the Applicant. The report offers a placement to the Applicant for a 3-month treatment period, and support thereafter for an unlimited period.

19. Of particular importance is the fact that the report states that the assessment of the Applicant was completed on the 16 August 2019 (see above paragraph 8).

20. The information before me does not clearly set out whether the assessment report from the external organisation was before the Duty Member. However, it is safe to assume that it was not, having regard to the chronology. That said, I note that the Duty Member stated in his ruling that the Applicant was going to be assessed.

21. The decision of the Duty Member goes on to point out that he is not persuaded that an oral hearing is required: that the Applicant has been assessed as suitable for a high intensity training course and concluded that the MCA member had considered all relevant matters.

22. In their written submissions to the Duty Member which referred to the external programme, no explanation is offered by the Applicant's legal representatives as to why they did not seek to have the matter adjourned to await the outcome of the assessment from that organisation which, as I have noted, assessed the Applicant on the 16 August.

23. I should point out that I have received information on behalf of the Secretary of State who, in a short, written, submission has sought to argue that "*this application is not eligible for the reconsideration mechanism as it is requesting an oral hearing rather than a reconsideration of the decision not to release Mr Nightingale*".

24. Rule 20(6)(a) is clear that a decision not to direct release under Rule 19(1)(b) is eligible for reconsideration when a rule 20 application for an oral hearing is refused. However, the decision subject to reconsideration is the decision made under rule 19(1)(b). Any application for reconsideration, in order to be successful, must demonstrate that this decision was irrational or reached in a manner that was procedurally unfair. In my judgement, if the Applicant succeeds in this application, whilst that would be the natural outcome of this application to reconsider the decision of the Duty Member, it does not preclude a Reconsideration of the decision of the Duty Member.

25. In my view this application is eligible for reconsideration.

Current parole review

26. In reviewing the Applicant's dossier, it is clear that the Applicant was entitled to have his case reviewed in the period commencing April 2019 and not beyond October 2019. The Applicant's case was properly accepted by the Parole Board. It was reviewed, first by the MCA member in July and, on further review, before the end of August, by the Duty Member.

27. The application before me is based upon the assertion that the Duty Member wrongly applied the relevant principles relating to the review of a decision as to whether or not to grant an oral hearing. It is asserted that the Duty Member should have reviewed the MCA decision to allow the Applicant's wish to have an oral hearing and should have directed the matter to an oral hearing. This is said to be the procedural unfairness in the way the rule 19(1)(b) decision was upheld.

The Relevant Law

28. I have had regard to the decision of **Preston [2019] PBRA 1** which, is an earlier Parole Board decision as part of the Reconsideration Mechanism pursuant to Rule 28(1) of the Parole Board Rules 2019. In that decision a Reconsideration Assessment Panel was invited to consider whether an oral hearing could, or should, have been granted. The facts of this case are different, but the general principles apply.

29. Referring to the case of **Osborn and Booth -v- the Parole Board [2013] UKSC 61** the Reconsideration Assessment panel point out that:

> "*the Supreme Court did not decide that there should always be an oral hearing but said there should be if 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 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*".

30. As the Reconsideration Assessment Panel pointed out, at para 2 (vi) Lord Reed added:

> "*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".*

Discussion:

31. **Ground 1**: The first point I must consider is whether the reference in the decision of the Duty Member to the training course which is not available to the Applicant at his current establishment amounts to a decision which was irrational. The course is not available to the Applicant at his current establishment but there is no evidence that it is not available within the prison system. Indeed, it appears on the list of accredited programmes.

32. The location of a prisoner is not a matter for the Board. Those responsible for the management of the Applicant determined that he should be moved to a prison which is said not to afford him access to the relevant training course.

33. Access to a particular programme is not a matter for the Board. It is a matter for those responsible for the management of the prisoner when considering his sentence. If his sentence plan is prepared on a certain basis then it is for the prison authorities to ensure it is capable of being carried out.

34. It seems to me that on the facts of this case it was within the scope of the Duty Member to refuse to allow the application to alter the decision of the MCA member. In my judgement on this point he did not exercise his discretion in a way which can be said to be unreasonable and thus irrational.

35. **Ground 2**: the independent programme and the assessment carried out on the 16 August. Was there a procedural irregularity having regard to the fact that there was or may be, a treatment programme which might be an appropriate one for the Applicant to undertake, perhaps as an alternative to the programmes considered by the treatment managers at the prison?

36. It is clear that the Applicant was seeking to undertake a treatment programme, because the Duty Member refers to this in his judgement.

37. In this regard it must be pointed out that the Reconsideration Mechanism is not an opportunity for persons disappointed by a decision of the Parole Board to put fresh evidence before it when seeking to have a decision reviewed. As part of any judicial proceedings it is incumbent on all parties to ensure that all relevant information is before the tribunal before allowing the case to proceed. Accordingly, if a report is pending, or if relevant information is available to the parties which would assist the fact-finding and/or decision-making tribunal at first instance or, as in this case, on review, it is incumbent on the parties to ensure that the relevant information is lodged. If that is not possible because, as in this case, the final report or assessment is not available, it is incumbent on the party concerned to seek to have the matter adjourned. No such application was made in this case by the Applicant's legal representatives.

38. The fact that there was a pending assessment must have been apparent to the Applicant's representatives. Having regard to the foregoing principles, in my judgement, the assessment report by the independent organisation should have been made available to the Duty Member.

39. I have concluded that the Applicant's legal representatives should have sought a delay of the ruling of the Duty Member so that the evidence now before me might properly have been put before the Duty Member. In those circumstances does the decision of the Duty Member amount to a "*procedural irregularity*"? The Duty Member cannot be criticised when potentially relevant material is not placed before him as part of the rule 20 application procedure.

40. In my judgement, on the totality of the information available to him the Duty Member properly considered all relevant matters and came to the correct conclusion. It might have been advisable to seek further information from the Applicant's representatives but a failure to do so cannot in my view amount to a procedural irregularity.

41. I have concluded that in the circumstances of this case, based on the information then available to them the conclusions of the MCA Member and the Duty Member cannot be criticised.

42. Accordingly, the application to have the decision of the Duty Member reconsidered must therefore fail.

Decision

43. I have decided that the application fails. However, I must add this. It is clear that the information now provided by the independent organisation affords the Applicant an opportunity to argue that core risk reduction work might now be capable of being addressed. The Applicant cannot be held to blame for the failure of his representatives. I express the view that in the light of this new information and having regard to the Osborn principles, in particular the views of Lord Reed, the Secretary of State might review this case as soon as possible and direct an early referral.

Nicholas Coleman
18 October 2019