[2019] PBRA 66

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Application for Reconsideration by Evans

Application

1. This is an application by Evans (the Applicant) for reconsideration of a decision of the Parole Board not to direct his release on the basis that the decision was irrational and procedurally unfair.

Background

2. The Applicant is now 38 years old is serving a term of Imprisonment for Public Protection (IPP) with a minimum term of 3 years, less time spent on remand, imposed on 11 October 2006. His tariff expired on 19 June 2009. His fifth review took place before a panel of the Parole Board made up of a psychologist and two independent members on 27 September 2019. On that day evidence was heard from the Applicant (who was legally represented), his Offender Manager, Offender Supervisor and a prison psychologist who had assessed the Applicant in August 2019. At the conclusion of all of the evidence the legal representative of the Applicant applied for an adjournment to give the Applicant an opportunity to display a sustained period of good behaviour and to allow for further development of a risk management plan. The Offender Manager indicated, while standing by her recommendation not to release nor direct a move to open conditions, that a period of at least six months would be necessary to provide evidence of a reduction in risk. The Panel declined to direct an adjournment and indicated that the review would be concluded on the papers after consideration of written closing submissions on behalf of the Applicant.

3. The index offence leading to the conviction for wounding with intent to cause grievous bodily harm occurred in March 2006. This was the Applicant's second conviction for causing grievous bodily harm. While he had a considerable criminal record going back to 1997 largely for offences of dishonesty and vehicle related offending, he has while serving his current sentence, been convicted twice in 2009 and 2018 of offences of violence on prison officers in prison.

Request for Reconsideration

4. The application for reconsideration is dated 28 October 2019.The Applicant is not legally represented and has prepared his own written grounds running to six manuscript pages.

5. The Applicant's Grounds for Reconsideration are as follows:

(a) That his mental health issues were used against him;
(b) He disputes that the risk factors set out in the decision letter are properly so described;
(c) That the Panel incorrectly said that his wife's ex husband is or was a serving prisoner.
(d) That the Panel erred in referring to "several occasions" when his prison conduct had been referred to the police; and
(e) That the Panel incorrectly observed that none of the professional's recommended release.

The Relevant Law

6. Rule 25 (decision by a panel at an oral hearing) and Rule 28 (reconsideration of decisions) of the Parole Board Rules 2019 apply to this case.

7. Rule 28(1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case.

8. In **R (on the application of 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."*

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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

Discussion

9. Before considering each of the Applicant's grounds it is appropriate to make the following observations; my intention in doing so is to provide some context to this application.

(a) The Applicant has previously spoken about issues concerning his mental health which has been set out in various reports contained in the dossier.

(b) For the purposes of the present application it is in my view important to understand that there had been very little or no progress by the Applicant on his journey through his sentence.

(c) A Panel heard the Applicant's fourth parole review in October 2017. The key risk factors identified then mirror those identified by the Panel in the most recent decision which is the subject of this application. Those key risk factors are a propensity to violence and the carrying of weapons; poor emotional management; drug misuse; mental health issues and impulsivity.

(d) The Panel in 2017 recognised the Applicant's frustration at his lack of progress through the system which they found lead him into a vicious cycle where poor behaviour interfered with progress. They observed that the Applicant was no further forward then than he was in 2015 when a move to open conditions had been recommended. The recommendation before the 2017 Panel was not in support of a progressive move. Nonetheless, the Panel, as had its predecessor in 2015, directed a move to open conditions to give the Applicant an opportunity to progress.

(e) In 2015 and again in 2017 it was unacceptable behaviour by the Applicant that brought to an end any stay or any prolonged stay in open conditions. The Applicant's Offender Supervisor noted that his conduct had now twice prevented a progressive move and that the Applicant seemed to self destruct, his fear of getting out of prison or of failing in open conditions leading him to self sabotage.

(f) The psychological report of August 2019 expressed the Applicant's problem succinctly as being an inability to break the cycle of destructive behaviours which keep him stuck in a system that he deeply resents. I note that the Secretary of State does not appear to have considered whether a shorter parole window might be an effective way of progressing this case.

10. I turn to the Applicant's grounds for reconsideration.

(a) <u>That his mental health issues were used against him.</u>

It is clear to me that it would be impossible to achieve any understanding of or to reach any conclusions about the Applicant's case without taking into account

the issues that surround his mental health. For example, it would not be possible to understand why the Applicant has not managed to progress now so many years past his tariff unless it was by reference to his mental health. I do not see from the Panel's decision any evidence at all to support the suggestion that this aspect of the case has been used against him. If anything, it has given those carrying the burden of decision making crucial evidence on which to base their decisions. There is more than one example in the dossier of decisions being made in the Applicant's favour sympathetic to and in the light of his mental health.

(b) He disputes the risk factors.

There has been a notable consistency in the identification of risk factors throughout this sentence. The Applicant has on many occasions been found in possession of items capable of being used as weapons. The absence (as he submits) of any specific adjudication, which is something that can occur for many reasons, is not relevant for these purposes. Neither is the fact that the Applicant's main purpose may be self harm as opposed to inflicting harm on others. The index offence, his criminal history and his conduct in prison (for example, his two convictions for assaulting prison officers) all support the proposition that the identification of his risk factors by the Panel was evidence based and logically justifiable.

(c) The prison location of his wife's former husband.

It is difficult to see how this very small piece of evidence could conceivably have been of any value or importance. It is relevant to point out that the Applicant was present and represented at the hearing and capable of dealing with the background to the meeting of his wife. If it had mattered, the Applicant's legal representative was also given the opportunity of making further submissions when the hearing was adjourned.

(d) The number of occasions on which his prison conduct was referred to the police.

In his submissions the Applicant on page 4 submits that there was only one occasion when his conduct was referred to police. Again I am unable to see how given the amount of information and material that there is in this case regarding conduct, that even if the Applicant was correct it would not in my judgment have had any effect upon the final outcome. In fact the Applicant cannot be correct, because he was successfully prosecuted twice for criminal offences in 2009 and 2018.

(e) <u>The Panel incorrectly observed that none of the professionals recommended release.</u>

As I read them none of the recommendations before the Panel were for release. The possibility at some future stage of a more therapeutic or progressive regime was touched upon in reports and no doubt in evidence to which the Applicant had every opportunity to respond and about which, as I have already noted, his legal representative was invited to make written submissions. I should add that since drafting this decision I have been sent a copy of the written representations made by the Applicant's solicitors following the conclusion of the Oral Hearing. For the sake of completeness I confirm that they do not impact upon my decision.

11. Panels of the Parole Board are under no obligation to accept the evidence of witnesses be they professional or otherwise. It is for the panel based upon evidence it decides to accept to make its own risk assessment and to evaluate the effectiveness of any proposed plan. It is for the panel and the panel alone to test and assess the evidence it receives. I have earlier drawn attention to an example of a panel in this case reaching a decision in favour of the Applicant against the recommendation of a professional witness.

12. This is by no means an easy or a straightforward case. The legal test of irrationality is a very strict one. The hurdle is set deliberately high. The panel in its Decision Letter which must be read together with the adjournment decision

set out in the Panel Chair Directions of 27 September 2019 explained giving all its reasons how it had carefully analysed and weighed the evidence in the dossier and the oral evidence it had heard. The conclusions it had reached were comprehensively and fairly set out. It stated and applied the correct test and reached a final decision that it was perfectly entitled to reach.

13. I have come to the clear conclusion that there are no grounds for interfering with the panel's conclusions. It was a decision that was in my judgment neither procedurally unfair nor irrational.

Decision

14. Accordingly, this application is dismissed.

HH Michael Topolski QC
26 November 2019