[2020] PBRA 125

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Application for Reconsideration by Stokes

Application

1. This is an application by Stokes ('the Applicant') for reconsideration of a decision of an oral hearing panel of the Board ('OHP') which on 24 July 2019, after a hearing on 20 June 2019, decided not to direct his release on licence but to recommend to the Secretary of State that he should be transferred from a closed prison to an open one.

2. The case has been allocated to me as one of the members of the Board who are authorised to act as Reconsideration Assessment Panels ('RAPs') to make decisions on applications for reconsideration.

3. The case was previously considered on 16 September 2019 by another RAP which decided not to direct reconsideration of the OHP's decision. That RAP's decision was the subject of an application for judicial review, and on 10 July 2020 it was quashed by the Administrative Court. That court directed that the case should be considered afresh by another RAP: that is how I have come to be considering it.

4. I have read the judgment of the Administrative Court but not the decision of the previous RAP. The other documents which I have read are:

   - The 424-page dossier provided by the Secretary of State, which includes the decision of the OHP;
   - The application for reconsideration made on 14 August 2019 by the Applicant's solicitors on his behalf; and
   - E-mails dated 22 August 2019 and 1 September 2020 from the Public Protection Casework Section ('PPCS') of the Ministry of Justice which indicated that the Secretary of State does not wish to submit any representations in respect of this application.

   With the exception of the PPCS e-mail of 1 September 2020 these are the same documents as were seen by the previous RAP.

5. The Administrative Court in its judgment made a specific finding in relation to one of the grounds advanced by the Applicant's solicitors. As will be explained below, that finding means that I must direct reconsideration of this case. A RAP of the Board is a judicial tribunal inferior to the Administrative Court, and as a matter of judicial discipline is obliged to follow a specific finding of that court.

6. That point is sufficient for me to make a decision in favour of the Applicant. It is therefore unnecessary to consider in detail the various other points relied on by his solicitors, but out of courtesy to them I will deal one particular point which might well have provided an additional basis for reconsideration.

Background

7. The Applicant is aged 61. On 12 October 1979, when he was aged 20, he received a life sentence for his part in a murder and robbery. There were three others involved in these offences, in which there was a sexual element.

8. During his sentence Mr Stokes has been released on licence twice and recalled to prison twice for what were said to be breaches of his licence conditions. The first recall was in 2005 and the second in 2017. He has been back in custody, in a closed prison, since 10 July 2018. Following his latest recall his case was referred to the Board to decide whether to direct his re-release on licence.

9. On 28 September 2018 his case was directed to proceed to an oral hearing. The hearing was delayed because the Applicant was undertaking work with a Psychologist and an Occupational Therapist, but it eventually took place on 20 June 2019. Further written information was then sought by the OHP, which issued its decision on 24 July 2019 without the need for a further hearing.

10. At the hearing the OHP heard oral evidence from five professional witnesses: three Psychologists, the official responsible for supervising the Applicant in prison and the Probation Officer who had been responsible for supervising him on licence in the community and would be responsible for supervising him again if he was re-released on licence. All the professional witnesses supported re-release on licence, believing that the proposed risk management plan would be effective to enable the Applicant's risk to be managed safely in the community.

11. The panel's conclusion was, nevertheless, that the Applicant's risk was such as to require his continued confinement in prison for the protection of the public.

The Relevant Law

The test for release on licence

12. The test for release on licence is whether the prisoner's continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the OHP at the start of its decision.

The rules relating to reconsideration of decisions

13. Under Rule 28(1) of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence. A decision to recommend or not to recommend a move to an open prison is not eligible for reconsideration.

14. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by

- a paper panel (Rule 19(1)(a) or (b)) or
- an oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or
- an oral hearing panel which makes the decision on the papers (Rule 21(7)).

15. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both of two grounds: (a) that the decision is irrational or (b) that it is procedurally unfair.

16. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. It is made on both grounds.

Irrationality

17. 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."*

This was the test set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. It applies to all applications for judicial review.

18. 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.

19. The Board, when deciding whether or not to direct a reconsideration, will adopt the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under rule 28: see **Preston [2019] PBRA 1** and others.

Procedural unfairness

20. 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 from the issue of irrationality which focusses on the actual decision.

21. It has been established that the things which might amount to procedural unfairness include:
    (a) A failure to follow established procedures;
    (b) A failure to conduct the hearing fairly;
    (c) A failure to allow one party to put its case properly;
    (d) A failure properly to inform the prisoner of the case against him or her; and/or
    (e) Lack of impartiality.

The overriding objective is to ensure that the case was dealt with fairly.

Failure to give sufficient reasons

22. It is well established now, by decisions of the Administrative Court and RAPs, that a failure by a panel to give adequate reasons for its decision is a basis on which its decision may be quashed and reconsideration directed. Complaints of inadequate reasons have sometimes been made under the heading of irrationality and sometimes under the heading of procedural unfairness: whatever the label, the principle is the same.

23. The reason for requiring adequate reasons was explained by the Administrative Court in its decision in this case, referring to earlier decisions of the courts in **R v Secretary of State for the Home Department ex parte Doody (1994) 1 WLR 242, R (Wells) v Parole Board (2009) EWHC 2710 (Admin) and R(PL) v Parole Board and Secretary of State for Justice (2019) EWHC 3306**.

24. The principal reason for the duty to give reasons is said to be the need to reveal any error which would entitle the court to intervene: without knowing the panel's reasons the court would be unable to identify any such error and the prisoner's right to challenge the decision by judicial review would not be an effective one. In **Wells** Mr Justice Saini pointed out that the duty to give reasons is heightened when a panel of the Board is rejecting expert evidence.

Request for Reconsideration

25. The application for reconsideration was made on the standard form provided. On the form there are two boxes to complete, one for each of the two possible grounds, so as to show whether the application is being made on the ground of irrationality or procedural unfairness or both. In both boxes the solicitors have typed "*Please see representations attached".*

26. The attached representations begin by summarising points clearly directed to the issue of irrationality. The representations state: *"… the decision was irrational in that the panel did not apportion weight fairly, and were influenced by unproven and unsubstantiated material."* The representations went on to identify a number of points suggesting that the panel attached weight (or too much weight) to evidence which should have carried little or no weight, and other points suggesting that the panel failed to attach to other parts of the evidence the weight which should have been attached to them.

27. The representations go on to state: *"In addition the panel failed to give proper and sufficient reasons for the rejection of the recommendations of five professionals with significant and considerable experience in their field, who all supported [the Applicant's] release in the community."* Although the representations do not say so expressly, the inference is that this complaint is being put forward on the basis of procedural unfairness.

Discussion

Procedural unfairness

28. It is convenient to discuss first the complaint of procedural unfairness. This is the ground on which the Administrative Court made a specific finding by which I am bound.

29. The court accepted the submission of counsel for the Applicant that, whilst the OHP was entitled not to accept the unanimous opinions of the expert witnesses, its reasons for rejecting those recommendations *"fell below an acceptable standard in public law".* The court pointed out that the OHP's reasoning for its decision that the Applicant's risk was too high to be managed safely in the community rested on his behaviour during his two previous periods on licence. The professionals had however provided substantial evidence of significant change on his part during the lengthy period since his last recall, and the probation officer had provided a risk management plan which in several respects was likely to be more effective than the previous ones. None of these matters, the court found, had been put into the balance in favour of the Applicant in the OHP's decision.

30. The court's ruling that the OHP failed to give sufficient reasons for rejecting the evidence of the professionals was a ruling on the very point which I now have to address on the complaint which the Applicant's solicitors make under the heading of procedural unfairness. As it happens I am in complete agreement with the court's ruling but, even if that had not been the case I would have been obliged to follow it and to direct reconsideration of the OHP's decision.

Irrationality

31. The primary complaint made under the heading of irrationality concerns the weight which the OHP placed on evidence given by the probation officer suggesting that the Applicant was preoccupied by sex and presented a substantial risk of sexual and violent behaviour towards any future intimate partners. There was clearly a substantial dispute of fact on this issue between the probation officer and the Applicant.

32. According to the decision letter, the probation officer told the OHP that the Applicant spent time on 'sex sites' on his phone: he would get approached by people befriending him on a social media website and would continue the contact despite being told that they were not real people but were trying to get him to go to a sex site; the probation officer said that at first it seemed that the Applicant did not seem to understand that it was not a real person who was contacting him but after he was told about the situation he continued to access the sites. This was clearly a point to which the OHP attached significant weight in reaching their decision.

33. The Applicant's solicitors contend that the probation officer's evidence was not accurately recorded in the OHP's decision and that in any event it was inaccurate and unsubstantiated.

34. They state that the notes made by the legal representative at the hearing differ in one important respect from the decision letter. If it had been necessary to resolve this particular factual issue I would have asked to be provided with the OHP's record

of the evidence on the point (an audio recording or handwritten notes or both); but, since I am directing reconsideration in any event, I do not think that is necessary.

35. As regards the accuracy of the probation officer's evidence, the solicitors point out
    (a) that the probation officer was unable to provide any details of what "*sex sites*" the Applicant was accessing
    (b) that his phone was not seized and examined and
    (c) that no messages were downloaded and available to the OHP.

36. Much of the probation officer's evidence on this part of the case appears to have been hearsay. Hearsay is of course admissible in parole proceedings, but only if the panel considering it can be satisfied that it is fair to do rely on it. There must be significant doubt about whether it was fair to rely on this particular hearsay evidence.

37. Confidence in that evidence is not increased by the fact that the probation officer does not appear to have mentioned it when requesting the Applicant's recall or in her post-recall report to the Secretary of State. There are other points made by the solicitors as casting doubt on the reliability of the probation officer's evidence on other matters, but I do not think it is necessary to make any findings about those.

Decision

38. It follows from the above that this application must succeed on the ground that, as the Divisional Court found, inadequate reasons were given for departing from the recommendations of the professionals and there was therefore a procedural irregularity resulting in unfairness. It is unnecessary to make findings on the complaints of irrationality but there is clearly some substance in the arguments presented by the Applicant's solicitors in that respect.

39. My decision is therefore that the case must be reconsidered.

Jeremy Roberts
14 September 2020