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[2020] PBRA 152

Application for Reconsideration by Bidar

Application

1. This is an application by Bidar (the Applicant) for reconsideration of a decision of an oral hearing dated 4 August 2020 not to direct release or recommend a transfer to open conditions.

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, the decision letter, the application dated 23 September 2020 and an email from the Panel Chair to the Parole Board Case Manager dated 14 September 2020.

Background and Current Parole Review

4. The Applicant is serving an indeterminate sentence of imprisonment for public protection imposed on 3 July 2009 for five offences of robbery and one offence of using a firearm with intent. He was 21 years old when he was sentenced. The minimum term was set at 8 years and expired on 3 July 2017.

5. The Applicant is now 32 years old. This is his second parole review.

6. The Applicant's case was referred to the Parole Board by the Secretary of State in March 2018 to consider whether or not it would be appropriate to direct his release. At the point of referral, the Applicant was not eligible for open conditions.

7. An oral hearing in October 2018 was adjourned to enable the Applicant to obtain a report from an Independent Psychologist. The two member panel returned to hear the case in February 2019 but were unable to agree on a decision and directed that the case be heard by a fresh panel.

8. A change in policy led to an updated referral in July 2019, asking the Parole Board to consider whether or not it was appropriate to direct the Applicant's release and, if release was not directed, to advise the Secretary of State on his continued suitability for open conditions. An oral hearing in December 2019 then had to be deferred due to the Applicant being transferred to a different prison.

9. The Applicant's case proceeded to an oral hearing, heard by a three member panel via video link on 16 June 2020. The panel heard evidence from the Applicant, his

Community Offender Manager, a Prison Offender Manager who attended in place of the Applicant's assigned Offender Supervisor and an Independent Psychologist. Following the hearing, the case was adjourned in order to obtain further information and evidence regarding a number of allegations made against the Applicant. The case was set for review on 31 July 2020. On 4 August 2020 the panel, having considered further information, decided to conclude the case 'on the papers'.

Request for Reconsideration

10. The application for reconsideration is dated 23 September 2020 and was submitted on the Applicant's behalf by his Solicitors. The application runs to forty-eight paragraphs and so is not repeated in full. The grounds have been extracted from that application, which submits that the decision was both irrational and procedurally unfair.

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

Irrationality

(a) The Panel's approach to behavioural allegations was irrational as it lacked anxious scrutiny, did not follow the Parole Board Guidance on allegations and failed to provide adequate reasons for its decision;

(b) That the panel rejected evidence from two Independent Psychologists and did not adequately explain why; and

(c) That the decision did not address the closing submissions in any meaningful way.

Procedurally unfair

(d) That the Panel, after adjourning, ought to have held a further oral hearing rather than concluding on the papers. To not do so was unfair.

12. The application also identifies that the decision letter, although dated 4 August 2020, was not issued until 15 September 2020. I have made enquiries regarding this and have seen an email from the Panel Chair, dated 14 September, which indicates that the case was considered on the papers on 4 August and the decision letter was now ready and attached. No explanation is given either in that email or within the decision letter itself as to why the decision letter was not completed within 14 days in accordance with Rule 25(6) Parole Board Rules 2019. Whilst this does not amount to a ground for reconsideration, it is regrettable that such a delay occurred, particularly as no explanation has been given.

The Relevant Law

13. The panel correctly sets out in its decision letter dated 4 August 2020 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019

14. 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. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

15. However, the Applicant in this case did make an application for release and was eligible for release and therefore the decision is eligible for reconsideration.

Irrationality

16. 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."

17. 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.

18. 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

19. 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.

20. 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.

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

22. It is well established now by decisions of the Administrative Court and Reconsideration Assessment Panels, 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 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 **R (Wells) v Parole Board (2009) EWHC 2710 (Admin)** Mr Justice Saini pointed out that the duty to give reasons is heightened when a panel of the Board is rejecting expert evidence.

The reply on behalf of the Secretary of State

24. The Secretary of State did not submit any representations in response to the application.

Discussion

25. The Applicant's submission at ground (a) concerns the application of the Parole Board's Guidance on Allegations ('the Guidance'). This also links to ground (d) regarding whether a further hearing should have been held.

26. Paragraph 8 of the Guidance deals with relevance. A relevant allegation includes (amongst other things) alleged harmful behaviour or behaviour associated with risk factors, particularly risk factors already associated with the prisoner. In this case, there were a number of allegations made regarding the Applicant's behaviour within custody including an alleged attempt to escape, alleged threatening and aggressive behaviour towards a Prison Governor and alleged threats towards staff. The Applicant does not seek to argue that these allegations are not capable of being relevant.

27. Paragraphs 6 and 9 of the Guidance provides that a panel faced with a relevant allegation will need to either disregard it, make a finding of fact or make an assessment of it (to decide whether and how to take it into account as part of the parole review).

28. Paragraphs 11-17 of the Guidance deal with findings of fact. Paragraph 11 sets out that a finding of fact may be necessary when it is capable of being relevant to the parole review, and if the panel is in a position to make a finding of fact, and if the prisoner has a fair opportunity to contest the allegations. Paragraph 15 goes on to say that panels must apply the 'balance of probability test' when making a finding of fact. Paragraph 17 states that, having made a finding of fact, the panel will need to assess how it is relevant to the decision regarding parole and what

weight should be given to it. The weight to be given to the finding of fact may depend on a number of factors including the nature and circumstances of the finding of fact and the prisoner's evidence.

29. Paragraph 18 of the Guidance notes that a panel may make an assessment of the level of concern if it is not in a position to make a finding of fact because making such a finding would be unfair or because there is insufficient evidence to make a finding on the balance of probabilities.

30. As the Applicant highlights within his application, paragraph 7 of the Guidance states, '*Panels must record in the decision letter their analysis and conclusions regarding allegations, including any impact the allegations have on the parole decision'*.

31. The Application relies on an analysis of the evidence relating to each allegation in submitting that there were 'major inconsistencies' in the same or there was simply insufficient evidence and as such, findings of fact could not be made. The Applicant notes also that the Prison Offender Manager and Community Offender Manager applied weight to the allegations in reaching their recommendations to the panel not to progress the Applicant, although neither witness had discussed the incidents with the Applicant. The Applicant goes on to submit that it appears from the wording used in the decision letter, that the panel did make findings of fact or at least applied weight to the allegations.

32. It is submitted that in doing so, the panel did not approach the allegations in accordance with the process within the Guidance, and has not made it clear what its analysis and conclusions are in relation to those allegations in accordance with the requirements within the Guidance. The Applicant relies on this under the ground of irrationality.

33. The Applicant further submits that, given the manner in which the decision was taken, procedural fairness should have required a further hearing. Without knowing how the panel was going to approach the allegations, particularly in light of the further information provided, the legal representative could not argue for a hearing to be resumed but the panel ought to have reasonably considered this following its own deliberations. In accordance with the overriding objective, the panel ought to have resumed the hearing in its duty to deal with the case justly (ground (d), paragraph 41 of the application).

34. I have considered the decision letter carefully. It is specifically said within that letter at the point of the adjournment that some of the assessments took account of information that was in dispute and that, '*whilst it was not clear to what extent the reassessment would affect overall conclusions'*, it was '*only fair*' to the Applicant that all parties had access to further information.

35. In relation to the allegation of an attempt to escape, the decision letter states, '*The upshot of all the evidence provided by reports in the dossier, especially statements from prison staff, is that while you clearly behaved aggressively and caused sufficient disturbance for the journey to be withdrawn, is to support the police conclusion that there was no genuine attempt to escape'.* The decision letter does not detail the Applicant's version of events in relation to this incident and

whether his evidence was taken into consideration in reaching its conclusion. It is noted within the dossier that an adjudication, contested by the Applicant, was not proceeded with on the grounds of 'natural justice'. In the conclusion of the decision letter when addressing consideration of a recommendation for open conditions, the letter states '*leaving aside the recent allegations of attempted escape'*. From the decision letter, I therefore conclude that the panel made it clear that it applied no weight to the allegation of escape. However, the panel did appear to conclude that there was aggressive behaviour on the Applicant's part yet there is no clear basis for establishing that all the evidence, including the Applicant's, was examined in reaching that conclusion regarding behaviour linked to the Applicant's risk factors.

36. In relation to the incident in the gymnasium with the Prison Governor, the decision letter states, '*Thus you were said to have behaved in a threatening manner towards a Governor in the gymnasium at [the relevant prison], with whom you engaged in a confrontation about what you saw as your lack of progression in your sentence. The conclusion was drawn that no significant risk reduction had been demonstrated*'. The Panel does not say what evidence was given in relation to that incident nor what the Applicant says about it. It is not clear whether a full finding of fact was made. It does read as if weight was attached to the incident and it has impacted on the panel concluding that the Applicant's risk has not reduced significantly. It must be noted that legal representations submitted before the oral hearing argued that this incident should be given no weight due to the lack of an adjudication and no explanation as to why. It must also be noted that the panel made a direction when adjourning this case to be provided with information regarding this incident. The dossier now contains use of force paperwork, but this relates to what happened after the alleged threats rather than during. The decision letter does not make mention of that paperwork or any assessment of the same.

37. In relation to the threats to staff, the decision letter reads, '*In May 2020, you were adjudicated for refusing to leave the exercise yard and, it is said, threatening to stab a member of staff if they came near you. It is also said that there had been other concerns about your behaviour that day and that you might have been intoxicated. The panel noted but had no evidence on which to draw any firm conclusions, your representations which suggested that had you threatened an officer, that would have been the subject of adjudication'.*

38. I am not clear at all as to what the panel means by this. The Applicant's legal representative submitted that the Applicant had been adjudicated for disobeying a lawful order by refusing the leave the exercise yard, but the relevant forms of the adjudication did not make reference to him being threatening. This appears to me to be a wholly appropriate and relevant submission that the panel ought to consider. The panel appears to say that it has no evidence on which to consider that submission. The panel in adjourning the case asked for details of this allegation including any statements from staff involved and any related adjudications or warnings. I can see from the dossier that the panel was provided with case notes but not any statements or any suggestion that an adjudication regarding threats was proceeded with. It is therefore not clear on what basis the panel rejected the submission, which of course it was free to do, provided it explains why and the reasoning is not irrational.

39. It is important to highlight that, although matters raised did not result in proven adjudications, the standard of proof in an adjudication is 'beyond reasonable doubt'. It is therefore entirely possible for a panel to reach a finding of fact on a balance of probabilities for a matter that has not resulted in a proven adjudication without introducing any irrationality or unfairness. However, in accordance with the Guidance, '*Panels will only be in a position to make a finding of fact when it has a reasonably sufficient body of evidence on which it can properly make a finding of fact on the balance of probabilities'*. It is not made clear in the decision letter what the panel has decided in relation to this incident, what the evidential basis was for any findings or the impact of any such finding or assessment on its decision.

40. Finally in the conclusion of the decision letter, the panel accepts that there have been allegations that have not proceeded to adjudication but goes on to say that it '*is able to, and should, weigh all the evidence and patterns of behaviour'*. As already indicated, this is accepted, but the panel must do so by applying the Guidance on Allegations where relevant. There is no reference to the Guidance at all in the decision letter. Whilst it is not necessary to explicitly reference the Guidance, it would be good practice in my view to do so. Alternatively, it would be expected that reference to the salient points of the Guidance is made. There is no such reference in this decision letter and the reader, along with the Applicant, is left in a position where it does not know whether findings have been made and significantly, on what basis they have been made.

41. The Applicant relies on irrationality in submitting that the Guidance was not applied. It may well be argued that it was procedural unfairness but whatever the label, the principle and the conclusion I draw is the same in that I accept the points raised under Ground (a).

42. The Applicant submits in Ground (d) that given the approach the panel appears to have made, it ought to have held a further hearing. As I am not unclear on what the panel found and how it went about doing so, I cannot be sure whether they were unfair to not resume a hearing. Certainly, the panel was under a duty to give the Applicant a fair opportunity to contest any allegations and respond to any further evidence. However, as the Guidance makes clear '*This may be achieved through oral evidence, written submissions, or in interview with an Offender Manager, depending what is fair in the case.'*

43. Given my finding in respect of Ground (a) and the comments in respect of Ground (d), I do not consider it necessary to go on to consider Grounds (b) and (c).

Decision

44. Accordingly, having applied the test and accepted the submission under Ground (a), the application for reconsideration is granted and the case should be reviewed by a fresh panel by way of an oral hearing.

Cassie Williams
16 October 2020