

[2021] PBRA 67

Application for Reconsideration by Uddin

Application

1. This is an application by Uddin (the Applicant) for reconsideration of a decision of a Panel of the Parole Board dated 18 March 2021 following an oral hearing on 4 March 2021.
2. The Panel made no direction for release.
3. 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.
4. I have considered the application on the papers. These are the dossier of 445 pages (that includes the decision letter) and the application for reconsideration.

Background

5. The Applicant was aged 28 at the time of sentence and is now aged 37 years old. He was sentenced to an extended sentence of 13 years imprisonment (consisting of a 9 year custodial term and a 4 year extended licence) on 26 October 2012 for offences of rape and false imprisonment. The Sentence Expiry Date is in June 2025.
6. The Applicant was released automatically on 23 December 2016 and recalled on 7 November 2018. This was his second review since the recall.

Request for Reconsideration

7. The application for reconsideration is dated 15 April 2021.
8. The grounds are as follows:
 - (a) Failure to place sufficient weight on the risk reduction work undertaken (procedural impropriety);
 - (b) Failure to obtain police evidence relating to the recall (procedural impropriety);
 - (c) The Panel relied on 'manufactured evidence' from the professionals (procedural impropriety);
 - (d) The Panel relied on 'manufactured evidence' from the police (procedural impropriety);

- (e) The professionals failed to obtain evidence that was supportive of the Applicant's behaviour in custody (procedural impropriety); and
- (f) In the absence of proven further offending, the Panel's assessment of risk was flawed (irrationality).

Current parole review

- 9. The Applicant's case was referred to the Parole Board for an annual review. An oral hearing was directed in May 2020.
- 10. The case was listed for an oral hearing on 10 November 2020 and adjourned at the Applicant's request during the hearing in order for police material relating to the recall to be obtained.
- 11. The adjourned oral hearing was conducted remotely (by telephone) on 4 March 2021 due to the current COVID-19 restrictions. The Panel heard evidence from the Applicant, as well as from the prison probation officer and the community probation officer.

The Relevant Law

- 12. The panel correctly sets out in its decision letter dated 18 March 2021 the test for release.

Parole Board Rules 2019

- 13. 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.
- 14. Such a decision is eligible for reconsideration on the basis that (a) the decision is irrational and/or (b) that the decision is procedurally unfair.

Procedural unfairness

- 15. 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.
- 16. 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 properly informed of the case against them;
 - (c) they were prevented from putting their case properly; and/or
 - (d) the panel was not impartial.
- 17. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Irrationality

18. 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."

19. 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.

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

The reply on behalf of the Secretary of State (the Respondent)

21. The Respondent has stated that he does not wish to make any representations.

Discussion

22. I shall consider the different grounds separately.

(a) Failure to place sufficient weight on the risk reduction work completed

23. The question of the weight to be placed on a particular piece of evidence is pre-eminently a matter for the Panel. They have had the benefit of oral evidence from the Applicant (and other witnesses).

24. There were two specific pieces of work that the Applicant refers to. One is engagement with the substance and alcohol misuse agency in custody. The Panel specifically refers to this in the decision letter as being something that the Applicant completed.

25. There does not appear to be any reference in the dossier to the other programme, nor is it mentioned in the decision letter. Neither has any evidence been provided by the Applicant to say that it was referred to at the hearing. In those circumstances, the Panel could not be criticised for not referring to it.

26. In any event, it was for the Panel to balance all the various factors. Although alcohol use was of concern, the Panel did not appear to consider that this was a current significant risk factor.

27. The application does not elaborate on this ground and I do not consider that it could be said that the Panel erred in its assessment of this.

(b) Failure to obtain police evidence relating to the recall / (d) 'manufactured evidence' (procedural impropriety)

28. These grounds fall to be considered together.

29. The case was adjourned on 10 November 2020 at the Applicant's request in order to obtain further material from the police relating to the recall.

30. This material was not provided. This includes at least two witness statements, the case summary and the 999 call.

31. The deadline for this was 22 January 2021, so some two months before the hearing. It is not clear why the directions were not complied with. The response from the probation officer indicated that enquiries with the police did not bear fruit, but there is no indication of what further attempts were made.

32. It is clear that the above material existed at the time of the directions and there is no apparent reason why it could not have been provided.

33. However, no application was made before, or at, the hearing for an adjournment, nor is there any suggestion that the Applicant raised his dissatisfaction at the inadequacy of the material in advance of, or at, the hearing.

34. The grounds suggest that the Applicant felt that *'there was little option but to proceed'* with the hearing as the alternative was a lengthy delay in an attempt *'to access them with little chance of success'*. That may be the case, but it does not explain why, having requested the case be adjourned, no action was taken by the Applicant in the lead-up to the resumed hearing.

35. Further, it is not clear that the evidence would have helped. The 999 call was also not included in the dossier. I note that this was not made by the complainant of the recall matter, but by neighbours. The summary of the call was that the neighbours called police *'stating [that parties at the address where the Applicant was] have been arguing'*.

36. It was described in a Probation risk assessment document as *'a possible disturbance'* and that the neighbours heard *'shouting and banging throughout the night'*.

37. In light of that, it does not appear that this material would have assisted the Panel.

38. However, the ground is wider than that as there is a challenge to the weight placed by the Panel on the allegations that led to recall.

39. This was not the first review after recall. It could be said that the time for the Applicant to challenge the factual basis for the matters recorded would be the first time that the case was considered after the recall, not least because if there were any conflict of evidence matters would be much fresher in everyone's mind than it would be several years later.

40. However, when the oral hearing was directed, it is clear that the Parole Board member envisaged that the question of the recall would be fully considered at the oral hearing. To that end, she directed police material be obtained.
41. Having put this so centrally in issue, and then adjourning for further material, it appears to me that the Panel fell into error in the assessment of the recall allegation.
42. It is clear that there was a sharp factual dispute as to what happened. The Panel were clearly entitled on the evidence to disbelieve the Applicant. However, in doing so, the Applicant was entitled to know on what basis he was being disbelieved.
43. There is no doubt that the Parole Board is obliged to provide reasons (**R v Civil Service Appeal Board, ex parte Cunningham [1991 4 All ER 310]**). Given the issues at stake, it is necessary to adopt an 'anxious scrutiny' of the decision (see, in the context of Parole Board decisions, **R (Wells) v Parole Board [2019] EWHC 2710 (Admin)** at para 35).
44. This does not mean that the reasons need to be lengthy (there is a lot to be said for brevity), but they must be sufficient to show that the Panel adopted the correct approach to unproven allegations and, in brief, what they found and why (see, as an overview, **De Smith's Judicial Review** (eighth edition) at 7-105 – 7-108).
45. When faced with such unproven allegations, the Panel was obliged to follow the approach as set out in the Parole Board document 'Guidance for Parole Board members on the consideration of allegations which have been made against a prisoner' (published on 11 April 2019).
46. This has been considered, and upheld, twice by the Administrative Court in the last year (**R (Morris) v Parole Board [2020] EWHC 711 (Admin)** and again in **R (Pearce) v Parole Board [2020] EWHC 3347 (Admin)**).
47. The policy sets out the process that should be followed when faced with an allegation that is not accepted by a prisoner and has not been proven. The advantage is that this provides Panels with a structured approach to follow.
48. In brief, the Panel should first consider whether the allegation is (if true) relevant to risk. If it is (as this allegation undoubtedly was) then they must consider whether there is sufficient evidence to make a finding of fact, and whether it is fair to do so.
49. If so, then the Panel must make a finding of fact as to what happened on the balance of probabilities. If not, then the Panel must make an assessment of the level of concern, following the process set out at paras 18-24.
50. The decision letter should then set out the factual conclusions arrived at and how this impacts on the decision-making process.
51. The reasons do not need to be lengthy, but need to be sufficient to explain to a reader what conclusions the Panel drew from the evidence and why.

52. In this case the Panel stated that it found the Applicant's account 'unconvincing'. There is a concern that that is a misstating of the burden of proof, but leaving that aside, I do not consider that this is sufficient to explain to the reader what it was that the Panel found, and why they found it.
53. The Applicant was entitled to know what it was that the Panel had (on the balance of probabilities) accepted from his account, and brief reasons as to why this was the case.
54. I have considered whether it could be said that, notwithstanding the lack of reasons, the decision can stand. I consider that it cannot.
55. The fact that the Panel made no reference to the 'Guidance on Allegations' document means that a fair and independent observer could not conclude that the correct process was followed.
56. Further, having adjourned for the further evidence which was not provided, the Applicant would have a legitimate concern that the proceedings against him were not fair.
57. It is often the case that there will be a number of matters raised at a hearing that the prisoner disputes. A Panel does not have to make findings of fact on everything that is in dispute. Even when a Panel does so, it will often be possible to set out the Panel's conclusions in a sentence.
58. However, it is clear from the direction sending the case to an oral hearing, and the subsequent adjournment, that the recall was considered to be significant by the Panel.
59. The finding in relation to the recall is only a part of the reasons why the Panel concluded that the Applicant's risk is not manageable. The Panel has set out clear and cogent reasons for that.
60. However, I do not consider that I could conclude that that aspect is severable. This would require me to conclude that the outcome of the recall matter would not have made any difference to the Panel's conclusion.
61. Given that the Applicant had been in the community for nearly two years prior to the recall, and the seriousness of the matter alleged, I do not consider that I could conclude that this could not have made a difference to the Panel's conclusion.
62. In those circumstances I am driven to the conclusion that this ground is made out.

(c) Reliance on manufactured evidence in custody (procedural impropriety)

63. The first aspect relates to an allegation that the Applicant made a threat towards his community probation officer. This was disputed by the Applicant.
64. The grounds submit that the Panel erred in relying on this as it was an unproven allegation, did not result in disciplinary action and was not recorded by the prison as an incident of concern.



65. It does not seem to me that these points indicate that the Panel erred. These are points that would have been made to the Panel and was for them to assess. It is not part of the reconsideration mechanism to re-argue matters.
66. The Panel were entitled to reject the Applicant's account of this incident, and were entitled to place weight on it. This is subject to (as above) the fact that any such finding must be reasoned.
67. In this case, it does not appear that the Panel gave reasons why it disbelieved the Applicant on this point (other than saying that it was 'in the face of [the] evidence' of the two offender managers).
68. Although the finding of the Panel was clearly open to it, the failure to explain why (on the balance of probabilities) they accepted the evidence of the professionals on this point (which was mentioned twice in the conclusion as being of significance), over his evidence was an error.
69. I do not consider that this, of itself, would mean that the Application should succeed given that this was one of a number of different incidents in prison that were proven in adjudications and the straightforward conflict of evidence. However, it is a further reason why I consider that the application should be granted.

(e) The professionals failed to obtain evidence that was supportive of the Applicant's behaviour in custody (procedural impropriety)

70. The representations have referred to two positive behaviour entries that, it is said, the professionals were not aware of. These are dated 23 October 2019 and 26 February 2020, and so they pre-date the hearing by at least a year.
71. The grounds state that this was discussed at the hearing, but there is no evidence provided by the Applicant to substantiate this. Nor is there any indication that any such conflict of evidence was considered to be of any significance to the Panel. That is sufficient to dispose of this ground.
72. In any event, if they were discussed at the hearing the Applicant could (and should) have said at that point that he had evidence to support it.
73. In relation to the Incentive and Earned Privileges entries, as is made clear by **Nightingale [2019] PRBA 40**, there is no provision in the reconsideration mechanism to take account of fresh evidence.
74. Given the above, and that there were a number of adjudications and other issues, I do not consider that this could have realistically made any difference to the Panel's assessment of the case.
- (f) In the absence of proven further offending, the Panel's assessment of risk was flawed (irrationality)*
75. It is correct to say that there was no further proven offending in the recall. However, that is not determinative of the application.



76. Leaving aside the reasons of challenge, the Panel carried out an assessment of the risk that the Applicant presented and assessed that it could not be manageable in the community.
77. This is a global assessment that must take account of all circumstances. It is clear that in relation to recall cases there will be cases where there is proven re-offending but the Panel consider that an individual's risk is manageable and direct release. Equally, there will be cases where there is no allegation of criminality, but a Panel can legitimately conclude that the person's risk is not manageable in the community.
78. To say that a decision is irrational is a high bar. No reasons are given under this head, other than that there was no further offending.
79. The Panel made a decision which was clearly open to them in light of the evidence called and the recommendations. In those circumstances it cannot be considered to be irrational.

Conclusion

80. The Applicant was recalled following a concerning incident. Since then, on any view, his behaviour has been poor. There was certainly sufficient evidence for a Panel to conclude that the Applicant's risk was not manageable.
81. However, for the reasons set out above, I consider that the Panel did not give sufficient reasons for its conclusion in relation to the recall matter (in particular) for the fair minded observer to be satisfied that the correct procedure in relation to unproven allegations was followed, and clear findings (with reasons) made. Given that the conclusion on this matter could impact on the assessment of risk, the application must be allowed.

Decision

82. For the reasons I have given, I conclude that the application for reconsideration should be granted.

Daniel Bunting
21 May 2021