

[2021] PBRA 178

Application for Reconsideration by Grimwood

Application

1. This is an application by Grimwood ('the Applicant') for reconsideration of the decision of a panel of the Board ('the panel') which on 22 November 2021, after an oral hearing on 12 November 2021, issued a decision not to direct his release on licence and not to recommend that he should be transferred to an open prison.
2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.

Background, and history of the case

3. The Applicant is aged 56 and is serving life imprisonment for his part in a murder committed when he was aged 21. After a contested trial he was sentenced in February 1987 when he was still aged 21. His minimum term ('tariff') was set at 15 years. It expired as long ago as January 2002.
4. The Applicant has remained in custody throughout his sentence, though he has spent 3 periods in open prisons: on each of those occasions he was returned to closed prisons where he now is.
5. This is the sixth review of his case by the Parole Board. The review commenced in February 2018 when the Applicant was detained in an open prison. The Secretary of State referred his case to the Board to decide whether to direct his release on licence and, if not, to advise the Secretary of State about his continued suitability for open conditions.
6. A great deal has happened since that referral and this review of his case has been substantially delayed, as will be described below.
7. Eventually an oral hearing was held on 12 November 2021. The panel comprised two independent members and a psychologist member of the Board. Oral evidence was given by the Applicant, two psychologists (Dr A and Ms B), the official responsible for the supervision of the Applicant in prison (Ms C) and the official prospectively responsible for his supervision in the community (Ms D). As will be explained below all four professional witnesses supported release on licence to designated accommodation, but the panel decided that it remained necessary for the Applicant to remain in prison for the protection of the public.



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8. This application for reconsideration of the panel's decision was made on 25 November 2021 by the Applicant's legal representative on his behalf.

The Relevant Law

The test for release on licence

9. The test for release on licence was whether the Applicant's continued confinement in prison was necessary for the protection of the public. This test was, as one would expect, correctly set out by the panel at the start of its decision.

The rules relating to reconsideration of decisions

10. 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.
11. 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)).
12. 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.
13. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. It is made on both of the above grounds.

The test for irrationality

14. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin) (the "Worboys case")**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It stated 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."

15. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.
16. 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.
17. The Board, when deciding whether or not to direct a reconsideration, adopts 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 cases in the courts

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 other cases.

Procedural unfairness

18. 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.
19. 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.
20. This is not an exhaustive list. The fundamental question on any complaint of procedural unfairness is whether, viewed objectively, the case was dealt with fairly.
21. It is important to distinguish between procedural unfairness and a procedural irregularity. Procedural irregularities of one kind or another are not uncommon. A procedural irregularity may or may not result in procedural unfairness. It will not do so if it is insignificant or if the panel's decision would clearly have been the same if the irregularity had not occurred.

Request for Reconsideration

22. The Applicant's legal representative has provided detailed representations in support of the application for reconsideration of the panel's decision. As I read those representations the following complaints are made about the panel's decision and the way in which this review of the case was carried out:
 1. There were unreasonable delays in the progress of the review;
 2. The correct process was not followed in relation to the panel's concerns about the evidence of the two psychologist witnesses;
 3. The panel's decision was influenced by its reluctance to proceed with the hearing;
 4. The panel unreasonably rejected the recommendations of the professional witnesses;
 5. The panel failed to attach appropriate weight to evidence that the Applicant had been able to use the thinking skills which he had learned;
 6. The panel failed to attach appropriate weight to the 1:1 work which the Applicant had completed with Ms B;
 7. The panel unreasonably dismissed the proposed risk management plan as being unlikely to be effective to enable the Applicant's risk to the public to be managed safely in the community;

8. The panel failed to attach appropriate weight to the absence of any evidence to suggest that the Applicant would not comply with the risk management plan; and
9. The panel failed to attach appropriate weight to the evidence that the Applicant's risk was not imminent.

Documents considered

23. I have considered the following documents for the purpose of this application:
 - (a) The dossier provided by the Secretary of State for the Applicant's case, which now runs to page 1045 and includes a copy of the panel's decision letter;
 - (b) The representations submitted by the Applicant's legal representative in support of this application; and
 - (c) An e-mail from PPCS stating that on behalf of the Secretary of State they offer no representations in response to this application.

Discussion

24. I will discuss separately each of the grounds advanced by the Applicant's legal representative in support of this application for reconsideration.

(1) There were unreasonable delays in the progress of the review

25. The delays are referred to in the legal representative's representations: I am not sure whether they are in themselves relied on as a ground for reconsideration (on the basis of procedural irregularity) or merely as background to other grounds, but I will discuss them anyway.
26. It is a regrettable fact that this review has been long drawn out. The referral was in February 2018 and the target month for the oral hearing was October 2018. A hearing date was fixed for February 2019, but the hearing had to be repeatedly deferred for reasons which I am satisfied were beyond the control of the Board. There were also several changes in the constitution of the panel.
27. The reasons for the deferrals included:
 - (a) The complexity of the case;
 - (b) The Applicant's moves between prisons on a number of occasions (unusually during the 'parole window', and some at his own request);
 - (c) On one occasion, the inability of the Applicant's legal representative to attend the hearing;
 - (d) On another occasion, the inability of the panel chair to attend;
 - (e) The COVID-19 restrictions and the suspension of oral hearings: the Applicant understandably wished the hearing to be conducted face to face and it was hoped that that would be possible though ultimately the hearing was conducted by video link; and
 - (f) The need for further evidence to be obtained.
28. Even if there had been any valid criticism of the Board for the delay in the oral hearing taking place, that would not have afforded a ground for reconsideration of the panel's decision unless it could be said to have affected that decision, and I have

seen no evidence that that was the case. The remedy for unreasonable delay is an action in the courts.

(2) The correct process was not followed in relation to the panel's concerns about the evidence of the two psychologist witnesses

29. Dr A is an independent psychologist whose reports in May 2019 and April 2021 were commissioned by the Applicant's solicitors. Dr B is a prison psychologist whose reports in August 2019, March 2020 and October 2020 were commissioned on behalf of the Secretary of State.

Dr A

30. The panel's concern about Dr A's evidence related to her previous involvement in treating the Applicant. In 2005 a prisoner who had been released on licence committed a murder, and it transpired that his release had been recommended by a psychologist who had previously been involved in treating him or her. That case was the subject of intense media attention and various enquiries. Since then, it has been generally accepted by the psychologists' profession that as a general rule a risk assessment for the Parole Board should not be carried out by a psychologist who has previously been involved in treating the prisoner. The basis for that view is the possibility of 'unconscious bias'.

31. As a result of that approach reports prepared by psychologists for the Parole Board usually contain a statement that the psychologist has had no previous knowledge of the prisoner. I have however come across cases in which the psychologist has expressly declared a previous involvement in the prisoner's treatment but has explained that (usually because of the passage of time) s/he does not consider that that involvement is a bar to him/her carrying out the assessment. There appear to be differing views within the profession about whether that is an acceptable approach.

32. From the Parole Board's point of view there is no rule that a panel cannot consider and attach weight to the evidence of a psychologist called by one side or the other to give risk assessment evidence when s/he has previously been involved in treating the prisoner. However, the panel may need to consider carefully whether the psychologist may have been influenced by 'unconscious bias', and legal representatives can be expected to anticipate that that may be the case.

33. Dr A very properly disclosed in her reports that she had been involved in the Applicant's treatment between 2006 and 2009 and that she had prepared previous risk assessments for a Mental Health Tribunal in 2011 and for the Parole Board in 2015. She clearly did not regard that involvement in his case as a bar to her providing an independent risk assessment for the purpose of this review of the Applicant's case; and nobody appears to have raised any questions about the appropriateness of her providing the risk assessments in 2011 and 2015.

34. She was accordingly put forward by the Applicant's solicitors to give evidence as an expert witness in this case, and no objections were raised on behalf of the opposing party (the Secretary of State) to her doing so. Nor was any concern raised in this

review, before the first day of the hearing, by any of the panels who had considered the case.

35. However, at the outset of the hearing a concern was raised by the panel. The purpose of raising that concern must have been to alert the Applicant's legal representative to the fact that the panel might need to consider the possibility of unconscious bias when assessing Dr A's evidence and might not be able to attach the same weight to her evidence as it would have done if she had not had any previous involvement in the Applicant's treatment.

Dr B

35. The panel's concern about Dr B was that her detailed risk assessment had been carried out in August 2019 and her two subsequent reports in March and October 2020 were brief and had been written more than a year before the hearing. It is generally accepted that a psychological risk assessment should only be regarded as valid for 12 months. The purpose of this approach is to ensure that the assessment is based on information which is reasonably up to date.

36. Again, the purpose of the panel raising this concern must have been to alert the Applicant's legal representative to the fact that the panel might feel unable to attach as much weight to Dr B's evidence as they would have done if her reports had been more recent.

Discussion at the hearing

37. The panel gave the Applicant's legal representative the opportunity to discuss these matters with her client, in case he wished to apply for a further adjournment or deferral. After taking her client's instructions the legal representative informed the panel that the Applicant's request was for the hearing to go ahead, so it did.

38. The legal representative informed the panel that although Dr B's reports had been made at an earlier stage she had since then been meeting with the Applicant on a monthly basis so she was able to provide more up to date information. In her representations the legal representative states: "[Dr B] has been working closely with the Applicant during the months running up to the oral hearing as evidenced at the hearing. Our client has been engaging with two hour sessions every month for the last eight months and is reported to have been responding well." "The panel's decision records that [Dr B] stated in evidence that these meetings each lasted for one hour, that there had been five of them between April and October 2021 and that [Ms C] and [Ms D] had participated in them."

39. It is unclear whether these sessions with Dr B should be regarded as 'treatment' for the purpose of the principles discussed above. The reliance placed on them by the legal representative in her representations as evidencing a reduction in risk [see Ground (6)] would suggest that they should be so regarded.

The solicitor's submission and my view of it

40. Although not expressed in exactly these terms, the solicitor's submission is in effect that it was unfair for the Applicant to be confronted on the morning of the hearing



with the need to make an important decision of this kind, and that if he was to be expected to make that decision the point should have been raised earlier so that he and his legal representative could have an opportunity to discuss it at their leisure without the pressure under which they were inevitably placed.

41. There is, I think, force in this submission, especially given that the Applicant is a man with mental health and personality difficulties. This is a very difficult area, not made any easier by the lack of unanimity among psychologists about whether involvement in treatment a long time previously means that a psychologist should not be making a risk assessment for the Parole Board.
42. I should say that the panel were obviously anxious to avoid any unfairness to the Applicant which might have resulted from his being unaware that the weight which the panel could attach to the evidence of the two psychologists might be limited by reason of the points which concerned the panel. However, the fact that the points were raised by the panel at the start of the hearing did, I think, place the Applicant and his legal representative in an unsatisfactory and unfair position.
43. I do not know, of course, why the points were raised by the panel at such a late stage. One very likely explanation is that it was the psychologist member of the panel who raised them with her colleagues having only been able to prepare for the hearing at a very late stage (as is often the case with busy psychologist members). Whatever the explanation, however, I am driven to the conclusion that to confront the Applicant and his legal representative with these important points at the start of the hearing can properly be regarded as inadvertent procedural unfairness.

(3) The panel's decision was influenced by its reluctance to proceed with the hearing

44. I do not think this ground is made out. I do not think it is right to say that the panel was reluctant to proceed with the hearing. On the contrary, once they had been informed that the Applicant wished the hearing to proceed, they conducted it in a correct and appropriate manner and reached their conclusions accordingly.

(4) The panel unreasonably rejected the recommendations of the professional witnesses

45. A panel of the Board is not bound to follow the recommendations of professional witnesses. It is the panel's responsibility to make its own assessment of the prisoner's risk and its manageability on licence in the community.
46. If a panel fails to give adequate reasons for departing from the recommendations of the professional witnesses, or if its reasons can be shown to be flawed, that may be a ground for reconsideration. However, I cannot see that either of those situations arise in this case. The panel dissected the evidence of the professionals in detail and gave detailed reasons for disagreeing with them. Other panels might have reached different conclusions but there is no demonstrable flaw in the panel's reasoning.

(5) The panel failed to attach appropriate weight to evidence that the Applicant had been able to use the thinking skills which he had learned

47. There may be some force in this submission but in view of my conclusion on Ground (2) it is unnecessary for me to express any conclusion about it.

(6) The panel failed to attach appropriate weight to the 1:1 work which the applicant had completed with Ms B

48. Again, there may be some force in this submission but in view of my conclusion on Ground (2) it is unnecessary for me to express any conclusion about it.

(7) The panel unreasonably dismissed the proposed risk management plan as being unlikely to be effective to enable the Applicant's risk to the public to be managed safely in the community

49. Other panels might have taken a different view, but I do not think the panel's conclusions on the likely effectiveness of the risk management plan can be regarded as irrational within the meaning explained above.

(8) The panel failed to attach appropriate weight to the absence of any evidence to suggest that the Applicant would not comply with the risk management plan

50. Compliance with the risk management plan does not mean that the plan will be sufficient to enable a prisoner's risk to be managed safely. The risk management plan can only go so far to protect the public. The prisoner has to have sufficient internal controls to go with the external ones.

(9) The panel failed to attach appropriate weight to the evidence that the Applicant's risk was not imminent.

51. If a prisoner's risk of serious harm to the public is imminent, that may be a very good reason for saying that it is not manageable on licence in the community. However, the converse is not true. The Parole Board's risk assessment is not confined to the short term. It has to look further into the future and decide whether the prisoner's risk will be manageable safely in the longer term. I cannot therefore uphold this ground.

Decision

52. Ground 2 is clearly the principal ground relied on by the legal representative, and for the reasons explained above I accept her submission that there was - albeit I believe it occurred unwittingly and with the best of intentions - procedural unfairness in this case.

53. I am satisfied that that procedural unfairness necessitates reconsideration of the panel's decision. It cannot be regarded as insignificant, and I cannot say that the panel's decision would necessarily have been the same if it had not occurred: I cannot exclude the possibility that the Applicant's presentation in giving evidence might have been more impressive if he had not had to make an important decision without any pressure of time.

54. It follows that I am bound to find (applying the test set out in paragraph 19 above) that, viewed objectively, this case was not dealt with fairly. I do not find that any of the other grounds have been substantiated, but my finding on Ground 2 is sufficient to require a direction for reconsideration. That is therefore the direction which I make.

Jeremy Roberts
10 December 2021