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[2023] PBRA 103

Application for Reconsideration by Reavill

Application

1. This is an application by Reavill (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 21 April 2023. The decision of the panel was not to direct release.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, and/or (b) that it is irrational and/or (c) that it is procedurally unfair.

3. I have considered the application on the papers. These are the dossier consisting of 464 pages; the application for Reconsideration submitted by the Applicant's legal representative; and the response by the Secretary of State (the Respondent).

Background

4. In August 2006, aged 22, the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection for an offence of attempted robbery. His tariff was set at 2 years and 3 months (less 58 days spent on remand) and expired in September 2008. At the time of the index offence he had just completed a post custody licence following a conviction in relation to four robberies, committed with a knife, in 2002. He had been recalled several times on that licence for non-compliance. He had also been recalled on two occasions in relation to the index conviction. The facts of the index offence were that the Applicant, conspiring with a co accused, approached the victim in the street. The co accused demanded cash from the victim or she would accuse him of rape. The victim refused and was struck in the face by the female co accused with a mobile telephone. The Applicant then approached and intervened by grabbing the victim's arm. The victim was able to break free and went to a nearby shop where the police were called.

Request for Reconsideration

5. The application for reconsideration is dated 12 May 2023.

6. The grounds for seeking a reconsideration are set out below.

Current parole review

7. The Applicant was 39 years of age at the time of the Parole Board review. He was initially released in November of 2016 to live in probation Approved Premises. There were concerns about drug use. He received a warning but was subsequently found collapsed having again used illegal drugs. He was recalled 9 days following his release. He was released again in 2017. In 2018 he was arrested for offences of burglary. He was later convicted of these offences and was sentenced to 90 months imprisonment.

8. The oral hearing panel consisted of three independent members of the Parole Board. Oral evidence was received from the Prison Offender Manager (POM), the Community Offender Manager (COM) and a prison psychologist. The Applicant gave evidence and was legally represented. A dossier consisting of 373 pages was considered.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 21 April 2023 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 (as amended)

10. Pursuant to 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. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).

11. 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**.

Irrationality

12. 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."

13. 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.

14. 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

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 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.

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

18. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

The reply on behalf of the Respondent

19. The Respondent offered no representations.

Grounds and discussion

Ground 1

The hearing was procedurally unfair due to the Panel Chair granting permission for the [prison psychologist] to leave the hearing without consulting the legal representative.

20. The background to this complaint was the fact that the prison psychologist requested an early release from the hearing. Having listened to the tape recording of the hearing, the evidence indicates that the psychologist had given notice in advance that she needed to leave the hearing because of personal difficulties. During the course of the questioning by the Applicant's legal representative, the psychologist reminded the panel that she had a commitment. The legal representative was able to complete her questioning and did not raise a concern

about this request at the time of her questioning. The Chair then asked the other panel members whether they had any views regarding the release of the psychologist (they did not). The Chair omitted to ask the legal representative for any view before releasing the psychologist. However the Chair was quickly (and appropriately) reminded by the co-panellists that the solicitor should be given an opportunity to make representations. The Chair then asked the solicitor whether she had any representations. She initially replied "*I don't have any concerns*". She also indicated that she would take instructions from her client as there was to be a break at this point. On return from the break the legal representative repeated the earlier indication that she did not have any concerns. The chair then suggested that if there were any concerns or if any issues arose during the remainder of the hearing, that arrangements could be made for the psychologist to listen to the evidence and to respond to any queries. The legal representative indicated that if she had any concerns, she would bring the matter to the attention of the panel.

21. I fully accept that the omission by the Chair to seek representations from the legal representative in relation to the release of the psychologist, before allowing release, was potentially discourteous and could have had implications if there were issues which would have necessitated the psychologist remaining. I note that the chair was in some difficulties in this case because of technological problems which meant, it appears, that the Chair was obliged to use the telephone rather than the video system. However the chair very quickly sought representations, and in my view had a clear indication from the Applicant's solicitor that there were no concerns about the release of the psychologist. It appears to me that it was incumbent upon the legal representative to express any concerns at the time, rather than raise them in a reconsideration application. Additionally, it appears that no issues have arisen since the conclusion of the matter and that the Applicant's legal representative did not take up the chair's invitation to raise any issue after the conclusion of the hearing. I am not therefore persuaded that the temporary failure to seek representations from the legal representatives in this case could amount to a procedural irregularity in the sense set out above.

Ground 2

The hearing was procedurally unfair due to the manner in which the questioning was conducted by the Panel Chair.

22. Having listened to the tape recording of the hearing in this case I was not able to detect evidence of undermining of evidence by way of questioning from the panel chair.

23. Dealing directly with the example cited by the Applicant's solicitor under this ground. The panel chair asked the POM, at the conclusion of her evidence, about three areas which required clarification following the examination by the Applicant's solicitor. The chair asked whether the POM was a probation officer. This was a perfectly reasonable question as it would enable the panel and the Applicant to assess the evidence adduced by that witness in the light of the witness' professional background (prison offender managers have varied backgrounds, some are drawn from the probation service others have prison service backgrounds). The panel chair also asked whether the POM had experience of work in the community. The POM did have such experience, again it appeared to me that this was a perfectly

reasonable enquiry to make in order to assess the weight of the evidence given by the POM. The panel chair also wished to clarify with the POM the replies that she had made in connection with the risk scoring. The chair asked the POM to confirm that she accepted that the Applicant had been assessed as having a high risk of serious harm in the community using one measure and a moderate risk of violent offending using a different measure. Again the questions were proportionate and ensured that two different risk scoring measures were not conflated or confused.

24. In the circumstances I determine that there is no basis, in relation to this ground, to assert that the hearing was procedurally unfair. The role of the chair and of the panel is to assess the quality and weight of the evidence and to make appropriate enquiries to ensure that all parties understand any evidence adduced by witnesses. In this case the chair, in my determination was performing this function fairly and reasonably.

Grounds 5 and 6

The Panel acted irrationally in not giving due consideration to the professional's recommendations and the oral evidence that the test for release is met.
The Panel have not properly addressed why [the Applicant] does not meet the statutory test for release and therefore the decision is procedurally flawed and irrational.

25. I have addressed these two grounds together as they refer to the same fundamental issue namely whether the panel, as explained in the case of **Wells v The Parole Board 2019 EW HC 2710** have explained clearly its reasons for the decision. This particularly being the case where it is contrary to the opinion of one or more of the professional witnesses. The reasons should be sufficient to justify its conclusions.

26. The representations, on behalf of the Applicant, set out a number of evidential points made in the hearing by various witnesses indicating that the Applicant met the test for release. In brief:

(a) That the Applicant had made good progress in undertaking offending behaviour programmes and could be safely managed in the community.
(b) That although recommending open conditions the community probation officer conceded that the statutory test for release was met.
(c) That the Applicant had advanced in dealing with emotional management and although he had been involved in an assertive confrontation in an argument about prison funds with a prison officer, he had in fact dealt with this matter in a more mature fashion than he might have done in the past.
(d) That the evidence in the hearing was that the Applicant's self-management skills, and ability to comply had been tested by his behaviour in the closed prison environment.
(e) That the evidence indicated that the Applicant have developed a more open and honest approach to admitting drug use since his time in prison.
(f) That the panel concluded incorrectly that the Applicant's only strategy to prevent drug relapse was the use of avoidance. The Applicant's solicitor argues that there was evidence of other skills within the dossier.
(g) That the panel misconstrued the evidence of the psychologist and failed to take account of the fact that, despite the unavailability of community support from

an organisation called Intensive Intervention and Risk Management (IIRMS), the psychologist maintained the view that the Applicant's risk could be managed in the community.

(h) That the panel failed to take account of evidence within the dossier that the Applicant was able to manage life problems and had sufficient internal skills to manage his risk and meet the test for release.

The basis of the panel's decision

27. The panel set out in their decision the rationale for the conclusion that the Applicant did not meet the test for release in particular:

(a) At paragraph 2.5 the panel pointed out that they determined that despite regular meetings between the Applicant and his probation officer, when he was on licence, his drug misuse was not detected or disclosed which raised the concern about warning signs of relapse, honesty and openness and deterioration.

(b) At paragraph 2.16 the panel took the view that the Applicant was living on a stable prison wing, and that this environment was not an effective test of how the Applicant might comply and act in the community.

(c) At paragraph 2.18 the panel pointed out that the Applicant had been in the community for a relatively short period of time in recent years. The panel had taken account of the Applicant's evidence concerning his ability to resist drug misuse, however having heard the evidence, the panel did not share the confidence of the Applicant himself in that regard.

(d) At paragraph 2.26 the Applicant told the panel that he would not go to an open prison because there were not enough staff to support him, he would be bored and would probably walk out. The panel clearly cited this as a concern relating to compliance and emotional stability generally.

(e) At paragraph 2.29 the panel indicated that the COM was recommending open conditions. She accepted however (when asked) that whilst the Applicant's risk of serious harm in the community would not be imminent, she took the view that he would deteriorate quickly and his risk would rise, hence her view was that a gradual transition towards living in the community was indicated.

(f) At paragraph 3.12 the panel indicated that, despite the evidence that they had heard, they were not persuaded that the Applicant had developed sufficient internal skills to manage his risks in the community.

Discussion

28. The panel had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant as well as the witnesses. The Applicant was also legally represented throughout. Where there is a conflict of opinion, it is plainly a matter for the panel to determine which opinion they preferred, provided the reasons given for their decision are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision.

29. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their

own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, - they have the expertise to do it.

30. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, **per R (Wells) v Parole Board 2019 EWHC 2710**.

31. The Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the evidence for that found by the panel, unless, of course, it is manifestly obvious that there was an error of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

32. As is clear from the representations made by the Applicant's solicitor and by the decision of the panel, this was a case of conflicting views. The analysis of risk is complex. Predicting future behaviour relies upon a cautious assessment of historical behaviour, the observation of changes in behaviour, an analysis of any learning or programmes undertaken in the case of a prisoner, an assessment of the views of professionals, and a careful assessment of the evidence of the prisoner himself.

33. It is not uncommon for there to be differing views in the realm of risk. It is also not uncommon for professionals to take differing views and for those differing views to be often supported by credible arguments.

34. In this case having heard the tape-recorded evidence it was clear that the POM took a positive view of the progress of the Applicant and of his ability to manage his emotions. The Applicant's positive behaviour in custody (particularly in more recent times) was cited by the POM as the basis of reaching her assessment.

35. There is some evidence that the POM may have taken account of the fact that the Applicant had made it clear that he would not accept a transfer to an open prison, and indeed it was clear (in any event) that he may have difficulty in transferring to an open prison because of his history of absconding in the past.

36. As I have indicated however I fully accept the submissions by the solicitor for the Applicant that there was positive evidence of appropriate prison behaviour from the POM supporting her contention that the Applicant's risk was manageable in the community and that he should therefore be subject to a decision to release.

37. The panel, however, took the view that the Applicant was living on a stable prison wing and that the closed prison environment was not a sufficient test of how the Applicant might fare in the community. The panel noted that the Applicant's behaviour had very quickly deteriorated after earlier releases. It was also noted that the Applicant had spent a very limited amount of time living in the community and

that his ability to manage daily living may be limited. The panel therefore made clear why their view differed from the view of the POM.

38. The prison commissioned psychologist in this case had prepared a detailed report. In her report she had indicated that in the event of a decision to release, a number of protective and supportive factors should be in place. These included, probation hostel accommodation close to the Applicants family, and the accessing of the service called IIRMS. This would be a service which would adopt what was called a "strengths-based approach" and would focus on areas of risk such as emotional management and relationships. The psychologist suggested that this service would mitigate the risk posed by the Applicant in the community. By the time of the hearing it was clear that IIRMS would not be available if the panel directed release. The psychologist was referred to this part of her report. The panel noted in its decision that the psychologist, having learnt of the unavailability of IIRMS, had altered her position and appeared to be content to recommend release without support from this organisation. Clearly professionals are at complete liberty to revise or change their view, as appeared to have occurred in this case, however it is clear that the panel were concerned that there was an element of *'watering down'* of the initial risk based proposals in the light of the absence of this support organisation. The panel made clear in their decision that it was concerned about emotional resilience and strategies to avoid relapse which were of major concern and which would have been reinforced by IIRMS.

39. So far as the evidence from the COM was concerned, the panel noted that the probation officer was recommending a transfer to open conditions. That recommendation was on the basis that the Applicant had had difficulty in transitioning from prison into the community and had relapsed in the past and his risks had risen. However the COM also appeared to accept, when questioned, that the Applicant *'met the test for release'*. When questioned further the COM indicated that her concerns were that although the risk of serious harm may not be imminent, the likelihood was that the Applicant would quickly deteriorate if he were released immediately from prison and his risk of serious harm would then rise.

40. This evidential position clearly created difficulties for the panel. The panel had a duty to apply the statutory test without a temporal element. In the case of the Applicant, the panel were obliged to consider the applicant's ongoing risk in the future. The recommendation by the COM, of a transfer to open conditions, appeared to be attuned with the definition of one of the criteria to be considered in relation to recommending transfers namely "*the extent to which the prisoner has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm, in circumstances where the prisoner in open conditions may be in the community, unsupervised, under licensed temporary release*". The criteria envisages a prisoner whose risk is not manageable by way of immediate release but is manageable under prison licensed temporary release conditions.

41. In light of this conflicting position, the panel were, in my view, entitled to assess the recommendation of the COM with some care. The panel took the view that a transition was necessary and essential. In light of the history of deterioration and risk escalation following releases in the past, the panel's position was unsurprising.

The panel explained in their decision why they rejected the apparent assessment of the COM that the Applicant met the test for release.

42. It should be noted that this case was further complicated by the fact that the Applicant had absconded from an open prison, therefore it was unlikely that he would achieve one of the criteria underpinning a recommendation for transfer to an open condition - namely a low risk of absconding. This difficulty coupled with the assertion by the Applicant that (in any event) he would not move to an open prison, and he would likely leave if he were residing in an open prison, inevitably created a conflict for the professionals in terms of their recommendations.

43. The availability of a place in an open prison and the Applicant's views as to the value of an open prison, were clearly not matters relevant to the panel's decision. The panel's primary consideration was whether the Applicant met the statutory test for release and if not whether he met the criteria relating to transferring to an open prison. The inference from the panel's decision was that they determined that the COM's evidence was conflicting and accordingly the assertion that the Applicant 'met the test for release' was rejected.

44. As indicated above this was a case where there existed differing opinions as to the assessment of the management of the Applicant's risk in the community. Having listened to the recording of the oral evidence and assessed both the dossier, and the decision of the oral hearing panel, I am satisfied that the panel have explained the reasons why they have reached their conclusion not to direct release. The panel have taken account of the positive evidence and the recommendations of the professionals and of the evidence from the Applicant himself. The written decision sets out the reasons why the panel reached their conclusion, and why they rejected the views of the professionals. In the circumstances therefore I determine that this is not a case for Reconsideration.

Decision

45. For the reasons I have given above, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

HH S Dawson
30 May 2023