[2023] PBRA 30

the Parole Board
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Application for Reconsideration by Brown

Application

1. This is an application by Brown (the Applicant) for reconsideration of a decision of a Panel of the Parole Board dated 3 January 2023 (the 2023 Panel Decision) making no direction for the Applicant's release.

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:
   a) the 2023 Panel Decision;
   b) the decision of a Panel of the Parole Board dated 19 March 2021 (the 2021 Panel Decision);
   c) the Application for Reconsideration of the 2023 Panel Decision;
   d) the email dated 3 February 2023 from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State stating that no representations will be made in response to the Application for Reconsideration of the 2023 Panel Decision; and
   e) the Applicant's dossier containing 585 pages.

4. The grounds for seeking reconsideration are that: -

   a) the Panel was irrational as the Applicant contends that he "*was informed by his Prisoner Offender Manager (POM)) that he would not be able to complete all outstanding core work and this has been used against [the Applicant] when assessing his risk*" (Ground 1) and that,

   b) the Panel acted in a procedurally unfair manner as the Applicant had received the 2021 Panel Decision and after a successful application for reconsideration of the first decision, reconsideration was ordered and the Applicant:

      "*should have been granted a brand new panel (chair) and psychologist panel member [but] on his new second hearing on 19 October 2022 "which is the subject of the present reconsideration application] his [panel for that hearing" consisted of the same two parole panel members".* (Ground 2)

Background

5. On 3 July 2017, the Applicant, who was then 34 years old, received an Extended Determinate Sentence of 10 years' custody and a licence extension period of 4 years for the rape of a female who he had met on a bus.

6. The Panel explained that the Applicant had initially told the police that his sex with the victim was consensual and informed the writer of the Pre-Sentence Report that it was his recollection that he and the victim had had "*long consensual sex*", but he implied that it was possible that he had raped the victim but he did not remember doing this due to his mental health issues.

7. Since his first conviction in January 1997 when he was 16 years old, the Applicant had been convicted on around 30 occasions for about 52 offences, some of which were acquisitive offences (such as burglary, deception, handling and theft) while other offences raised the risk of causing serious harm (such as drugs supply, robbery, possession of weapon and sexual assault). The Panel noted that the index offence indicated an escalation in seriousness of the Applicant's offending and of the harm caused.

8. The Applicant has in the past breached trust by offending whilst on bail, failing to surrender as well as breaching community sentences, orders of the court (such as his SOPO and conditional discharge orders) and licence conditions on release for custody.

9. There have been concerns about the Applicant' s custodial behaviour. He spent 3 months in the Segregation Unit before transferring to "*the Bridge"* in an attempt to motivate and engage him, to help him to return to a normal location and to help him to pursue a treatment pathway. After his return to a previous prison in November 2019, there were many negative entries and he was on the Basic level of the IEP scheme at the time of the hearing before the panel which led to the 2023 Panel Decision. He was placed on report at adjudication in February 2022 for abusive behaviour and in October 2022 for climbing on the netting.

10. In addition, the Applicant has been described as "*responding badly*" if challenged or if not given or allowed what he wants, at which point he can become argumentative. Some of the Applicant's approaches and behaviour to female staff has been considered inappropriate; he is no longer permitted to have one-to-one contact with female staff. He denies that his conduct is inappropriate and considers that the staff misheard him or that there were misinterpretations.

11. The Applicant has not undertaken any accredited risk and offence-focussed interventions which look at sexual offending, attitudes or the future. He explained to the Panel that he was frustrated by this, because he had been eager to undertake programmes and he did not feel sufficiently well-supported to cope with his mental health. His evidence was that he had reflected on his offences and was willing to undertake programmes in the community.

12. During his sentence, he started the "*Motivation and Engagement*" programme (M&E) but the Covid-19 pandemic caused its curtailment and its conclusion in December 2021.

The Views of the Professionals

13. The Applicant's POM and his Community Offender Manager (COM) as well as an Independently- Instructed Psychologist (the Psychologist) gave evidence to the Panel.

14. According to his POM, the Applicant has an Intelligence Quotient of 76:

"*with particularly poor executive functioning [which] regulates control and manages other cognitive processes [which] would also account for his lack of willingness to accept his part in this offence or see any wrongdoing in his predatory pattern of sexual offending.*

His lack of ability to understand and appreciate the severity of his offending, both in relation to the breaching of his [SOPO] and the content of offending is intrinsic to his risk".

15. The other Professionals agreed with those comments explaining that the Applicant lacked insight and self–awareness and they attributed this at least in part to his learning difficulties and challenges. They noted the range and diversity of his offending and the challenges for effective risk management. The view of the professionals was that the Applicant needed a structured intervention to help him reflect on his risks and triggers to his offending, to challenge and reduce any unhealthy thoughts.

16. The professionals identified the need for the Applicant to undertake appropriate structured interventions "*to help him reflect upon his risks and triggers to his offending, to look at strengths, healthy intimate relationships, consent and healthy sex; to challenge and reduce any unhealthy thoughts; to help build a positive identity and a sense of purpose; and to help develop a "new me" that will not rely on sexual offending to address risks*".

17. The Panel, having considered the evidence from the professionals in relation to the Applicant, concluded that: -

"*The over-riding evidence from professionals was that they were concerned that he had not undertaken accredited interventions, and thus his opportunities for internalisation of skills and learning had been limited; and his abilities to practice skills, when he encounters stimuli and temptation is untested, and professionals were not confident he had internal controls. The panel notes that [the Applicant] has not yet established and tested strategies to manage risky situations"*

18. At the time of the hearing in October 2022, the Applicant had undertaken a programme needs and suitability assessment (PNA) which was completed after the hearing and disclosed. The assessment was for a treatment pathway through "*Becoming New Me*"(BNM). This programme was identified by the POM and COM as: -

"Essential *core risk-reduction, the learning and skills from which should then be consolidated and reinforced on release, perhaps through structured sessions including through New Me MOT."*

19. The Panel then stated that if the Applicant agreed, arrangements would have to be made for him to transfer prisons to undertake that programme. It is important to stress (with emphasis added) that *"all professionals identified such a move to be appropriate and encouraged [the Applicant] to take advantage of such an opportunity*". The importance of this evidence is that all the professionals regarded it as highly desirable for the Applicant to do this programme in prison, , and then for it subsequently to "*be consolidated and reinforced on release."*

The Approach of the Panel

20. A two-member panel of the Board held an oral hearing at on 19 October 2022 at which the panel heard oral evidence from:
    (a) the Applicant's POM;
    (b) The Applicant's COM;
    (c) the Independently- Instructed Psychologist; and from
    (d) the Applicant.

21. The Applicant was represented at the oral hearing by his solicitor. The Secretary of State was not represented by an advocate. A victim impact statement was provided and was read out. There was no evidence which could not be disclosed to the Applicant.

22. The Panel had to determine the significant question of whether it was necessary for the protection of the public for the Applicant to remain in custody.

23. The Panel noted that the OASys assessment was that the Applicant's risk of further offending was assessed as *"high*" as was his risk of further violent offending. Using OSP OSAP the Applicant's risk of conviction for further contact sexual offence is assessed as "*very high*". His risk of serious recidivism is assessed as "*medium*". The panel accepted these assessments of the Applicant's risk as correct.

24. Perhaps more importantly, the Applicant is assessed as posing *"a very high (and thus imminent) risk of serious harm to the public and a high risk of serious harm to a known adult (his victim)".* The panel accepted these assessments *"noting the [Applicant's] index and previous offences, his identified risk factors, the concerns about the lack of completed accredited interventions designed to address his risks and the triggers to his offending, or the lack of testing of any learnings and skills from any such interventions or his personal reflections".*

25. The Panel explained that it "*was not convinced by [the Applicant's] arguments for early release [and] noted that the Applicant had not addressed and reduced risk, and had outstanding and core risk-reduction work to undertake*". Having considered the Applicant's evidence, the Panel concluded that *"treatment needs have been identified, and this is assessed as core-risk reduction work that should take place in custody".*

26. The Panel concluded that the Applicant's risk *"is not manageable in the community and that it is necessary for the protection of the public that he remains confined and made no direction for release."*

The Relevant Law.

Irrationality

27. 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."*

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

Other

29. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."* See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

30. 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."*

Procedural Unfairness

31. Procedural Unfairness means that there was some procedural impropriety. In summary, an Applicant seeking to complain of procedural unfairness under Rule 28 has to establish 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 fairly; and/or
    (e) the panel was not impartial.

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

The reply on behalf of the Secretary of State.

33. PPCS stated in an email dated 3 February 2023 that the Secretary of State was not making any representations in response to the Applicant's reconsideration application.

Discussion

34. In dealing with the grounds for reconsideration, it is necessary to stress five matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgment of the Panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

35. The second matter of material importance is that when deciding whether a decision of the panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole.

36. Third, where a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact they saw and heard the witnesses, 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 of the panel.

37. Fourth, when considering whether to order reconsideration, appropriate weight must be given to the views of the professional witnesses, but reconsideration cannot be ordered if the panel has put forward adequate reasons for not following the views of the professional witnesses.

38. Fifth, in many cases, there can be more than one decision that a panel can be entitled to arrive at depending on its view of the facts.

Ground 1

39. This Ground is that the Panel was irrational as the Applicant contends that he "*was informed by his POM that he would not be able to complete all outstanding core work and this has been used against [the Applicant] when assessing his risk.*"

40. This Ground cannot be accepted. First, the POM was quite entitled (if not obliged) to give to the Applicant his honest opinion on whether there was outstanding core work for him to complete before release. Second, the duty of the POM was to explain to the Panel his impartial view on whether the Applicant could be safely released into the community. As has been explained by the Panel, he, like the other professionals "*was not convinced by [the Applicant's] arguments for early release [and] noted that the Applicant had not addressed and reduced risk and had outstanding and core risk-reduction work to undertake*".

41. This was a conclusion that the POM and the other professionals were entitled to reach. Nothing has been suggested, let alone proved, that this was an irrational approach bearing in mind that as has been explained in paragraph 19 above for an approach to be irrational, it must be "*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.*"

42. A further or alternative reason why this Ground cannot succeed is that the conclusion of the POM that the Applicant had to complete outstanding core risk was not in any way irrational was that it was shared not only by the other professionals but also by the Panel. Indeed, having considered the Applicant's evidence, the Panel concluded that "*treatment needs have been identified, and this is assessed as core-risk reduction work that should take place in custody*". It is noteworthy it has not been contended, let alone proved that the decision of the Panel was irrational.

Ground 2

43. This Ground is that the Panel acted in a procedurally unfair manner as the Applicant had received the 2021 Panel Decision and after a successful claim for reconsideration of that decision, reconsideration was ordered and the Applicant "*should have been granted a brand new panel (chair) and psychologist panel member [but] on his new second hearing on 19 October 2022 [which is the subject of the present reconsideration application] his [panel for that hearing] consisted of the same two parole panel members".*

44. The decision ordering reconsideration **Brown [2021] PBRA 56** was dated 10 May 2021 and related to the 2021 Panel Decision. The panel that gave the 2021 Panel Decision on 19 March 2021 following the hearing on 15 March 2021 comprised Mr L, Dr M, a Psychiatrist Panel Member and Ms–R S.

45. On the subsequent hearing on 19 October 2022, the Panel, which gave the 2023 Panel Decision comprised of Mr W and Dr B, a Psychologist.

46. It will be seen that the panel for the 2021 Panel Decision was different from the panel which produced the 2023 Panel Decision and so Ground 2 fails.

Conclusion

47.For all these reasons, this application for reconsideration must be refused.

Sir Stephen Silber
2 March 2023