

[2024] PBRA 119

Application for Reconsideration by Solway

Application

1. This is an application by Solway (the Applicant) for reconsideration of a decision of a Parole Board Panel (the Panel) issued on the 28 May 2024 not to direct release (the Decision).
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, (b) that it is irrational and/or (c) that it is procedurally unfair. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These consist of the usual dossier in respect of the Applicant consisting of 661 pages, the Decision, and written representations made on behalf of the Applicant by his Solicitors dated 31 May 2024 (the Representations).

Request for Reconsideration

4. The application for reconsideration was made on 31 May 2024.
5. The grounds for seeking a reconsideration are as follows:
 - a. The Decision was irrational in so far as;
 - i. it attached weight to an allegation involving the Applicant which was not pursued by the Police (the Allegation);
 - ii. it found the Applicant lacked insight in contrast to the opinion of the prison psychologist;
 - b. There was procedural unfairness in that;
 - i. the Allegation was raised without any prior warning just as the Applicant's legal representative was about to examine the Applicant at the hearing with the result the Applicant had no opportunity to prepare for this aspect of the hearing;
 - ii. the Applicant was subjected to hostile and aggressive questioning from the Panel, in particular the psychologist panel member;
 - iii. the Panel demonstrated prejudice and unfairness by a Panel member announcing before hearing evidence on the subject that the Applicant



should have been assessed as suitable for the Kaizen programme (contrary to the view of the expert witnesses).

Background

6. The Applicant was born on 29 September 1985 and is now aged 38. He was sentenced on 2 March 2007 when aged 21 to a sentence of imprisonment for public protection (IPP) with a tariff of 3 years, 5 months and 6 days. The tariff expired on 5 August 2010. The Applicant is thus now being held in custody over 13 years after his tariff expiry date. That alone, in my judgment, makes this an anxious case.
7. The sentence was in respect of an offence of wounding with intent to do grievous bodily harm and possession of class A drugs with intent to supply.
8. The history of recalls and reviews is unfortunately not entirely clear, but it appears to be as follows: The Applicant was first released in October 2011 following a Parole Board hearing but recalled in February 2013. He was then released again in October 2014 following a further Parole Board hearing and recalled in April 2015. His third release came in November 2018 (again after a Parole Board hearing) but resulted in recall in March 2020. Finally, he was released for a fourth time in September 2021 (again following a hearing) but recalled in April 2022. This was his first review after the last recall.
9. The first recall followed convictions for possession of drugs and assaulting his then partner. He received a sentence of 4 months for battery and criminal damage.
10. The second recall followed an assault on a male with whom he was in dispute about payment for drugs. This time he received a sentence of 27 months for two separate offences of assault occasioning actual bodily harm. The recall in March 2020 followed allegations of sexual assault but resulted in no prosecution. The final recall was in circumstances where the Applicant had sent abusive and threatening text messages to his previous partner (the same as referred to above) again resulting in a conviction and short custodial sentence.
11. This last recall also occurred in circumstances giving rise to the Allegation above-mentioned.
12. In short, the Allegation was that the Applicant had assaulted his new partner (whom I shall refer to as E), causing her to escape through a window from which she fell (triggering a neighbour calling the police and ambulance service) and was injured necessitating hospital attendance. E informed the hospital (which was duly noted by the hospital) that she was escaping from an abusive partner. She complained to the police of assault on her and damage to her property by the Applicant (including to the living room of her upstairs flat, and her mobile phone – the latter photographed by police -) and her climbing on to a window ledge and jumping from the window to escape the Applicant's abusive behaviour.
13. Shortly after this, E withdrew the allegations against the Applicant claiming she could remember nothing of the incident having been drinking and taking drugs all



weekend. She did recall arguing with the Applicant, dangling from the window, falling, and running to her neighbour's. The CPS decided not to proceed.

14. The Applicant, for his part, whilst admitting being at the scene, left without alerting emergency services or offering support or comfort to E because, he told the Panel, he thought he would be arrested.
15. He had however, in breach of his licence conditions, failed to disclose his relationship with E which was one of the factors leading to his recall.

Current parole review

16. The Panel constituted a video hearing on 14 May 2024 and consisted of three members: a judicial chair, an independent member, and a psychologist member. Witnesses also gave evidence via video link. These consisted of the Prisoner Offender Manager (POM), a prison instructed psychologist, and the Community Offender Manager (COM). The Applicant also gave evidence and was legally represented. The Secretary of State (the Respondent) was not represented. The Panel had the dossier (then 603 pages) plus additional papers in the form of an OASys and legal representations (now in the dossier).
17. The recommendations of the POM, COM and prison psychologist were all for the release of the Applicant.
18. In its lengthy Decision, the Panel carefully analysed the Applicant's past and present history and conduct both in confined conditions and on release. They outlined and again carefully analysed the evidence at the hearing and the relevant risk factors and the risk management plan. What is striking about this analysis (fully supported by the evidence) is the problem the Applicant had and has with drugs and violence and how markedly different his behaviour is between life in prison and in the community. (Though that might be said to be hardly surprising.)
19. A substantial part of this analysis related to the Allegation concerning E referred to above to which I refer in more detail below.
20. Notwithstanding the recommendations, the Panel concluded on the basis of the evidence before them, in short, that the Applicant posed a high risk of serious harm to the public and to known adults and children and that the probability of violent and general reoffending was also high. Again, notwithstanding the professionals' evidence whilst the Panel accepted that the Applicant had in many respects been a model prisoner in custody and had undertaken all risk reduction work available to him, he lacked insight and understanding into his potential risk. Good behaviour in prison was not a significant factor, it was indicated, in assessing the risk of serious harm in domestic environments. Here, the Applicant's history, lack of insight and propensity for violence led them to the conclusion that the Applicant did not satisfy the test for release. The recall had been appropriate, release was refused and no move to open conditions recommended.

The Relevant Law



21. The panel correctly sets out in its Decision 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.
22. At the outset it must be remembered that 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 other witnesses. The Applicant was also legally represented throughout.

Parole Board Rules 2019 (as amended)

23. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

Irrationality

24. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined in **Associated Provincial Houses Ltd -v- Wednesbury Corporation** [1948] 1 KB 223 by Lord Greene in these words "*if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere*". The same test applies to a reconsideration panel when determining an application on the basis of irrationality.
25. In **R (DSD and others) -v- the Parole Board** [2018] EWHC 694 (Admin) a Divisional Court applied this test to parole board hearings in these words 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.*"
26. In **R (on the application of Wells) -v- Parole Board** [2019] EWHC 2710 (Admin) the Court set out what was described as a more nuanced approach in modern public law which was "*to test the decision maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied*". This test was also adopted by a Divisional Court in the case of **R (on the application of the Secretary of State for Justice) -v- the Parole Board** [2022] EWHC 1282 (Admin).
27. This is not, however, a different test to the **Wednesbury** test. The interpretation of and application of the **Wednesbury** test in Parole hearings as explained in **DSD** was and remains the basis for interference with a decision said to be based on irrationality.



28. It follows from these principles that in considering an application for reconsideration the reconsideration panel cannot and will not substitute its view of the evidence for that of the panel who saw and heard the witnesses in the absence of the **Wednesbury** test being satisfied or some compelling reasons.

29. Further while the views of the professional witnesses must be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. The panel must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.

Procedural unfairness

30. 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.

31. In summary an Applicant seeking to complain of procedural unfairness under rule 28 must satisfy the Reconsideration panel 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;
- (e) the panel did not properly record the reasons for any findings or conclusion; and/or
- (f) the panel was not impartial.

32. It is principally (b), (c), (d) and (f) which is relied on here, but all are fundamentally reflected in the overriding objective which to ensure that the Applicant's case was and is dealt with justly.

Allegations of Fact and Assessment of Risk

33. The High Court has been required to consider on a number of occasions the issue that lies at the heart of this application, namely, how the Parole Board should treat allegations of misconduct or criminal offending which have not been proved either in civil proceedings or in the criminal courts.

34. The law regarding how a panel should approach the use of allegations in its decisions is now settled and is as stated by the Supreme Court in the case of **Pearce v The Parole Board** [2023] UKSC 13. Parole Board members are further assisted by Guidance prepared by the Board – the most recent version of which is dated September 2023, published following the Judgment in **Pearce**.

35. The relevant conclusions reached by the Supreme Court in **Pearce**, given the nature of the challenge made to the panel's approach may be summarised as follows:



- a. The function of the Parole Board is not to find a prisoner guilty or innocent of any criminal offence or other misconduct. Its function is to assess the risk that would be created if the prisoner is released on licence.
- b. The Board is not bound by the rules of evidence which apply in a criminal trial. It is entitled to take hearsay into account (and does so routinely) together with other evidence or information regarding misconduct or criminal offences. It must also take into account information or evidence regarding the good conduct of a prisoner, whenever it took place. Therefore, in making what has been described as a "*global assessment of risk*" a panel's assessment is bound to have regard to all the relevant information placed before it provided that the prisoner is given a proper opportunity to respond. Therefore, there is no limit placed on the Board as to the nature and character of the information it takes into account in assessing risk, provided that the Board in all respects act fairly.
- c. The weight to be given to the evidence or information received is and remains a matter entirely for the Board. If weight is to be given to an allegation of criminal or other misbehaviour the panel's first task is to examine the facts and consider if it is able to make a finding on the truthfulness or otherwise of the allegation. If, as often happens, a panel is not able to make such a finding, it should then examine the facts and consider if it can make findings as to the surrounding circumstances of the allegation which may or may not point to behaviour by the prisoner that is relevant to the assessment of risk giving it as much weight as it considers appropriate following an assessment of all of the information before it.
- d. At all times a panel must proceed with considerable caution which includes giving the prisoner the opportunity of making submissions on how the panel should proceed.

The reply on behalf of the Secretary of State

36.No reply or representations were received from or on behalf of the Secretary of State.

Discussion

Notice of the Allegation Involving E and Hostile Questioning – Unfairness?

37.It is convenient to start with the submission that there was procedural unfairness in that the issues surrounding the Allegation was, in effect, only raised at the last minute giving the Applicant no opportunity to prepare for this aspect of the hearing. It had not been raised in the Panel Chair Directions (PCDs) or in any preliminary introductions at the hearing but only as the Applicant was about to give his evidence.

38.The Decision noted that the panel chair had advised the Applicant's legal adviser that the allegations would be considered in the context of the Guidance published by the Parole Board referred to above.

39.I entirely accept that the overriding requirements of justice and fairness require proper notice of the nature, gist, and substance of the allegations to have been



given to the Applicant in advance. Ideally this could be by being set out in any PCDs or at the commencement of the hearing, certainly where the prisoner is unrepresented. In this case the Applicant was legally represented, was warned, albeit at a late stage, that the Allegation would be investigated, and through his legal representative clearly given the opportunity to make submissions as to how the Panel should proceed (e.g. by way of a short or longer adjournment to enable instructions to be taken) and how to respond to the Allegation both in evidence and closing submissions. Moreover, there was material relating to the topic (such as detailed police reports, statements (including from the hospital attended by E), and photographs) in the dossier. The Applicant and his legal representative cannot therefore have been taken by surprise. The Decision dealt with the Applicant's version of events including his denial of any violence or threats, his evidence that E had suffered a "*psychotic incident*" which led to her jumping from the window, and his having left the scene through fear of arrest. As to how he might have otherwise prepared for this aspect of the hearing or have added to his evidence on these matters is not suggested. Moreover, if there had been a real apprehension of unfairness, I have no doubt that an application for an adjournment could have been made but does not appear to have been.

40. Reliance was also placed on alleged hostile and aggressive questioning by members of the Panel leading to the Applicant being "*consistently interrupted*" and unable to give his best evidence at the hearing. Again, it is not suggested what this "*best evidence*" might have been nor, whilst it is stated that dissatisfaction with this approach of the Panel was raised after the hearing it does not appear whether any objection was raised during the hearing, or any adjournment was sought on account of such approach whether by way of temporary break or for any longer period.

41. Witnesses (including offenders) at panel hearings may well expect questions to be challenging, probing, and detailed given the important public and personal implications of the hearing. But this does not mean that they should be treated with aggression, hostility, interruptions, rudeness or disrespect, whoever they are or whatever their evidence. Given, however, the Applicant had at least the protection of legal representation throughout the hearing, and noting the apparent absence of objection to the Panel or request for an adjournment (temporary or otherwise) and whilst I have given this particular aspect much anxious consideration and am in no way condoning or seeking to excuse any such approach, I am not persuaded that of itself this resulted in any procedural unfairness as outlined above. Any applicant should of course be given every opportunity of fully and fairly answering questions the panel or others might ask. One of the tasks of the legal representative is to ensure this opportunity is fulfilled, if necessary, by way of re-examination and to object in the face of the tribunal or panel if it is felt a witness is being treated unfairly.

42. Accordingly, I do not consider that ultimately there was any procedural unfairness in this case from the matters above-mentioned.

Assessment of the Allegation Involving E – Irrationality?

43. I remind myself of **Pearce** and the principles in this area summarised above.



44. I have set out above brief essential details of the circumstances leading to the Allegation and in particular how E had retracted her earlier statement leading to the police and CPS not proceeding with the case which was, as the Panel observed in its Decision, “*unsurprising, considering the withdrawal statement by [E]*”.
45. The panel, in my judgment, indeed gave the matter the appropriate and proper careful, cautious, and lengthy consideration in its Decision and appear to have had the principles and guidance from **Pearce** well in mind. The Decision considered and analysed a number of items of evidence including E’s initial and subsequent statements, the police photographs, the statement of the orthopaedic surgeon at the emergency department attended by E, the Applicant’s version of events, the absence of any medical evidence of any psychotic incident having been suffered by E and the Applicant’s own history of violence.
46. In substance the Panel concluded that E’s initial version was correct.
47. In my judgment, there was and is no flaw in the Panel’s approach or in its lengthy and careful reasoning and reasons. As they noted, of some particular relevance (amongst other matters) was the evidence of the orthopaedic surgeon whose contemporaneous reports gave no indication that E was suffering any after effects of drugs or alcohol, nor was she in the grips of a psychotic incident, nor presenting as incapacitated but on the contrary reported (as she had told the police initially) that she was escaping from an abusive partner. There was ample evidence to justify the conclusions reached by the Panel and there was nothing irrational (in the above sense) in that conclusion.

Irrationality – The Prison Psychologist

48. The prison psychologist as noted above recommended release. Upon hearing in more detail about the Allegation involving E she did not change the conclusions reached in her report. The Panel did not however accept her recommendations or conclusions. Again, after careful and lengthy analysis they concluded that the psychologist had seriously underestimated the incident involving E. The psychologist seemed persuaded by the fact that the police were taking no further action, but the Panel took the view that the incident demonstrated exceptionally serious behaviour by the Applicant and rejected the recommendation and findings of the psychologist. As previously noted, merely because a professional witness adopts a particular stance does not mean the panel must follow suit. The POM and COM, the Panel found, had been unduly influenced by the views of the psychologist. It followed that if those views were undermined, so must the opinions of the other professionals. The Panel, who saw and heard the professionals as well as the Applicant, reached the conclusion the Applicant lacked insight. That decision was a matter for them and there was material and reasoning justifying their departure from the views of the professionals. I find nothing to suggest that this conclusion by the Panel, in its careful and reasoned Decision, was irrational in its conclusions on this aspect.

Unfairness – Bias or Prejudice?

49. Any panel must of course be careful in expressing what appears to be a predetermined view or bias in advance of the conclusion of a hearing. Announcing,



during the course of the hearing, that the Panel was of view that the Applicant should have been assessed as suitable for the Kaizen programme (briefly, an offender behaviour programme for males assessed as posing a high or very risk) would have been unfortunate, to say the least. It does not appear to me however, that this factor was, at the end of the day, exclusively determinative of the outcome of the hearing. The Panel noted that the Applicant had been assessed as unsuitable for the Kaizen programme, accepted that his behaviour in prison had been appropriate, and that he was a model prisoner and had undertaken all risk reduction work available to him. Again, as noted, good behaviour in prison did not necessarily mean good behaviour in the community. The Applicant's lack of insight and propensity to lose control and use threats to females when he felt his needs were not being met meant that the identified risk of serious harm presented by the Applicant remained at a level which did not meet the statutory test for release. Accordingly in my judgment there was no procedural unfairness in the statement which affected the outcome to such an extent as to lead to the inevitable conclusion that the result was unfair or unjust.

Conclusion

50. Standing back and looking at matters in the round, this was a careful and reasoned conclusion by the Panel based on evidence before them which they were entitled, as they did, to assess, analyse and accept or reject.

Decision

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

HH Roger Kaye KC
26 June 2024

