[2021] PBRA 127

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Application for Reconsideration by Vigrass

Application

1. This is an application by Vigrass (The Applicant) for reconsideration of a decision of an oral hearing dated 14 July 2021. The outcome of the letter was not to direct release or recommend transfer to open conditions.

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 the reconsideration application (the Application), the decision of 14 July 2021 (the decision) and the dossier considered by the panel of the oral hearing. I also considered the Parole Board Guidance on Allegations (the Guidance) and reviewed the recording of the hearing, some 6 hours or so.

Background

4. The Applicant is serving a life sentence for the offence of S.18 Grievous Bodily Harm (Wounding with Intent). His tariff was set for 4 years and a day, this expired in September 2006. He was released on licence following a decision of the Parole Board in April 2018 and recalled in September 2020. This was his second recall.

Request for Reconsideration

5. The application for reconsideration is dated 6 August 2021.

6. The grounds for seeking a reconsideration are as follows:

   (a) Irrationality

- That an unreasonable amount of weight was placed on intelligence reports provided by the police witness;
- That the panel's statement in relation to the Applicant's grandfather's health was irrational; and
- That the panel failed to place sufficient weight to the Applicant's emotional stress during the hearing which led to him making flippant remarks.

(b) Procedurally unfair

- That the panel failed to consider the benefits of a move to open conditions at all.

Current parole review

7. The Secretary of State's referral to the Parole Board is dated 15 October 2020. There were some delays to getting the case to an oral hearing in order to ensure that directed material was provided.

8. On 2 July 2021 a panel of three independent members considered the Applicant's case over a video link. They considered a dossier of 255 pages, all of which was disclosable to the Applicant. Oral evidence was taken from the Applicant, two police service witnesses and his Community Offender Manager (COM) and Prison Offender Managers (POM).

The Relevant Law

9. The panel correctly sets out in its decision letter dated 14 July 2021 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

10. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. 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.

Other

18. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin), R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:
    (a) the progress of the prisoner in addressing and reducing their risk;
    (b) the likeliness of the prisoner to comply with conditions of temporary release
    (c) the likeliness of the prisoner absconding; and
    (d) the benefit the prisoner is likely to derive from open conditions.

19. 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.*"

20. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

The reply on behalf of the Secretary of State

21. On 18 August 2021, the Secretary of State indicated that they would be making no submissions in relation to the Application.

Discussion

22. I propose to take each point made by the detailed representations in turn.

23. The first point (the Application's point number 2) comes in several parts but relates to the panel's approach to their consideration of a number of allegations that were made against the Applicant while he was in the community on licence this second time. This relates to the first bullet point in paragraph 6 (a) above.

24. It is important to state here that the Application does not complain that the panel made any findings of fact at any point with respect to the allegations. I note that the panel was careful in indicating that they did not do so because of insufficient evidence. The complaint is that the panel placed too much weight on the oral evidence of the primary police witness. This witness admitted he did not know the Applicant but was giving evidence in relation to a number of pieces of evidence already in the dossier. He was in a formally appointed position that held responsibility for managing the Applicant in the community for the police service.

25. The point made by the Application in relation to the knowledge held by the police witness is well made, since the police witness stated that he did not have first hand knowledge of any of the police evidence presented to the panel. The panel makes it clear however that they relied on several pieces of evidence, partly provided by the police, but including a significant amount of evidence provided by the Applicant at the hearing.

26. There are so many separate allegations and pieces of evidence that it would not be useful to go into each and every one of them for my consideration. I think it more than sufficient to focus on three examples of the panel's approach in relation to serious allegations.

27. The first example is in relation to evidence provided in the dossier of matters that came to light (to probation services) after the Applicant's recall. One of the matters was an allegation of a s.18 assault at a club that the Applicant accepted he frequented. The Applicant denied any assault. The Police Service witness had told

the panel that this club was known for being frequented by criminals, in particular for drug dealing, although not for violence. From the evidence before it and that of the police witness, I find that panel was reasonable in being concerned about the Applicant's frequenting this club. When the panel asked the Applicant about this, he gave sufficient details to corroborate his attending the premises frequently. He also gave answers to questions relating to his knowledge or otherwise of others who frequented this club and whether he was aware of any criminal actions by others. I find that the panel's conclusion that the Applicant was likely associating with people he knew may be engaged in criminality was a reasonable conclusion given the evidence before them.

28. I now turn to the issue of the circumstances that led to the recall which involve another allegation of a s.18 assault, also denied by the Applicant and not taken any further by the police. I consider that the panel's approach to their assessment of these allegations is careful and considered and fully takes into account the Parole Board's published guidance on how to approach allegations where there has been no court disposal (Guidance). I explain this in more detail below.

29. I accept the Applicant's position that the police evidence in relation to this allegation is not entirely satisfactory. There is more than one account of what happened. However, the police service witness had collated these accounts for the hearing and gave evidence in relation to them.

30. Because of this unsatisfactory evidence and with the clear denial of the Applicant about any involvement in violent behaviour, the panel quite reasonably makes no findings of fact in relation to the allegations.

31. Following the Guidance, I find that the panel made it clear that the circumstances of the recall were relevant to their assessment of risk because the allegations are related to harmful behaviour; they involve risky behaviour (attending the above mentioned club known for criminality); drinking alcohol which the Applicant is aware is a risk factor; and that because of the risky behaviour in the full knowledge of his risk factors undermining his credibility as a witness; and finally in their assessment of the weight that they gave to the recommendations of the POM and COM at the hearing, who the panel noted had not sufficiently explored the circumstances surrounding the allegations with the Applicant. The COM did not know the Applicant very well and he had not engaged with her as fully as he might, therefore their knowledge of him was understandably limited. The POM said explicitly during the hearing that they had not gone into any depth about the allegation (indeed on all the various allegations that came to light before and after the recall) because the matters had been dropped.

32. Having established *relevance*, therefore, the panel reasonably decided that although they could not make a finding of fact, they could not dismiss these potentially serious matters and therefore went on to make an assessment of the evidence before them. Once again, this properly follows the Guidance.

33. The Application complains that too much weight is given to the police evidence which could not be reliable. I find that there is little evidence that undue weight was given to this evidence. Some weight was given, and since this evidence emanated

from a source that should be considered to be reliable and relevant, I find that there cannot be any irrationality in the weight given to this evidence.

34. The decision letter however makes it clear that significant weight was given to the Applicant's own evidence of the circumstances leading to the allegation. The panel spent a long time questioning the Applicant about this incident and took a careful note of what he said. The decision letter makes it clear that the panel found that the Applicant's answers to their questions were not credible. The decision letter explains why this was the case. For example, the Applicant said that he was at the venue for a wedding of a friend. During the event, he became aware that there was some sort of altercation outside the venue, but he stayed inside. He then said that the Groom and Best Man went outside to do something about the problem. He then or later became aware that someone had been stabbed. Since this person was not from the local area but from Birmingham (this is corroborated by police evidence), he did not know this person. He decided to go home to change his shoes. There was a slightly unclear account of exactly what happened with respect to his then girlfriend, who had come with him but then wanted to go back to the venue. There were allegations made by this former girlfriend, later rescinded, that the Applicant had rammed her car with a vehicle without licence plates. I can find little evidence that the panel relied much or at all on her allegations.

35. Three separate sources alleged that the Applicant was responsible for the stabbing, however none of them was prepared to come forward and give formal evidence, and the matter was dropped.

36. When arrested for this s.18 assault, the police evidence was that an axe was found next to the Applicant's bed along with 'drug paraphernalia' but no drugs. The Applicant denied having any drugs. He admitted having an axe in his room and said he used it to chop wood for the wood burner. The panel asked him why he would keep the axe in his bedroom instead of near the wood burner or in other more suitable parts of the house.

37. The panel, while making no findings of fact in relation to this allegation, was clear in its decision that it did not find the Applicant's evidence to the panel to be credible on a number of counts in relation to the circumstances of this allegation, and this is explained fully in the letter. It gave some weight to the police information and oral evidence. I find that the panel's approach was fair and fully explained and cannot find that there was any irrationality in its finding on that allegation in particular.

38. The third example was another serious allegation where the panel, having taken careful evidence from the police witness as well as the Applicant, were concerned about the Applicant's credibility. This was in relation to a matter that had emerged after the recall, and as such could not form part of the decision about the appropriateness of the recall. It was however, relevant to risk and the panel understandably explored this incident.

39. This matter related to an alleged 'home invasion', where an account of the victim (after which the victim refused to co-operate with police and the matter was dropped) indicated that the Applicant, with other associates had attempted to force their way into their home and in the process of the victim defending himself, the

Applicant was stabbed in the back. Someone called the police, and the Applicant was detained (on the street) and then taken to hospital. He was said to be under the influence of substances and his behaviour at the hospital was said to be appalling. There was some corroboration of the details in the written and oral police evidence.

40. The Applicant, in the course of the hearing, denied any wrongdoing. He admitted to walking down a road with friends having been to a party and said that he had been stabbed in the back by an unknown person for no known reason. He said that his friends did not see anything.

41. The panel put together as much corroborative material as was available during that incident, provided by the police and the Applicant and clearly were concerned about the Applicant's own evidence, indicating that they did not find it to be credible and providing a full explanation as to why in their decision letter.

42. I now turn to the specific point made about the grandfather's health. The Applicant complains that the panel says in its findings on protective factors that the Applicant's relationship with his grandfather is a protective factor 'in spite' of his frail health. I accept that the statement reads oddly, however I find that it is a simple error of word usage. The panel made a clear finding that his relationship with his grandfather as a protective factor, which is a matter in the Applicant's favour. There is no evidence that any negative point was taken from this relationship in the ultimate decision of the panel

43. In relation to the Applicant's point 4, which was about an allegation that the Applicant had thrown a phone at the alleged victim, I do not find the complaint borne out. It is perfectly acceptable to indicate as the panel did that the matter was not taken any further by the police. That it was not further investigated because the allegation was made falsely is not in my opinion in issue because there is no evidence that this allegation was taken into account in the panel's approach to its decision.

44. The Application also points out that the panel went against the recommendations of the professionals. This is indeed the case. 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. I accept that the panel, if disagreeing with the recommendations of professionals, have a duty to explain their reasons.

45. I have read the decision letter carefully and I judge that the panel was painstaking in ensuring that they took full and relevant evidence from the professional witnesses and made it clear why they consider the Applicant does not meet the test for release. They went the additional step, after taking over 5 hours of evidence, to giving the Applicant another chance to answer questions put to him by his legal representative, as opposed to just asking for closing submissions. This was after

the Applicant had heard the evidence of the professional witnesses. In my view the panel could do little more to explore the issues in question and fully explained their decision. The point can be made again here as above that the panel did not find that the professionals had a full enough knowledge of the Applicant. This was partly because one of the witnesses had not explored the many allegations with the Applicant during their discussions with him, and also party because of the Applicant's own refusal to engage with their COM. I accept that the witnesses were able to hear the Applicant during the hearing and this can sometimes be useful for professionals to refine their thoughts about the Applicant, however the hearing is not a forum for a professional witness to make significant assessments of risk.

46. I now turn to the point made about the Applicant's stated refusal that he would comply with any licence conditions imposed that were additional to those that he had been originally released with. The reason he gave for this refusal was because he had not breached his earlier licence, had done nothing wrong and should not have been recalled. His position was clear. The Application complains that his refusal was made in frustration, that his refusal was 'flippant' and that the panel should not have placed weight on this evidence.

47. I have listened carefully to the record of the hearing and can find nothing irregular or wrong in the way the panel approached this issue. The Applicant was asked more than once if he would comply, and he clearly said 'no' and explained why. I note that he had also told as much to at least one of the professional witnesses prior to the hearing. However frustrated the Applicant was about his recall and subsequent further incarceration, he was not someone who did not know what the parole hearing was about. He had legal representation, and he had an extra opportunity at the end of the hearing to clarify his position about any conditions imposed by the panel upon his licence should they consider re-releasing him. He did not avail himself of this opportunity. His refusal was clear, consistent, explained and unequivocal. I find that the panel was not only justified in taking his evidence into account, it would have been irrational in that case not to do so. It is also always open to a legal representative to ask for an adjournment in order to give their client an opportunity to reflect on what he had said, and indeed in this case I note that there were at least two points when the panel adjourned for the Applicant to have a private conference with their legal representative.

48. Finally, I have considered the complaint with respect to the decision not to recommend the Applicant's transfer to open condition on the ground of Procedural Irregularity, although this is not argued by the Applicant. I would remind the Applicant that a decision not to recommend a transfer to open conditions is not within the remit of this reconsideration process. However, I have considered whether the panel was aware of the correct test. Although they did not state the test in its full version, they sufficiently stated the elements of the 'open test' to satisfy me that they understood the test. They gave their reasons for not progressing the Applicant to open conditions in the decision letter, demonstrating that they applied the test. I can find no procedural impropriety or unfairness.

Decision

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

Chitra Karve
9 September 2021