[2021] PBRA 170

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Application for Reconsideration by Razzell

Application

1. This is an application by Razzell (the Applicant) for reconsideration of a decision of an oral hearing panel dated 9 October 2021 (but see below for correction of this date) not to direct 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 Decision Letter dated 9 October 2021;
   b) Reconsideration Application dated 14 November 2021, signed by counsel who did not appear at the oral hearing, and by the solicitor who did and;
   c) The Dossier, numbered to page 924, of which the last document is the Decision Letter.

Background

4. The Applicant is now 62 years old. In November 2003, when he was 44, he received a sentence of life imprisonment, with a Tariff Expiry Date of 12 September 2019, for murdering his wife. He denies the offence. His victim's body has not been found. He has been in open conditions since November 2017.

Request for Reconsideration

5. The application for reconsideration is dated 14 November 2021.

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

   a) The decision of the oral hearing panel (OHP) was irrational because the effect of its application of the **Prisoners (Disclosure of Information about Victims) Act 2020** forces the authorities and treatment of prisoners who maintain their innocence into redundancy;
   b) The OHP failed to consider the totality of the evidence it received; and

c) The Decision Letter is dated 9 October 2021. The written submissions on behalf of the Applicant were submitted on 13 October 2021. A decision made without considering the written submissions would be procedurally unfair.

7. I will deal at once with Ground (3), because I agree that a decision made without considering the written submissions on behalf of the Applicant would almost certainly be procedurally unfair.

8. I asked the Parole Board secretariat to draw this ground for reconsideration to the attention of the Chair of the OHP. He responded by email as follows:

'The date of the 9 October is an oversight on my part. No doubt it is when I may have drafted non-contentious parts of the decision letter. It does not reflect the date of the final drafting which was significantly later. Given the complexity of the case we adjourned the case until 13 October for parties to submit closing submissions as set out in the decision letter. I can confirm the panel considered [the prisoner's representatives] helpful closing submissions. Final agreement on the decision letter was reached on the 20 October. I am cc'ing this to my 2 panel members in case they wish to add anything.'

9. Another panel member added that he was away when the Chair was finalising the draft, so was unable to comment on it (and the other panel member's suggested amendments) until 18 October 2021.

10. Contrary to what is asserted in the Application, the submissions on behalf of the Applicant are mentioned in the Decision Letter, on page 1:

'On 8th October 2021 the panel heard the remaining evidence. The case was adjourned until 13 October for the parties to submit their closing submissions in writing. These have now been received and included in the dossier.'

11. Indeed, in the **Conclusion and decision** section of the Decision Letter the panel quotes directly from the submissions: "*the next logical step* … ."

12. It is standard practice after an oral hearing for the panel Chair to prepare a first draft of the Decision Letter and send it to the other panel members for discussion and amendment. It is obviously good practice for the panel Chair to set down as soon as possible after the hearing the uncontentious parts of the Decision Letter, which may include, for example, the background history and a summary of the evidence considered.

13. The process of consideration by other panel members, and final submission of the decision to the secretariat of the Parole Board, is readily evidenced in every case by an email chain. The panel Chair and the panel member will have been able to check the dates given above.

14. I therefore accept the panel Chair's explanation, that the date on the Decision Letter is incorrect, and the correct date is 20 October 2021, and that the submissions were considered by the panel.

15. I must therefore conclude that, although on the face of the papers there might possibly have been merit in Ground (3), in fact there is nothing in Ground (3). A closer reading of the Decision Letter might have persuaded the Applicant's legal advisers of that fact.

Current parole review

16. The Secretary of State referred the Applicant's case to the Parole Board on 28 November 2018 for consideration of release. An oral hearing took place on 10 September 2019 and was adjourned for an updated psychological assessment. The case was listed for a face-to-face hearing on 12 May 2020 but was adjourned on 7 May 2020 because of the pandemic.

17. According to the Application, and there is no reason to doubt this, the panel that heard the case remotely, starting on 19 May 2021, that is, the OHP that decided the case and delivered the Decision Letter, was an entirely fresh panel. This is important in the light of the matters raised under Ground (2) of the Application.

18. It was not possible to conclude the evidence on 19 May 2021, and the case was adjourned to 28 June 2021. On that day the current Community Offender Manager (COM) was unable to attend, and the case was adjourned by agreement and re-listed for 8 October 2021. The panel heard the remaining evidence and adjourned as discussed above for written submissions to be made by 13 October 2021. As I have said, I am satisfied that the Decision Letter was finalised and sent to the Parole Board by the panel Chair on 20 October 2021.

19. The OHP in 2021 consisted of a psychologist member, an independent member and a judicial member of the Parole Board. The panel considered the dossier, heard evidence from the victim's family and watched recordings of victims' personal statements. On 19 May 2021 the panel heard evidence from the Prison Offender Manager (POM), and from the Applicant, and read reports from the former COM (DO), who was not well enough to give evidence on that day. A second COM gave evidence on that day, but she was ill and unable to attend on 8 October, so her line manager gave evidence in her place. On 8 October two chartered psychologists gave evidence, and the Applicant added to his former evidence. The Applicant was represented by a solicitor throughout. The Secretary of State was also represented.

The Relevant Law

20. The panel correctly sets out in its decision letter the test for release (whether it was satisfied that it was no longer necessary for the protection of the public that the Applicant remain confined), and the issues to be addressed in making a recommendation to the Secretary of State that the Applicant continued to be suitable for open conditions.

Parole Board Rules 2019

21. 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)).

Irrationality

22. 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."

23. 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.

24. More recently, in **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"A more nuanced approach in modern public law is 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 respect 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."*

Procedural unfairness

25. 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.

26. 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.

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

The reply on behalf of the Secretary of State

28. The Secretary of State has responded to the Application on 25 November 2021 by giving some dates relevant to Ground (3). Otherwise he has indicated that he does not intend to make any representations about this Application.

Discussion

29. Ground (1) asserts that the OHP's application of **the Prisoners (Disclosure of Information about Victims) Act 2020** (the 2020 Act) was flawed because *"it forces the authorities and treatment of prisoners who maintain their innocence into redundancy"*. I read this as meaning that the OHP erred in its approach to the 2020 Act (which undoubtedly applies in this case).

30. The 2020 Act adds a new **s28A** to the **Crime (Sentences) Act 1997** (the 1997 Act).

31. What this new provision requires the Parole Board to do when considering the case of a prisoner to whom the Act may apply is first to decide if the conditions set out in s28A(1) of the 1997 Act are made out. Here they plainly are:
    a) The Applicant's life sentence was passed for murder;
    b) The Parole Board does not know where or how the victim's remains were disposed of; and
    c) The Parole Board (through the OHP) believed that the Applicant had information about where or how the victim's remains were disposed of which the Applicant has not disclosed to the Parole Board.

32. There is not, and there could not be, any complaint about the OHP's decision that the Applicant's case falls under s28A(1) of the 1997 Act.

33. The statute goes on to require the Parole Board, when taking a public protection decision, to take into account the prisoner's non-disclosure and the reasons, in the Board's view, for the non-disclosure. The decision I am considering is, by definition, a public protection decision (s28A(5)).

34. The application stresses the importance of s28A(3): *"This section does not limit the matters that the Parole Board must or may take into account when making a public protection decision."*

35. The application argues that the provisions of s28A do not make the factors listed under s28A(2) conclusive of a decision against release. It argues that the OHP has treated the Applicant's non-disclosure as conclusive against a direction for release.

36. What the OHP said was this:

'The panel must make the assumption that you were rightly convicted. It follows that the panel must take into account (i) your non-disclosure and (ii) the reasons why in its view you have failed to disclose the information. Whilst the panel must consider other matters, as its primary task is to consider the risk you pose, it must take the reasons into account as part of its consideration of the totality of the case. The panel acknowledges that there is no rule or policy which automatically prevents a prisoner who maintains their innocence from being released. However, it is the panel's view that in this case the reasons for your non-disclosure are relevant to risk and do carry significant weight.

After hearing your evidence, and the evidence of the professionals including the psychologists, the panel believes that there are 3 reasons why you have not disclosed the information (i) your continued denial of the offence (ii) your desire not to lose your desired status as a "wrongly convicted murderer" by maintaining your false claim of innocence and (iii) self-preservation in order to keep yourself "psychologically intact." This involves keeping control of the narrative. A by-product of this is your apparent lack of empathy towards your family and hostility towards [one of the victim's family members]. This is evidenced by your commitment to the documentary apparently disregarding its likely impact upon the family. It follows that the reasons behind your non-disclosure, whilst by no means determinative, do have some bearing upon your risk. They support the view that you have poor insight into what led you to murder your wife and up to now and as a consequence you have failed to address this issue by undertaking appropriate work. They also reveal a lack of empathy which suggests deficits in internal controls should you encounter difficulties in any future relationship.

It is the panel's view that your wilful and deliberate withholding of this information indicates poor insight into your own behaviour which suggests you require associated offence related or risk reduction work to be undertaken in the context of any future relationships. You have undertaken no such work to date. Whilst you have now indicated a willingness to undertake such work, you maintain that it will not affect your risk. This suggest both poor insight and a low level of commitment to such an intervention. At the moment you consider that your poverty of emotional expression is a product of being in prison for a long time rather than recognising that you have lingering personality traits that need to be addressed.'

37. The Application suggests that this passage amounts to treating the Applicant's non-disclosure as conclusive against the direction of release. The panel specifically said. "*The panel acknowledges that there is no rule or policy which automatically prevents a prisoner who maintains their innocence from being released."* The panel was plainly aware of, and applying, both s28A(2) and s28A(3). The Application asserts repeatedly that the OHP's analysis puts the maintaining of innocence as the only factor in the balance. That is not, on my reading of the Decision Letter, the case. The panel carefully analysed and carefully expressed, as it was required to do, the conclusions that it considered should be drawn from the Applicant's non-disclosure and how they related to the Applicant's risk. Those conclusions were open to the panel and took account of all the evidence. The panel was specific: *"The reasons behind your non-disclosure, while by no means determinative, do have some bearing on your risk."*

38. Again, the panel was clear in its expression of a fundamental issue.

"The primary area of concern relates to any future partner. In the panel's view there is no evidence that you have addressed the issues that led you to murder your wife."

39. That is a conclusion properly open to the panel. The fact that one reason, perhaps the reason, for the Applicant's not addressing the relevant issues is his denial of the offences does not prevent it from being a perfectly valid conclusion.

40. I do not find Ground (1) to be made out.

41. As to Ground (2), where the assertion is that the panel was obliged to consider the totality of the evidence it received. This is, of course, correct. The first complaint is that the Board failed to reflect the totality of the evidence heard at the oral hearing on 10 September 2019 while simultaneously relying on evidence used for that hearing and tested in that hearing through questions put to the relevant witnesses.

42. At the heart of this complaint is the notion that the OHP whose decision is under discussion should have taken into account not only the material in the dossier and the evidence it heard in May and October 2021, but the evidence another panel heard in 2019.

43. This is incorrect. A panel of the Parole Board can only act on the material before it, not on material that was before a differently constituted panel on a different occasion. The complaint is that *"The Board treated this case almost as it stands alone following the 19 May 2021 hearing and the resumed hearing on 8 October 2021."* That was what the Board was obliged to do. The reports which were the subject of oral evidence in 2019 were in the dossier, and were therefore material upon which the OHP could properly act, even though the maker of those reports was not available to give evidence. The Applicant gave evidence, and could therefore deal with any aspects of the reports with which he disagreed. As I read the submissions made to the 2019 panel, which are in the dossier, there was little factual disagreement about the reports in any event.

44. The next complaint is that it was irrational of the panel to place weight on the suggestion by one of the psychologists that core risk reduction work needed to be completed before the Applicant could be safely managed in the community. It is suggested that if that is the case he is not suitable for open conditions. This, with respect, is not a sound argument. It is perfectly possible for an offender who, for particular reasons, cannot be safely managed in the community to be safely managed in open conditions. That is one of the things that open conditions are for.

45. The next complaint is that it was irrational of the panel to state that that the evidence of one psychologist was that the risk of physical harm could be relatively imminent if he were to develop a relationship.

46. What the panel recorded as the psychologist's evidence was that she is of the view that the Applicant have the capacity to inflict serious harm on a partner, although she acknowledges that the imminence of risk is currently low given his single status. She assesses that the risk of imminence could increase to moderate once a new relationship commences. There is no suggestion that the panel recorded the evidence incorrectly, just that it is said to be inconsistent with other evidence. It is for the panel to assess the evidence.

47. The next complaint is that the panel failed to attach adequate weight to the Applicant's time in open conditions and the amount of time he had spent on temporary release. The panel was fully aware of those matters, and the weight to be attached to them was a matter for the panel.

48. The next complaint is that the panel attached some weight to previous complaints of assault by the victim against the Applicant, which did not result in convictions. This is something the panel, looking at the fact that the Applicant eventually murdered his wife, was perfectly entitled to do. It did so in moderate terms:

'Whilst circumstances do not allow for the panel to make factual determinations in respect of all these previous matters, in the light of your conviction of the murder of your wife and your evidence, the panel has re-visited these allegations. It takes the view they are relevant to this review and concludes that there are significant concerns about your previous conduct towards your wife. The panel consider that you have been less than open and honest about your relationship with your wife. Whilst the murder was well-planned, this previous conduct is also suggestive of spontaneous violence on your part when in disagreement with your wife. Whilst your denial of these allegations at this stage may be closely connected to your entrenched denial of the murder of your wife, the panel does have concerns as to your lack of candour.

This approach cannot be faulted.

49. It is next submitted that the public protection test is met because the Applicant's risk is moderate, though it may escalate if and when he enters into a relationship. The panel considered all aspects of the case and concluded, on the evidence, that the public protection test was not met, for reasons which it gave and which were supported by the evidence.

50. It is suggested that the panel's conclusion that the Applicant lacked candour was against the balance of the evidence. That is discussed above.

51. It is finally suggested that it would be irrational to place significant weight on the issue of non-disclosure as determinative of lack of insight. The panel did not treat anything as determinative of anything. As it was entitled to do, it made an assessment of all the evidence, including the fact of non-disclosure, and concluded that the Applicant had not demonstrated insight into his offending. In the circumstances, that is a conclusion it would be difficult to avoid. As the Application itself asserts, he cannot have any insight if he maintains his innocence. That, of course, is not correct: the true position is that it is difficult for him to demonstrate insight when he denies his guilt (as he is perfectly entitled to do). That was

established as a relevant (though not determinative) matter before the 2020 Act, and remains so: see s28A(3) of the 1997 Act.

52. Ground (2) is not made out.

Decision

53. 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.

Patrick Thomas QC
5 December 2021