[2022] PBRA 91

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Application for Reconsideration by Smith

Application

1. This is an application by Smith (the Applicant) for reconsideration of a decision of an Oral hearing panel (OHP) dated the 29 June 2022. The panel did not direct release of the applicant.

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 dossier consisting of 550 pages, the representations of the Applicant's solicitor entitled 'Appeal representations, and the response by the Secretary of State.

Background

4. The Applicant is serving an indeterminate sentence for public protection which was imposed on 12 February 2008. The index offence was robbery. His tariff expired in June 2009. He was last released from prison on licence on 2 November 2020 and was recalled on 4 November 2020. The details of the index offence are that the Applicant entered a corner shop. He jumped onto the counter of the shop and tried to wrestle money from a shop assistant. The shop assistant resisted, and the Applicant eventually ran away. The Applicant had a previous conviction for robbery and also had a number of other previous convictions including a conviction for burglary, and a conviction for the offence of affray. There were also a number of breaches of court orders recorded.

Request for Reconsideration

5. The application for reconsideration is undated but was received by the Parole Board on 13 July 2022.

6. The grounds for seeking a reconsideration are summarised and set out in paragraphs below.

Current parole review

7. In December 2020 the Secretary of State referred the Applicant's case to the Parole Board to consider whether to direct the Applicant's release. If release were not directed the Parole Board were asked to consider whether the Applicant was ready to move to open prison conditions.

8. The Parole Board panel consisted of an independent member who was the Chair of the panel, a psychiatrist member and a further independent member. Evidence was given by the Applicant's Prison Offender Manager (POM) and the Applicant's Community Offender Manager (COM), the Applicant was legally represented. There were two earlier adjournments. The first adjournment was in June 2021. Papers had been received at a late date and a request was made for further assessments, the matter was adjourned to October 2021. In October 2021 the case was further adjourned as further reports were required. The panel reconvened in March 2022. On that occasion the case was part heard and adjourned. There had been technical difficulties in March 2022 and further information was also required. The matter resumed once again and was finalised in June 2022.

The Relevant Law

9. The panel correctly sets out in its decision letter 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. 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 if it is made by an oral hearing panel after an oral hearing (Rule 25(1)).

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 a decision on a 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. Justice must not only be done but be seen to be done and so procedural unfairness includes not only an unfairness of process, but also the perception of unfairness (for example, failure to deal with the arguments or evidence advanced in an appropriate manner or not at all).

19. It is for me to decide whether I consider the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties.

20. The test to be applied when considering the question of transfer to open conditions (as at the date of this hearing) 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.

21. 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.*"

22. 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.

23. 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.

24. 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.**

25. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that 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.

26. 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 facts as 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.

27. Cases in which the party to Parole Board cases have been represented by a lawyer are highly unlikely to generate a successful appeal if there had been no challenge made to the alleged irregularity by the applicant, save in the event for instance of a failure by the other party (for example, a failure to disclose material relevant to the ultimate decision to the applicant).

The reply on behalf of the Secretary of State

28. The Secretary of State offered no representations.

Grounds of Appeal and Discussion.

29. **Ground 1** – *Procedural Unfairness – The panel failed to take account of the increased pressure that multiple hearings had placed upon our client.*

I have considered this ground of appeal. The position of the oral hearing panel is that it can only respond to the evidence presented before it. There appears to be no evidence within the decision, or in the appeal grounds, to indicate that the panel were advised that the Applicant was suffering a difficulty as a result of the number of hearings. I fully accept that adjourned hearings can be stressful for a prisoner. However, it would be inappropriate for the panel to make assumptions about the Applicant without being presented with evidence or with an application. No application was made for an adjournment or for further time on behalf of the Applicant. In the absence of evidence of stressful circumstances which required intervention by the panel I am not satisfied that this ground can amount to a procedural irregularity.

30. **Ground 2** *Procedural unfairness – The panel failed to take account of the effect upon them of the misinformation it had received, and this has had an effect upon the unconscious bias of the panel.*

The factual context of this ground was that a witness at an earlier hearing had indicated to the panel that the Applicant had undertaken a number of sessions of mental health intervention. The Applicant told the panel that this was incorrect and that he had not undertaken sessions of mental health intervention. The panel requested further enquiries about this issue. The result of the further enquiries were that the witness had been wrong. The name of the applicant had been transposed with another prisoner. The applicant was perfectly correct in saying that he had not had the interventions that had been suggested. I have considered the question of whether there is evidence of bias in this case. Panels of the Parole Board receive appropriate training in relation to cognitive bias and decision making. The evidence within the oral hearing decision is that the panel fully understood that a witness had made a mistake about whether the Applicant had been involved in some sessions of mental health support. It transpired there had been a mistake in the record-keeping. The Applicant therefore was correct in informing the panel that he had not actually been involved in this intervention. Whilst it is important that the information provided within dossiers and by witnesses is accurate, in reality mistakes will occur. This mistake was fully explained within the oral hearing decision. I can detect no evidence of bias associated with the mistaken evidence or of any perception of unfairness that could arise in these circumstances. In the absence of any supporting evidence that the panel were biased against the Applicant I am not persuaded that this ground has merit.

31. **Ground 3 –** *Procedural unfairness- The panel failed to attach sufficient weight to the risk reduction work undertaken by the Applicant.*

The panel within the decision letter confirmed that the Applicant had behaved well during his recall period. They acknowledged that he had worked in the prison system and had had no adjudications. The panel also acknowledged that the Applicant had engaged in some psychological work within the prison. The panel sought to understand the effectiveness of the intervention work and asked the Applicant whether he could identify problems which might elevate risk. The panel's view was that on the basis of the Applicant's comments he did not appear to have a realistic understanding of the challenges that he would face, in the community, relating to substance misuse and an absence of support. I am satisfied that the panel considered the more recent intervention work that had been undertaken by the Applicant, as well as work that had been undertaken in the past. The panel clearly explained that they took the view that

the Applicant continued to find difficulty in recognising risks and triggers in respect of offending and substance misuse. Accordingly, I am satisfied that the panel appropriately considered the risk reduction work that had been completed by the Applicant. The panel's view, as clearly recorded in the decision, was that, despite the work that he had completed, the Applicant was not able to demonstrate his ability to use the learning and to understand the triggers that might bring about elevation of risk.

32. **Ground 4 –** Irrational - *It is believed that the panel failed to place sufficient weight upon the effect that support (available to him) in the community would have on the manageability of the Applicant in the community.*

Within the decision letter, the panel analysed the Risk Management Plan. The panel noted that the Applicant would initially be residing in approved premises. He would have support from the probation service accommodation advisers and from a private charitable organisation who offer support in the community to those leaving prison. However despite taking account of the elements of the risk management plan, the panel concluded that it would be necessary for the Applicant to have significant professional and personal support in order to manage his risk in the community. The panel were not satisfied that there was evidence of support, at this level, available to the Applicant. The panel had also noted earlier in the decision that the Applicant had been released on very similar terms on the last occasion of his release from prison and within days had failed to return to approved premises and had become involved in alcohol misuse. The panel also took account of the fact that there was support for his release by the Applicant's probation officer and by the prison probation officer. Despite the support of those professionals the panel were not satisfied that there was sufficient support within the community to manage the risk posed by the Applicant. I am satisfied that the panel adequately analysed and explained the reasons for rejecting the recommendations of the professionals. The panel had concluded that the Applicant had not been able to demonstrate a clear understanding of the triggers and risks which he would face in the community. The panel were also concerned about the fact that there was insufficient support, available to him within the community, to prevent a relapse. The Applicants risks were directly related to relapses into alcohol and substance misuse.

33. **Ground 5 –** Irrational - *The panel failed to consider or adequately take into account the implementation of his new skills in being able to cope in the community.*

I have considered the question of whether the panel appropriately considered the Applicant's ability to apply skills and learning. I am satisfied that the panel did consider these issues. The panel had asked the Applicant to describe how he would implement skills. The panel also took account of the reports and the oral evidence of the professionals. It was for the panel to weigh this evidence and reach a conclusion. The panel indicated, in the decision letter, the reasons why they were not satisfied that the Applicant understood the nature of the triggers and risks associated with his offending.

34. **Ground 6** – *Irrational - That evidence of the professionals, supporting release, had not been given sufficient weight by the panel.*

As indicated above the panel set out in the decision letter the reasons why they rejected the views of the professionals in relation to release. They took the view that the risk management plan was not sufficient to support the Applicant in the community and to manage his risk. They also, as indicated above, took the view that the Applicant had not demonstrated an understanding of the triggers which would bring about an elevation of his risk.

The panel had the advantage of an extensive dossier of reports and other material. They also had the advantage 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 was plainly a matter for the panel to determine which opinion they preferred. I am satisfied that the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in their 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.

Decision

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

HH S Dawson
25 July 2022