[2023] PBRA 17

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Application for Reconsideration by Tocher

Application

1. This is an application by Tocher (the Applicant) for reconsideration of a decision of a Panel of the Parole Board following oral hearing on 5 December 2022. The decision letter is dated 15 December 2022.

2. The Panel did not direct release and made no recommendation for a move to open conditions.

3. 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.

4. I have considered the application on the papers. These are the dossier of 277 pages (which includes the decision letter) and the application for reconsideration that runs to 12 pages.

Background

5. [the Applicant] was sentenced to IPP in 2010 for an offence of s18 GBH. The tariff was set at 3 years and 3 months (with allowance for time on remand) and expired in 2012.

6. He was released in December 2017 and recalled four and a half years later in January 2022 after he was found in an address where police executed a search warrant following intelligence concerning the supply of Class A and Class B drugs.

7. Whilst some drugs and other material of potentially evidential value were found, no charges were brought in relation to this. The address was [the Applicant's] partner's address and the Panel noted that this relationship had not been disclosed to his community probation officer, nor had the fact that he was (as he told the police) using cocaine and cannabis.

8. There were some other allegations that did not feature in the decision to recall, including an arrest for cannabis cultivation in 2020 (for which he was still on bail at the time of the recall) and what would appear to (where it proved) amount to an affray on Boxing Day 2021. Neither of these went to Court or were otherwise adjudicated on.

Request for Reconsideration

9. The application for reconsideration is dated 2 December 2022. This is before the oral hearing and is therefore an error. It is likely that this is a misprint for 22 December 2022 however, whether or not that is the case, it is not suggested that the application was out of time. The application was not made on the published form CPD 2 but set out in a separate document prepared by the Applicant's lawyer.

10. The grounds for seeking a reconsideration are that the decision was an irrational one and was procedurally unfair.

11. There are two grounds. Firstly, it is said the decision is procedurally unfair for reasons set out at paras 27-39. Although the basis is said to be unfairness, the ground is essentially a rationality one as it is said that 'the evidence within the hearing' was not sufficient for the Panel to properly conclude that the test for release was not met.

12. The second ground is also said to be procedural unfairness. This relates to the way that the Panel approached the unproven allegations that featured in the recall.

Current parole review

13. The case was referred to the Parole Board by the Secretary of State in February 2022. It was considered by a single member at the MCA stage in April 2022 who directed an oral hearing.

14. The oral hearing was heard remotely on 5 December 2022. The Panel had a dossier of 254 pages and heard evidence from the Prison and Community Probation Officers.

15. The Applicant was represented by a solicitor, the same solicitor who prepared the application for reconsideration.

The Relevant Law

16. The panel correctly sets out in its decision letter dated 15 December 2022 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.

17. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

18. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)).

19. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

Irrationality

20. 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."*

21. 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.

22. 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

23. 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.

24. 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.

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

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The reply on behalf of the Secretary of State

26. The Secretary of State stated that he did not wish to make any representations.

Discussion

27. I shall consider the two grounds separately but remind myself that it is important to step back subsequently and consider the cumulative effect.

Ground 1

28. In relation to this point, it is a high threshold to show that a decision is an irrational one, and I do not consider that it has been reached in this case.

29. The Panel heard all of the evidence and considered an extensive dossier. Their conclusion was that the Applicant did not meet the test for release.

30. It seems to me that that was a decision that was properly open to them. Whilst it is true that there was no proven re-offending, that cannot be determinative. Further, whilst the fact that the community probation officer considered that the release plan was sufficient to manage the risk that he presented was a point that the Panel was bound to take into account in the Applicant's favour, the Panel was obliged to come to its own conclusion, which is what it did.

31. The grounds set out reasons why '*the Applicant's risk of causing serious harm has been managed successfully'* and why this would be the case going forward. However, my role is not to re-hear the arguments for and against release and come to me own conclusion, but to conduct a review of the Panel's decision.

32. From the decision letter it is clear that the Panel gave careful consideration to the Applicant's case. They focussed on the Applicant's openness and honesty and his substance misuse issues, which they were entitled to do, especially as there was historically a link between these and his risk of serious harm.

33. Criticism is made of the reference to '*organised crime'*. However, this reference must be read in full. When that is done, it is clear that this is related to the question of whether the recall was appropriate, which it clearly was.

34. For those reasons, I consider that the decision of the Panel was one that was clearly open to it.

Ground 2

35. I then turn to the second point, which is in relation to the allegations surrounding the recall.

36. The grounds for reconsideration state that although "*the Panel stated that they had made no finding of fact regarding an incident, it is evidence that they did rely upon the surrounding circumstances to support their conclusion that the risk of serious harm he posed' was too high to be managed in the community*."

37. The Parole Board had previously issued guidance to members that set out a structured approach to follow when a Panel is faced with an allegation that is not accepted by a prisoner and has not been adjudicated on.

38. However, following the Court of Appeal judgment in **R (Pearce) v Parole Board [2022] EWCA Civ 4**, the policy was withdrawn.

39. In the judgment the Court of Appeal said:

> *22. "Mr Rule originally submitted that R(D) is authority for the principle that it will only be in an exceptional case that the panel should consider allegations of wider offending. However, during discussion with the court he finessed his argument to the extent that he conceded that whilst it is necessary for the panel to consider the materials to determine whether they do aid a more complete understanding of risk, it is for the panel to decide whether the investigation of any aspect of an unproven allegation of wider offending will be necessary in this regard. I consider this a realistic concession which addresses Ms S's pertinent observation – on what basis is a case to be deemed exceptional in the absence of the necessary information. There is no suggestion that paragraph 8 of the Guidance which gives examples of potentially 'relevant' allegations, including those of harmful or risky behaviour, or which undermine the credibility of the prisoner's evidence or their reliability to comply with licence conditions, or which impact upon the weight that can be placed upon a professional witness who has not taken account of the allegations, misstates the authorities."*

40. The Court said this about the Panel's role :

> *35. "It may be that the difference sounds more in form rather than substance. The question of what constitutes a fair procedure to make findings of fact, or evaluations of the information, will be fact specific as explained in West and is unlikely to entail the formality of public law family proceedings. The test posed in Considine at paragraph [37] provides that a fair analysis of all the information should inform the necessary judgment in relation to risk. Nevertheless, what is clear to me is that the panel must conscientiously evaluate the information before it to make findings of fact upon which to make the assessment of the prisoner's risk; in these circumstances neither public protection nor public law fairness will be compromised. Established or undisputed constituent or consequential facts to an overarching allegation may provide compelling and convincing indications of risk in themselves, whereas simply*

to assess the seriousness of the nature of an allegation, provided there is some evidential basis for it is to embark down the route of 'no smoke without fire".

45. *"To illustrate the point, suppose that a dossier prepared for the parole review of a prisoner who had been convicted of sexual assaults against children, contains information that prior to the onset of his first conviction he had been arrested on suspicion of indecent assault of a child and otherwise questioned as a person of interest regarding another sexual assault in the periods between his convictions. Although he had not been tried for any of the offences these are potentially relevant allegations to the assessment of risk since they suggest that the prisoner has been involved in more extensive harmful behaviour and undermines his explanation of the trigger event which led to the offending for which he had been convicted. The information reveals that the reason for his first arrest was because the prisoner was often seen in the children's playground in which the child who had been assaulted had played; but that he was questioned in relation to the later allegation only because he was one of a number of men who had previous convictions for similar offences.*

46. *I would expect the panel to identify the last allegation as a 'mere' allegation without any evidential basis and to immediately disregard it. However, the information concerning the first allegation would justify the panel in questioning the prisoner about his alleged behaviour. If the fact that he was often in the proximity of the children's playground is undisputed or established as a fact on the balance of probabilities then, unless there is a plausible explanation for his presence, it suggests that he had engaged in risky behaviour some significant time before his first conviction. In such a case, the panel would have made a factual finding (of frequenting the children's playground) falling short of the original allegation, but upon which it could base its assessment of future risk.*

47. *However, if the prisoner denies any attendance at the playground and the information is insufficient to enable the panel to be satisfied that the prisoner did frequent the playground, or if he was seen proximate to it that he was not taking a well-recognised route elsewhere, then if the current Guidance were correct, since there is some evidential basis for the allegation the panel may proceed to make an 'assessment' of the 'level of concern' that the prisoner had been alleged to have committed a sexual assault, attaching great weight to the serious nature of the allegation in accordance with paragraph 20(c) and, on the basis of Morris, concluding that if there was 'a significant chance short of a probability' that he had committed such an assault, proceed to take that into account when assessing risk. I consider this unjustified on a correct reading of the authorities. I regard Baker J's judgment at paragraph [12] in Delaney, unqualified by commentary in the case of Morris, to be correct. In short, if the panel cannot be satisfied on the balance of*

probabilities that the prisoner was frequenting the playground at all, the allegation should be disregarded."

41. When faced with unproven allegations the Panel must consider what findings of fact (if any) can be made. The decision letter should then set out the factual conclusions arrived at and how this impacts on the decision-making process.

42. In this case the Panel conducted the appropriate fact-finding exercise and concluded that none of the allegations could be proved on the balance of probabilities. They then went on to consider the factual matrix as admitted by the Applicant and concluded that his account of his use of drugs, and his explanation of his presence at the scene of an incident, was a concern.

43. It seems to me that that was in no way impermissible (as, in fairness, the Applicant appears to accept at para 43). The Panel did not find that the Applicant had acted in an unlawful way, but gave clear reasons why, notwithstanding that, his behaviour at the time gave rise to concerns about his openness and honesty and, through that, to his manageability in the community.

44. In those circumstances, I do not consider that there is any error disclosed in the decision letter.

Decision

45. For the reasons I have given, I do not consider that the decision was irrational, nor was it procedurally unfair.

46. Accordingly, the application for reconsideration is refused.

Daniel Bunting
31 January 2023