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[2024] PBRA 17

Application for Reconsideration by Bhatti

Application

1. This is an application by Bhatti (the Applicant) for reconsideration of a decision of an oral hearing dated 13 December 2023 not to direct release. The application was made on the Applicant's behalf by his legal representatives.

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 are the amended application; the decision letter dated 13 December 2023; the dossier which was also considered by the panel and the Parole Board's Guidance on Foreign Nationals dated December 2023 (the Guidance).

Background

4. The Applicant is serving a life sentence for the offence of murder. His victim was his wife. The Applicant was sentenced on 3 August 2013. He was given a tariff of 11 years (less time on remand), and this tariff ended in March 2023. This was the first review of his sentence. The Applicant was 31 years of age when sentenced.

Request for Reconsideration

5. The amended application for reconsideration is dated 8 January 2024. The original (and in time) application was dated 2 January 2024.

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

   a) Error of Law
      i) The panel failed to ensure that the Applicant had a fair hearing by allowing the COM to make reference to undisclosed material. The panel should have adjourned to order the disclosure of this evidence or to allow for a non-disclosure application to be made;

  ii) The panel failed to direct a full risk management plan before the hearing or adjourning until 'the information' became available before reaching its decision; and
  iii) More generally the panel failed to discharge its duty as per the Parole Board Code of Conduct paragraph 8.4: "*You must take all reasonable steps, within reasonable time constraints, to ensure that sufficient, relevant evidence is adduced to enable you to make, or contribute to making, a decision in each case and to ensure that the prisoner has a fair hearing. This is primarily the responsibility of panel chairs but all panel members have a collective duty in this regard*."

b) Procedural impropriety:
  i) The COM was a stand in and had not met the Applicant and their assessment of risk was based on information not disclosed to the parties and was not in the dossier. Examples included assessment of risk of harm to staff. Their evidence was also misleading, with example given in the application; and appeared to be biased (against the Applicant);
  ii) The panel failed to direct specific information about how risk could be managed in Pakistan and therefore did not have an informed opinion of risk or its management if he were to be deported. The witnesses at the hearing were unable to provide information about this. This placed the Applicant at a disadvantage; and
  iii) The stand in COM failed to give adequate reasons for differing from previous recommendations made by the COM she was replacing, and the recommendations of the other witnesses at the hearing. The COM failed to state what further work the Applicant should be undertaking if not released. The prison psychologist had given evidence that the Applicant had completed all core risk reduction work.

c) Irrationality:
  i) The panel did not have information on which to base an assessment of risk if the Applicant was deported to Pakistan; and the panel took evidence from the witnesses who could only speculate about the risk management plan's effectiveness if he were to be deported;
  ii) The stand in COM's assessment of risk had been made on the papers as she had not met the Applicant; and her assessment was over-inflated and not in line with the other witnesses who knew the Applicant;
  iii) The witnesses did not adequately consider positive aspects of the Applicant's case;
  iv) The decision letter does not demonstrate exploration of gaps on the proposed risk management plan if the Applicant were to be released and subsequently deported to Pakistan;
  v) The panel appear to consider the risk management plan was sufficient when it became clear during the hearing that it was not; and
  vi) The decision letter does not sufficiently explain how the panel applied the statutory test in order to come to its decision especially when taking into consideration the positive aspects of the Applicant's case.

7. I asked for clarification of the Applicant's grounds as the original application also appeared to ask for the Parole Board to consider setting aside the decision, a

process that cannot be undertaken at the same time as a reconsideration. The amended application removed reference to the set aside procedure.

8. I considered asking the legal representatives to provide a more concise application. The application is, in my opinion, rather 'scattergun' in its submissions. However, I decided that I was able to work through the various parts of the application in order to consider it.

Current parole review

9. The Secretary of State referred the Applicant's case to the Parole Board for his on-tariff review in September 2022. The referral was to consider release on licence, or failing that, to advise the Respondent as to whether the Applicant should be transferred to open conditions. The referral also directed that the panel should give full reasons for their decision and to include any areas of risk that need to be addressed. The Applicant was 43 years old at the time of the oral hearing.

10. The panel that considered the Applicant's case at the oral hearing consisted of three independent members of the Parole Board. They considered a dossier of 354 pages. The dossier included a Victim Personal Statement from the family of the victim; details of the Applicant's progress through custody reported by his Prison Offender Manager (POM) and his Community Offender Manager (COM), details of offence focused work undertaken by the Applicant and information about his immigration status. The dossier also contained a risk management plan and a psychological risk assessment (PRA). Evidence was taken from the POM, stand in COM and the author of the PRA, a prison psychologist.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 13 December 2023 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 (as amended)

12. 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)).

13. 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)).

14. 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

15. 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."

16. 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.

17. 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

18. 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.

19. 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.

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

Other

21. In **<u>Oyston</u> [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.

The reply on behalf of the Secretary of State (The Respondent)

23. On 11 January 2024 the Respondent informed the Parole Board that they made no submissions in reply to the application.

Discussion

24. I will take each ground in turn. There are some repetitions in the submissions in the application and where I have dealt with any point I will refer to the relevant paragraph rather than repeat my arguments.

25. As a general comment, the submissions refer to a large number of caselaw. I have kept to the cases mentioned in this reconsideration decision as well as to the Parole Board Guidance. The submissions also refer to the Parole Board Code of Conduct for members.

a) Error of Law:

i) *Failure to adjourn because (stand-in) COM referred to undisclosed material*: I can see no evidence in the decision letter that the panel relied on information that was not available in the dossier or not provided in evidence. As the application indicates, there was no application for non-disclosure so the panel was not privy to information that was not available to the Applicant. It is submitted in the application that the stand-in COM raised issues for the first time during the hearing. The evidence taken from the stand-in COM was reported in the decision letter, and the panel noted that she did not know the Applicant. It may be that the stand-in COM referred to matters not in the dossier during the hearing, however these were not issues that the panel relied upon in coming to its decision since nothing is referred to in the decision letter that is not either in the dossier or adduced at the hearing. Furthermore, the Applicant has been represented throughout these proceedings and if there were procedural concerns during the hearing the representatives should have raised them at the time of the hearing, or in closing submissions. I do not see evidence of any objection raised by the legal representatives.

ii) *Failure to direct a full risk management plan*: There is in fact a full risk management plan in the dossier that was discussed at the hearing. If the issue here is a failure to direct a plan for Pakistan, that is not something that I consider to be a necessary step for a panel to take when considering the case for a foreign national. I discuss this more fully under the ground of procedural impropriety and adopt my reasoning for that ground.

iii) *Abiding by its Code of Conduct*: I see no evidence that the panel's approach to ensuring that it had all the evidence that it needed in order to come to a fair decision was in contravention of the Code of Conduct. I believe this complaint also relates to the 'failure' to direct further information about risk management in Pakistan, and I deal with this below.

For the reasons given above, I see no error in law.

b) Procedural impropriety/unfairness:

i) *The COM was a stand in, their assessment of risk was based on undisclosed information and they were misleading and biased*: It is of course unfortunate that the Applicant's COM was unable to attend the hearing and there was a stand in instead. This is not an unusual occurrence, and I accept that there is a duty on the panel to check any stand-in's opinion and assessments against the evidence they have of the longstanding COM or more generally in the dossier and from other witnesses. This is particularly the case if the evidence of the stand-in COM is relied on. In fact in this particular case, I note that the panel relied on the prison psychologist's assessment of risk of reoffending (paragraph 2.7 of the decision letter). The risk of serious harm reported in the decision letter was taken from a number of assessments including from the OASYS (probation assessment reports) and the prison psychologist. However I note that the panel does not clearly state its own assessment of that risk other than to make a clear finding that the risk is largely in relation to interpersonal relationships, this again was taken from the opinion of the prison psychologist. Therefore I do not find that there was reliance on the stand-in COM's opinions on risk that was not either evidenced by other professionals or was not already in the dossier. It may be that the decision letter could have been clearer in this respect, but I rely on the principles in the decision of *Oyston* as quoted above in my decision that there was no procedural impropriety by the panel in its assessment of risk.

An example given about the stand-in COM's misleading assessment of risk is that she assessed risk to carers without there being any evidence of that particular risk, I note two things. Firstly, that the panel does not itself make any findings on risk to carers. The decision letter does refer to it but only by stating what the stand-in COM's position was. This is not the same as agreeing or accepting her position. There is no finding in the decision letter about risk to carers or other staff. However, in any event, I find that there *is* evidence in the dossier that provides some concerns in relation to carers. The clearest is in the prison psychologist's PRA, and there is another reference in the 2022 OASYS (this document was not created by the stand-in COM but the Applicant's usual COM), which does not state in so many words that there is a risk to staff, but reports concerns expressed by carers who worked in the

Applicant's house about domestic violence and the requirement that there should be two carers and that carers should not be on their own.

The general point here that might assist is that it is not the credibility (or otherwise) of the witness that can itself be the subject of a reconsideration, but the panel's consideration and reliance on any witness's evidence that may be relevant.

ii) *Failure to direct information about risk management in Pakistan. Witnesses did not know either. This put the Applicant at a disadvantage*: I note firstly that being subject to deportation procedures does not prevent a panel from releasing someone, and there is no evidence that the panel considered this to be the case. Secondly, I note that a panel must assess risk not just in the UK but in any country to which a prisoner is removed or deported (as provided for in the Guidance). The panel very clearly understood its duty in this regard.

The panel's decision letter states that there was a risk management plan in place for the UK that was robust. The panel then went on to say that should the Applicant be deported to Pakistan, information would be provided by the UK to the receiving country, but there would be no liaison between the two countries about such matters. The panel, in its conclusion, expressly stated that there was no information as to how the Applicant would be managed in Pakistan and that this was a concern, given their finding that the available risk management plan was necessary in order to manage the Applicant's risk.

The question then is whether the panel could or should have done more to check the options (if any) for risk management in Pakistan. The Guidance on Foreign National Prisoners from the Parole Board to its members was updated and published in December 2023. I find it a little contradictory in some of its advice. In paragraph 11.3 the Guidance states that "*The risk management plan must extend to the country to which removal is proposed*." This sentence appears to suggest that a probation recommended risk management plan must somehow also take any future country into account. However on closer reading of the whole document, my reading of this sentence is that it means *that in order to be effective*, any risk management plan must extend to the receiving country. This can only be possible if there is some sort of sharing protocol and agreed management framework between the UK and that other country.

The Guidance goes on to say (and I paraphrase for brevity) directions MAY be made at an earlier stage in the review proceedings (before the oral hearing is listed) for the COM to include details of risk management in the country to which any prisoner may be departed. The Guidance further states that in reality it will be rare to find countries that manage risk in a similar way. The Guidance also states that currently there are no sharing protocols in place with any other country. And, most relevantly, the Guidance (at its paragraph 11.7) states that in reality there will be no monitoring or enforcement of a risk management plan in any other country. Therefore any panel will need to "*make an assessment of manageability (of risk) based only on internal factors (how the prisoner can manage their own risks) …*".

I find after careful consideration, that the panel acted reasonably in its approach regarding risk management in Pakistan. It noted that there was no sharing protocol. It asked witnesses if they were aware of any risk management in Pakistan. It could reasonably assess, taking the Guidance into account, that there would be little point in making further enquiries or directing further reports about risk management in Pakistan. A panel is entitled to make its decision on the information before it. I do not find that there is a duty upon the panel to make further directions or enquiries on this matter as per the case of *Williams*, above.

iii) *Various failures by the stand in COM*: This part of the complaint focuses largely on failures of the stand-in COM. It is obvious that no panel can be responsible for failures in the practice for any of the professional witnesses. The panel is responsible for making an assessment of what weight to put on any evidence from witnesses before it. I do not find that the panel put an unreasonable weight on the stand-in COM's evidence. On the contrary, I note that most of the panel's findings were based on the recommendations and opinions of the prison psychologist.

iv) Although this was not specifically quoted under the relevant ground, elsewhere in the application is a reference to the fact that the panel should have given an explanation where they differed from witness recommendations: From the decision letter, I can only see one professional – the Prison Offender Manager – who recommended release on licence. The prison psychologist is stated to have earlier recommended release on licence, however when it was put to them at the hearing that the Applicant might be deported to Pakistan the decision letter states clearly that the prison psychologist then stated that they could not recommend release if the Applicant were to be deported to Pakistan, as they were not confident that risk could be managed in Pakistan. The stand-in COM was against release. I do not find that there is any arguable position that the Applicant can take in relation to the panel's decision to accept the opinions of two of the witnesses against that of the Prison Offender Manager. There is more than sufficient explanation given for the decision of the panel.

c) Irrationality:

i) *The panel had no information on which to base an assessment of risk (in Pakistan)*: This part of the complaint deals with the issue relating to risk management (or lack of it) in Pakistan. In particular the complaint is that the panel, having no information on which to base an assessment of risk if the Applicant were to be deported, took evidence from witnesses who also did not know and could only speculate. Much of my argument regarding the approach of the panel on risk management in Pakistan is relevant here and is provided for in paragraph 25(b)(ii). I will state again that the panel did in fact have some information on which it could base its assessment of risk – which is that there is no sharing protocol between the two countries. Therefore the panel's concerns about management of risk in Pakistan, shared by the witnesses, was in my view reasonable.

ii) This is another complaint about the stand-in COM and in my view is not relevant to an application for reconsideration of the panel's decision. The Applicant has other avenues in which he can complain about this professional's practice should he wish to do so.

iii) *Witnesses did not adequately consider positive aspects of the Applicant's case*: I have already stated that the panel is not responsible for the practice of their witnesses. Having stated that, I do note that elsewhere the application also states that the panel did not take sufficient note of the positive aspects of the Applicant's case. I disagree. The panel clearly considered that, had the Applicant not been at risk of deportation to Pakistan if released, he could be released on the risk management plan proposed. This evidences that the panel must have taken the positive aspects of the Applicant's case into account, and indeed the letter states what these are.

iv) The Applicant submits that the decision letter does not provide evidence of exploration of 'gaps' in the risk management plan should the Applicant be released and deported to Pakistan. I have largely already dealt with this matter above, there is no information protocol. From the Guidance, it appears that rather than there be 'gaps' there might not be any plan at all. The licence conditions are unenforceable in any other jurisdiction. In my opinion the panel discharged its duty with respect to considering what might happen should the Applicant be released and subsequently deported.

v) *The application states that the panel appeared to consider the risk management plan was sufficient when it became clear during the hearing that it was not*: My understanding of this part of the application is that the Applicant is referring to the discussion about managing risk should the Applicant be deported. I have already dealt with this aspect. To add to that, it is often the case that, during a hearing, details of any risk management plan are explored and more information/evidence provided. This is standard practice and in fact necessary before a panel can make an assessment of the full plan.

vi) The decision does not explain how the panel came to its decision regarding the statutory test for release: I note the following:

The conclusion in the decision letter states that the Applicant would need monitoring if released, and the current risk management plan was sufficient to provide that monitoring (as long as the Applicant complied). The meaning of this is clear, that as far as management in the UK, the panel was satisfied that the test for release could be met.

The next paragraph (4.5) of the decision letter then goes on to consider what would happen should the Applicant subsequently be deported to Pakistan. This correctly follows the Guidance, in stating that if he were to be deported the licence conditions would not be effective, that it would be up to the authorities in Pakistan to consider what they would do and there was no information about what this might be before the panel. Therefore the panel's concerns that the Applicant's risk would need monitoring were he to be deported could not be satisfied. The following paragraph then makes it clear

that in these circumstances the panel could not find that risk would be manageable in Pakistan and went on to state their reasons why the test for release was not met. I consider this a clear exploration of the statutory test and a reason given for the panel's final decision.

Decision

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

Chitra Karve
17 January 2024