

[2021] PBRA 128

Application for Reconsideration by Teeling

Application

1. This is an application by Teeling (the Applicant) for reconsideration of a written decision of a panel dated 27 July 2021 made after an oral hearing refusing to direct the release of the Applicant. The panel comprised of two independent members of the Board, one of whom chaired the panel and a specialist Psychologist member. The hearing was conducted by video link.
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 decision letter of 27 July 2021 (the decision letter), the grounds for reconsideration and the Applicant's dossier comprising 629 pages.

Background

4. The Applicant, who was then 57 years old, was sentenced on 3 May 2018 to an extended determinate sentence of imprisonment with a custodial period of 4 years and an extension period of 3 years after he had pleaded guilty to offences of stalking involving a fear of violence between 31 October 2017 and 27 January 2018 and of disclosing private sexual photographs and film with intent to cause distress between those same dates.
5. The victim was an 18-year-old female who, according to the sentencing judge, had been the subject of a sustained campaign of terror involving extremely sinister and tangible threats through which the Applicant had derived a warped satisfaction from the immense psychological harm suffered by the victim.
6. The Applicant had formed an online relationship with the victim under an assumed name. Having obtained from the victim intimate and explicit photographs of her, the Applicant engaged in a campaign of harassment against her including making threats of physical violence including involving the use of a Stanley knife.
7. At the time when the Applicant was sentenced on 3 May 2018, he was said to have been in custody for most of the previous 12 years except for brief periods in the community in licence. At the time of the index offences, the Applicant was in the community on an extended licence following a conviction in November 2005 for sexual activity with a female under 16.

8. The Applicant has convictions in June 2001 for an indecent assault and in March 2005 for another indecent assault. He also has convictions for assault occasioning actual bodily harm in June 1986 and for wounding and affray in February 1989.

Current parole review

9. At the parole hearing, the panel heard oral evidence from the Applicant's Community Offender Manager (COM), the Applicant's Prison Offender Manager (POM) and a chartered and registered Forensic Psychologist (FP), who was instructed by HMPPS Psychological Services, and also from the Applicant. The panel did not hear any evidence which was not disclosed to the Applicant.
10. FP identified as factors in the Applicant's life which might make it more '*likely*' that he might reoffend in life included his social isolation/mental illness, his desire for power, his possible attraction to teenage girls and his poor problem solving and emotional management. To FP, the Applicant appeared to be struggling with life problems, including the loss of his father followed by the loss of his mother. The panel considered that the risk factors presented by FP were supported by the evidence.
11. According to FP, the Applicant's stalking behaviour appeared to be driven by many factors including his desire for contact to enhance self-esteem and his feelings of social and personal rejection and his desire for sexual gratification. The panel considered that the risk factors and the formulation presented by FP were supported by the evidence.
12. The POM and the COM had both been allocated to the Applicant's case relatively recently, but his relationship with the COM "*had recently broken down to the extent that [the Applicant had] made formal complaints about her*". There were also reports that the Applicant had behaved inappropriately towards a female member of prison staff.
13. In May 2021, the Applicant was dismissed from his employment in the prison kitchens after he reportedly became preoccupied with perceived injustices towards him leading to him ceasing to communicate with the team of staff and prisoners. There were reports from April and May 2021 that the Applicant had behaved inappropriately towards a female member of staff by attempting repeatedly to give the staff member gifts and the panel was concerned the Applicant appeared to be unwilling or unable to acknowledge the inappropriateness of his conduct.
14. The POM noted that the Applicant "*had experienced a difficult period of time in the last 3 months before the hearing on 20 July 2021 during which members of the Applicant's family had died, which may go some way to explaining the apparent manifestation of the Applicant's risk factors referred to above*". The POM reported that the Applicant had disclosed his bereavement and had "*sought support, including making requests to be seen by the mental health team, which the POM had also requested for the Applicant and which had not occurred apparently due to lack of capacity for mental health support during that time*".

15. It was noted that the Applicant had maintained Enhanced Status under the Incentives and Earned Privileges (IEP) scheme and that "*[the Applicant] has not been subject to adjudication*".
16. FP noted that it was encouraging that the Applicant had engaged in previous interventions and that he "*presents with a good level of theoretical insight into his presentation and risk*". It was also recorded that during his present sentence "*the Applicant had referred [himself] for work on substance misuse with the integrated Substance Misuse Team...and engaged in 'in cell' work that is considered to have been completed to a high standard and to have demonstrated insight into that area of risk*".
17. According to FP, it was likely that the Applicant did not trust professionals to collaboratively manage his risk with him and that he avoided problems rather than disclosing them. The panel agreed with FP's assessment and considered that recent issues relating to the Applicant's conduct in prison have provided further support for the notion that those aspects of his risk remained active.
18. The probation service assessment report concluded that the Applicant posed a low risk of serious recidivism, but a high risk of reconviction for a sexual crime and a non-sexual violent crime while he presented a high risk of serious harm to children and known adults.
19. FP identified the warning sign of escalation of risk explaining that the identification of some of these warning signs would be reliant on the Applicant communicating these to the professionals.
20. The panel agreed with all these conclusions of FP and also with his opinion that the Applicant posed a high risk of continued stalking as well as that he presented a moderate risk of serious physical harm, and a high risk of sexual offending should he be released at that time. The panel concluded that the risk of stalking at the time of their decision was imminent in the light of the Applicant's behaviour in prison in April and May 2021 as well as his very recent and ongoing behaviour and attitude to his COM which has been outlined in paragraph 14 above.
21. To manage the Applicant's risk in the community there was a proposed risk management plan (RMP) which was considered by the panel. The panel was persuaded by the opinions of the COM, the POM and FP that, first, "*there was no convincing evidence of risk reduction in [the Applicant's] case*" and second, that the Applicant's "*risk had not been reduced to the level at which it could be managed safely in the community under [the RMP]*". The panel refused to order the Applicant's release.

Request for Reconsideration

22. The application for reconsideration is dated 18 August 2021.
23. The grounds for seeking a reconsideration are the decision of the panel was procedurally unfair as:

- (a) The panel failed to consider in its decision dated 27 July 2021 and issued to the parties (i) the written closing submissions (the closing submissions) that it was agreed on 20 July 2021 would be served by the Applicant's solicitors and which were served on the Parole Board at 16.29 hours on 22 July and (ii) a reference on the Applicant from Prison Officer Jones (the Jones reference) which was served at the same time as the closing submissions. (Ground A); and
- (b) The decision letter contained errors which caused the panel to make an unfair and inaccurate assessment of outstanding risk reduction work which has contributed towards the negative decision (Ground B).

The Relevant Law

24. The panel correctly sets out in its decision letter the test for release.

Parole Board Rules 2019

25. 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)).

Procedural unfairness

26. 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.

27. 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.

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

29. For the Applicant's case to be dealt with justly and for him to have been given a fair hearing, it was necessary for the panel to have considered all submissions made on behalf of the Applicant and for the panel to explain, if it rejects those submissions, why it has rejected those conclusions.

30. There are statutory provisions relating to judicial review applications which apply by analogy to reconsideration applications which mean that if a party fails to comply with any of its public duties, the decision is not automatically quashed. A decision

must not be quashed if “*it appears to the court highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred*” in section 31 (2A) of the senior Courts Act 1981. The justification for that approach is that it would be pointless to quash a decision because, for example, there had been no consultation when if there had been consultation, it appeared to the court to be “*highly likely*” the decision then made would have been no different from the decision actually made.

31. Applying that principle to the facts of this case, reconsideration could not be ordered (subject to a point in the next paragraph) if it was highly likely that outcome would not have been sufficiently different, and release not ordered if the panel had considered properly the closing submissions and the Jones reference before making the decision that the Appellant could not be safely managed in the community.

32. This rule may be disregarded if it is considered that “it is appropriate to do so for reasons of exceptional public interest”. This approach is analogous to the approach laid down in relation to judicial review applications based on procedural unfairness in section 31 (2B) of the Senior Courts Act 1981.

The reply on behalf of the Secretary of State

33. The Secretary of State stated that he was not making any submissions in response to the grounds for reconsideration.

Discussion

34. In dealing with the grounds for reconsideration, it is necessary to stress that the Reconsideration Mechanism is not a process by which the judgment of the Panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those 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.

Ground A

35. This ground is based on the contention that before making the decision that the Applicant could not be safely managed in the community, the panel failed to consider in its decision dated 27 July 2021 (a) the closing submissions that it was agreed on 20 July 2021 would be served by the Applicant’s solicitors and which were in fact served on the Parole Board at 16.29 hours on 22 July submission and (b) the Jones reference on the Applicant both of which had been served at the same time before the decision had been made.

36. It was agreed on 20 July 2021 that the Applicant’s solicitors would provide written closing submissions to the panel after further information had been received from the COM regarding whether the Applicant was eligible for Polygraph testing. At 9.20 am on 22 July 2021, an email was received from the Parole Board including details from the COM and the Applicant’s solicitors were invited to submit closing submissions. Those closing submissions together with the Jones reference, which

was a very favourable reference on the Applicant from the Prison Officer, were served on the Parole Board at 16.29 on 22 July 2021.

37. The decision letter, which was produced on 27 July 2021, states that *"the panel considered the documents contained in a dossier of 618 numbered pages"*. The dossier contained the closing submissions of the Applicant's solicitors at pages 615-617 and the Jones reference on page 618. Therefore, it is clear that at and before the time when the panel produced the decision letter, it was in possession of the closing submissions and the Jones reference.

38. I was unable to find any reference expressly or impliedly to the closing submissions or the Jones reference in the decision letter and so I conclude that this material was not considered by the panel before it produced the decision letter. If, which is not the case, I had been in any doubt about this conclusion, I would have reached that conclusion because of the absence of any evidence or assertion from the Secretary of State or any party disputing the prominent contention in the Grounds for Reconsideration that the panel had failed to consider the closing submissions. Indeed, if there had been any consideration of the closing submissions or the Jones reference by the panel before it made its decision, I would have expected this point to be made in response to Ground A, but, as has been explained, the Secretary of State chose not to make any representations despite his right and invitation to do so.

39. As explained in paragraphs 30 and 31 above, an order for reconsideration based on procedural unfairness must not be made where it appears on the reconsideration application that it appears to the court to be highly likely that the outcome of the reconsideration application would not have been substantially different even if the procedural unfairness conduct had not occurred. That would cover the situation where, for example, it was highly likely that the material not considered by the panel would have had no effect on the outcome. In the context of this case, a crucial issue is whether it would have been "highly likely" that if the panel had considered properly the closing submissions and the Jones reference, it would have refused to release the Applicant.

40. I have considered whether it is "highly likely" that the panel would not have ordered the Applicant's release if it had considered the closing submissions and in particular contentions contained in them that:

- (a) On receiving the psychologist's report, the Applicant *"took on board the comments made and set out completing written work to address any queries/concerns professionals may have had. He has identified where he went wrong and the steps for the future."* This was an important assertion, which has not been considered by the panel or shown to be wrong. If correct, this assertion would have required the panel to consider whether the Applicant would have adopted steps for the future which could have led to a finding that the Applicant could have been safely released into the community.
- (b) Throughout the Applicant's sentence, he has *"worked hard in trying to address his risk factors and he has contacted numerous establishments and tried his utmost to address his offending behaviour"*. It was added that it was not the Applicant's fault that *"these recommendations have come so late in his sentence"*. The panel would have had to consider whether the Applicant would



have been able or was able to address his offending behaviour so that he could be safely managed in the community.

- (c) Since his loss of employment in the kitchen in May 2021, the Applicant has commenced education work to broaden his prospects of employment upon release and this would address his risk factor of boredom which was present at the time of the index offence, and which was relevant to the decision that the Applicant could not be safely released the community.
- (d) The Applicant's RMP envisaged his release to a designated accommodation where he would be working alongside agencies which would be able to offer individualised intervention to assist his return from custody to the community, they would be able to offer individualised intervention to assist his return from custody to the community.

41. In considering the significance of the closing submissions it is noteworthy that:

- (a) the Applicant has achieved and continues to hold Enhanced Status;
- (b) "[the Applicant] not been the subject to adjudication";
- (c) The Jones reference written by female prison officer, who has worked with the Applicant for some years, speaks highly of his conduct; and
- (d) The issue for me is not to consider whether it is "*likely*" that the panel would not have ordered the Applicant's release if it had considered the closing submissions and the Jones reference, but whether it is "*highly likely*" that it would not have done so, which requires a much higher threshold of probability.

42. Taking all relevant matters into account, I have concluded it is not "highly likely" that the panel would not have ordered the Applicant's release if it had considered the closing submissions and the Jones reference. This means reconsideration must be ordered and there is no reason to apply the exception referred to in paragraph 32 above. For the purpose of completeness, I should add that on the basis of the information before me, I would have reached the same conclusion if it was only necessary for it to be "*likely*" that the panel would not have ordered the Applicant's release if it had considered the closing submissions and the Jones reference.

43. Accordingly, I must order reconsideration on Ground A.

Ground B

44. The contention is that the decision letter contained errors which caused the panel to make an unfair and inaccurate assessment of outstanding risk reduction work which has contributed towards the negative decision.

45. In the light of the decision to order reconsideration on Ground A, it is not necessary to deal with Ground B, which is an alternative to Ground A.

Decision

46. Accordingly, whilst I have found there to have been a procedural irregularity, I do consider that the decision of 27 July 2021 to be procedurally unfair for the reasons set out above. The application for reconsideration is therefore granted of an oral hearing and the case should be reviewed by a fresh panel by way of a paper hearing.

Sir Stephen Silber
6 September 2021