[2021] PBRA 18

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Application for Reconsideration by Weller

Application

1. This is an application by Weller (the Applicant) for reconsideration of a decision by an Oral hearing Panel of the Parole Board dated the 7 January 2021 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 dossier consisting of 527 pages, the Applicant's personal representations, the oral hearing decision letter and the application drafted by the Applicant's solicitor.

Background

4. The Applicant was sentenced in November 2001 to life imprisonment for the offence of murder. The tariff expiry date was 1 November 2015. He was 34 at the time of sentencing and 54 at the time of the oral hearing panel decision letter. The Applicant's case had been last reviewed on 31 August 2016. The hearing had been delayed to allow for further medical reports to be prepared. There was also delay to allow the Applicant to complete some one-to-one psychological work which had been suggested by a psychologist.

Request for Reconsideration

5. The application for reconsideration is dated 1 February 2021.

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

    a. That the oral hearing panel acted irrationally by failing to set out adequately and sufficiently its reasons for departing from the recommendations for release;
    b. That the oral hearing panel failed to apply the correct analysis relevant to the test for release;
    c. That the professional witnesses agreed that there was no further core risk reduction work and that the risk was not considered to be imminent and that a robust risk management plan was presented;
    d. That the panel acted with procedural unfairness because they failed to take account of the Applicant's disabilities and communication style; and

e. That the Applicant would have benefited from a face-to-face oral hearing rather than a remote hearing.

Current parole review

7. The Applicant's tariff expiry date was 1 November 2015. The matter was last reviewed by the Parole Board at an oral hearing which took place on 31 August 2016. No direction for release was made at that time. It was anticipated that the matter will be reviewed in a further two years' time in September 2018. Initially a review by way of MCA assessment indicated that the hearing should take place on a face-to-face basis. The case was listed initially for hearing on 16 December 2019, this hearing was adjourned with further directions. An oral hearing was listed for 7 July 2020, this July hearing was further adjourned for administrative reasons. The matter was eventually relisted for hearing on 7 January 2021. Because of the Covid-19 restrictions, the hearing had to be by way of telephone conference.

8. The hearing panel consisted of a psychiatrist member, a psychologist member and an independent chair.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 11 January 2021 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. 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)).

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 the decision on the 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.

Procedural unfairness

14. 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.

15. 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.
    The overriding objective is to ensure that the Applicant's case was dealt with justly.

16. The test to be applied when considering the question of transfer to open conditions 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.

17. 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.*"

The reply on behalf of the Secretary of State

18. The Secretary of State made no representations.

Discussion

19. The panel had the advantage in this case of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant as well as the Prison Offender Manager, the Community Offender Manager, and a psychologist. The Applicant was also legally represented. Where there is a conflict of opinion, it is plainly a matter for the panel to determine which opinion they preferred. The reasons given must be soundly based on evidence, as well as rational and reasonable or at least not so outrageous as to be unreasonable in the sense expressed above.

20. 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 (whilst also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the divisional Court in the case of **DSD** 'they have the expertise to do it'.

21. However, where a panel makes a decision contrary to the opinions and recommendations of 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.**

22. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it, 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.

23. The reconsideration mechanism is not a process whereby the judgement of the panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should expect to substitute my view of the facts for 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.

24. I have considered the first ground of irrationality set out by the Applicant's solicitor. Namely that the panel failed to set out adequately its reasons for departing from the recommendation for release put forward by the professional witnesses.

25. So far as the recommendation of the psychologist was concerned the panel pointed out in its decision that the psychologist had indicated that a progression to open conditions would be logical, sensible and desirable. However, the psychologist had concluded, particularly taking into account the Applicant's own reluctance to accept a transfer to open conditions, that such a transfer was not necessary. This was on the basis that she had concluded that the Applicant had a moderate risk of further violence which would not be imminent in the community.

26. The Community Offender Manager, whilst agreeing that the risk may not be imminent, supported a move to open conditions rather than release because she took the view that the Applicant needed to demonstrate an ability to manage in less secure conditions, to develop his skills and experience by implementing what he had learnt whilst within a custodial environment.

27. The panel set out the reason why they had concluded that the Applicant's risk could not be managed immediately in the community. They pointed out that the understanding of the Applicant's risk factors was based upon an analysis of the circumstances of the offending but absent of any but limited insight from the Applicant as to what led to the offence. The Applicant had suffered throughout his prison sentence and periods of assessments with ongoing problems of recalling his offending behaviour.

28. The panel acknowledged that this lack of insight may have been associated with the Applicant's brain injury but indicated that the lack of insight was a matter to be treated with caution. Although the panel accepted that the Applicant had completed all the recommended behavioural work, the panel indicated that that work had not been at a level of intensity which might be expected on the basis of the index offence, and therefore again required to be considered with caution.

29. The panel also referenced concerns about the Applicant's rigidity of thinking and his unwillingness to consider avenues which he did not believe were justified. Such thinking concerned the panel because it impacted potentially upon future compliance.

30. The panel also referenced a concern relating to the Applicant's negative attitude towards women. The panel acknowledged that this may have stemmed from a desire to avoid risky situations, however again the panel felt that these attitudes had not been fully tested within a more open environment and required testing.

31. The panel finally referenced the fact that they were concerned about the Applicant's lack of insight into his risks and lack of insight into the significant challenges that he would be likely to face if released directly into the community, from closed conditions, following a substantial prison sentence.

32. The panel therefore set out with some clarity the reasons why they had concluded that, despite the recommendation of the prison psychologist, they had concluded that it remained necessary for the Applicant to be confined.

33. So far as applying the test for release was concerned the panel appropriately set out the statutory test. The panel also gave the reasons set out above for concluding that the test for release was not met. I do not therefore determine that the panel failed to apply the correct test to the facts as they found them at the oral hearing.

34. So far as the third complaint by the Applicant is concerned. The panel acknowledged in its decision letter that the Applicant had completed all core risk related work which it was possible for him to complete. The panel acknowledged that the Applicant's risk was not believed to be imminent and also that there was a risk management plan which involved a period of time in designated accommodation and other conditions. The panel however have a task of assessing the evidence

overall. The completion of behavioural work, and the offer of a risk management plan can only form part of an overall assessment of risk.

35. Although each case must be considered upon its own merits, the Applicant had served a considerable period of time in custody having committed a gravely serious offence. He clearly had no experience of coping with the stresses of living in the community following his long period of confinement. The Applicant had difficulties in connection with his cognition derived from physical health challenges. The panel clearly took account of these matters when assessing the Applicant's risk.

36. I have considered the complaint relating to the failure of the panel to take account of the Applicant's disability and communication style. I have read the decision letter with care. It is wholly apparent that the panel were fully aware of the Applicant's difficulties. The panel itself consisted of specialisms in psychology and psychiatry. The Applicant was well represented, and his interests therefore were supported by his independent solicitor. I can find no basis in the decision letter for the complaint that the Applicant's challenges were not considered by the panel. It is the case that the panel were concerned about the Applicant's lack of insight which may possibly be associated with his cognition difficulties. However, the panel were obliged to consider the statutory test which involves an assessment of risk. That assessment of risk would inevitably take account of the fact that there may be unique risk factors associated with a person suffering with cognition difficulties. The panel pointed out in their reasoning relating to open conditions, that the advantages of a period in open conditions would be the potential for demonstrating the Applicant's ability to cope with setbacks and pressures. I am therefore not persuaded that the panel failed to take account of the Applicant's medical and psychological challenges.

37. Finally, I consider representation that the Applicant would have benefited from a face-to-face hearing. As set out earlier in this decision, the hearing which took place in January 2021 was delayed for a lengthy period of time, partly no doubt because of the pandemic. The panel could not have conducted a face-to-face hearing within a reasonable timescale. I have concluded therefore that the panel acted procedurally correctly and reasonably in concluding that the hearing should take place remotely rather than be deferred once again. I also note that no application was made on behalf of the Applicant to adjourn the matter to await the cessation of the pandemic. Such an application would have been open to be made by the Applicant himself or his solicitor.

Decision

38. 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.

HH S Dawson
18 February 2021