[2021] PBRA 21

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Application for Reconsideration by Ellis

Application

1. This is an application by Ellis (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 11 January 2021 not to direct his 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 the decision letter, the dossier and the application for reconsideration.

Background

4. The Applicant was sentenced to imprisonment for life on 19 July 1996 following conviction for attempted murder to which he pleaded guilty. A minimum term of 12 years was imposed. On 2 February 1999, the Court of Appeal (Criminal Division) reduced this to 7 years. His tariff is reported to have expired on 18 September 2002. The Applicant was 18 years old at the time of sentencing and is now 43 years old.

Request for Reconsideration

5. The application for reconsideration is dated 1 February 2021 and has been submitted by solicitors acting for the Applicant.

6. It sets out two grounds for reconsideration as follows:

   (a) It was procedurally unfair for the case to have been adjourned on a number of occasions as this has caused the evidence to be misinterpreted; and

   (b) The decision made no sense based on the evidence of risk that was considered and therefore the decision was irrational.

7. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

8. This case has had a complex and protracted procedural history. Since the matter of adjournments has been raised in the application as a potential source of procedural unfairness, it is necessary to set out a full chronology of the review.

9. The Applicant's case was referred to the Parole Board by the Secretary of State in November 2018 to consider whether or not it would be appropriate to direct his release and, if release was not directed, to advise the Secretary of State on whether the Applicant should be transferred to open conditions.

10. In April 2019, the case was directed to an oral hearing. A psychological risk assessment (PRA) was directed, together with various other updated reports.

11. On 3 February 2020, panel chair directions (PCDs) were issued. Further updated reports were directed with a view to the case proceeding to oral hearing on 4 March 2020.

12. The hearing on 4 March 2020 was held face-to-face. The Applicant was legally represented. The hearing proceeded as a directions hearing. The reasons set out in the adjournment directions are:

    (a) The Applicant was feeling very unwell on the day of the hearing.

    (b) The panel had been informed on 2 March 2020 that the Applicant had been subjected to a targeted search and an unauthorised item (a memory card) had been found sewn into his trouser waistband. The matter had been referred to the police, but there was no update available prior to the hearing. On the day of the hearing, the Applicant's Offender Supervisor (OS) reported that the chip contained no illegal content, but the Applicant was to be charged with its possession. None of the professional witnesses had been able to discuss the matter with the Applicant.

    (c) The Applicant had been deselected from the regime within which he was managed (designed and supported by psychologists to help people recognise and deal with their problems) but the report regarding the deselection was not available.

13. The Applicant sought legal advice prior to the adjournment. Further directions were set for police information, the deselection report, a medical report and updated reports from professionals including a PRA addendum report in the light of the new developments.

14. On 11 June 2020, further PCDs were issued with a view to the case proceeding to oral hearing on 25 June 2020. It noted that the directed police information has not been provided at that time and further directed the attendance of the Head of Security from the Applicant's establishment.

15. The hearing on 25 June 2020 was again adjourned. Information regarding the memory card had not been provided by police. It was further noted that there were inconsistencies in the written evidence regarding whether there was an ongoing police investigation. Moreover, neither the Applicant's OS, OM nor prison

psychologist had had the opportunity to interview him prior to the hearing. A directions hearing was held, and further directions were made, including a police report, security report, addendum PRA and updates from OS and OM.

16. Further PCDs were issued on 5 August 2020 with a view to the case proceeding to oral hearing on 26 August 2020.

17. The case proceeded to oral hearing on 26 August 2020. This was the first hearing at which substantive oral evidence was taken. The panel heard "*extensive evidence*" from a police witness, the Head of Security, the prison psychologist, the Applicant's OS and OM and the Applicant himself. The Applicant was again legally represented throughout. The hearing was convened remotely as a face-to-face hearing was not feasible as a result of the COVID-19 restrictions in place. The Applicant joined the hearing by telephone (as he was self-isolating); all other witnesses gave evidence by video link.

18. The case was adjourned again. The adjournment PCDs dated 7 September 2020 note that "*the panel faced difficulties in evaluating the evidence that professionals gave to underpin their recommendation that [the Applicant] remained in closed conditions."* The panel further noted that release plans were not fully developed. It also noted a disagreement between the OS and the Applicant regarding the Applicant's contact with the UK Border Agency. A PRA addendum report and updated reports from OS and OM were directed to address these deficiencies.

19. On 5 November 2020, PCDs were issued with a view to the case proceeding to oral hearing on 4 December 2020.

20. The hearing reconvened on 4 December 2020. The Applicant and his OS and OM were present by video link. The prison psychologist was not present, and her supervisor gave evidence via telephone on her behalf. Oral evidence was taken from all witnesses. The Applicant was legally represented throughout and closing submissions in writing were provided after the hearing.

21. The panel made no direction for release and made no recommendation for the Applicant's transfer to open conditions.

The Relevant Law

22. The panel correctly sets out the test for release in its decision letter dated 11 January 2021.

Parole Board Rules 2019

23. 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)). This is an eligible decision.

24. 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

25. 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."*

26. 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.

27. 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

28. 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.

29. 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.

Other

30. 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

31. The Secretary of State has submitted no representations in response to this application.

Discussion

Adjournments have led to misinterpretation of evidence

32. It is first submitted that there have been a number of adjournments that has caused the evidence of professionals to be misinterpreted and this amount to procedural unfairness.

33. Before considering the decision letter in detail, I will first deal with the number of adjournments. This parole review was adjourned on 4 March 2020, 25 June 2020, 26 August 2020 and concluded on 4 December 2020. However, no substantive evidence was taken in the March and June 2020hearings, both of which were directions hearings only. Full oral evidence was taken in August and the case was concluded (with further oral evidence) in December. The March and June 2020 hearings dealt with the mechanics of gathering (not evaluating) written evidence. Insofar as the substantive hearing was concerned, it was adjourned once.

34. The Applicant was also legally represented throughout the entire review. There is nothing on the evidence before me to suggest that any objections were raised in relation to the adjournments at any of the hearings. Neither is there anything to suggest that the process of any of the adjournments fell foul of the requirements imposed by the Parole Board Rules 2019.

35. Therefore, I find no procedural unfairness insofar as the mechanics of the adjournments are concerned. The application does, however, go on to draw reference to a *"number of inaccuracies"* in the decision letter.

36. It is a well-established ground for judicial review that the tribunal has taken into account information which it is accepted is inaccurate. The grounds for reconsideration mirror those for judicial review and therefore it is also a ground for reconsideration. I accept that it is capable of being both irrational and procedurally unfair to take into account inaccurate factual information in making a decision. It is important that decisions are not only fair but are also seen to be made according to a fair procedure. If incorrect information is included in the decision letter, the fairness of the procedure is called into question.

37. However, it will not invariably follow that if there is an inaccurate fact or facts in the decision letter that an application for reconsideration will be granted. Reconsideration, like judicial review, is a discretionary remedy and if I am satisfied that the incorrect fact did not affect the decision then the application is likely to be refused.

38. I will therefore deal with each of the areas raised by the application in turn.

i. Index offence and tariff

39. The decision states at paragraph 1 that the Applicant was "*sentenced to life imprisonment for murder… minimum term set at 7 years and 1 day".* It is submitted that this is incorrect as the Applicant was convicted of attempted murder and his minimum term was originally 12 years, reduced to seven on appeal. I agree that this is incorrect. However, the decision also states the correct offence and tariff at paragraph 3 (albeit in replicating a previous panel decision of June 2012). Although the error in paragraph 1 does not set an immediate favourable impression of the decision, I do not find that the error affected the decision in any unfair way.

ii. 2018 decision: psychological risk assessment

40. The decision provides a summary of the findings of the panel that reviewed the Applicant's case in 2018. This includes a reiteration of the Applicant's negative reaction to an earlier psychological risk assessment. The Application submits that the matter has unfairly followed the Applicant in this present review, that the mention of a threat against the report's author was unsubstantiated and that the 2018 panel wrongly implied that the prison complaint system is not to be used to raise grievances.

41. The decision of the 2018 panel is not under review. Nonetheless, its decision (which is in the current dossier) does not imply that the prison complaint system should not be used. It does note that alternatives to the use of the complaints system may be a more constructive way of resolving grievances and disagreements. While it also notes the Applicant's view at that time that he did not want the report's author to feel threatened, it goes on to say his intentions *"did not seem to have succeeded".* It therefore cannot be said that the matter was unsubstantiated; neither is it unfair for the matter to have been raised again by the current panel or to seek the Applicant's current perspectives on the matter.

42. It is also submitted that the matter is not "*evidence of violence*" nor "*in line with the test for release*". There is nothing to suggest the panel has treated it as evidence of violence, but it is a legitimate matter for the panel to consider as part of its overall assessment of the Applicant's risk.

iii. Citizenship

43. The decision also provides a summary of the 2018 panel's consideration of the Applicant's dealings with the UK Border Agency (UKBA) and, in particular, its relevance to the Applicant's risk of absconding.

44. The panel asked the Applicant about this. He gave a version of events that was at variance with evidence provided by his POM. The panel was concerned that this raised concerns about the Applicant's credibility and reliability.

45. It is submitted that it is unfair to suggest that the Applicant deliberately tried to mislead the panel when trying to recall events from two years previously, and that the emphasis has changed from risk of absconding to manageability.

46. The panel is entitled to draw any conclusion it wishes on an any particular evidence before it and to decide how much weight to give it (provided that it does not act irrationally in the legal sense expressed above). It is not unreasonable for the panel to conclude that (what appears to be significant) variance between the Applicant's account is related to the management of his risk in the community if released.

47. The panel's conclusion also refers to this piece of evidence when considering the risk of abscond from open conditions, just as the 2018 panel had done. While a recommendation for open conditions is outside the scope of the reconsideration mechanism, it is nonetheless unsustainable for it to be suggested that the panel's emphasis had shifted from that of the 2018 panel.

iv. Erasure of the memory card

48. The decision notes the evidence of the prison Head of Security and Intelligence that there "*remained a concern that the data stick may have at some point contained other data that has been overwritten and was no longer obtainable".*

49. It is submitted that the panel has adopted the view that the Applicant has the propensity or intention of deleting or overwriting data on the memory card, and that to do so amounted to unfair speculation.

50. There is nothing in the decision letter to suggest the panel has adopted this view. It simply provides a statement of the Head of Security's evidence.

v. Possession of USB

51. The decision letter states that the Applicant told the panel that "*when transferred between prisons [he] had lost his SD card in the past*".

52. It is submitted that he did not say this, and the decision incorrectly implies that he has had more than one card in his possession.

53. The panel had the advantage of hearing the Applicant's evidence. In any event, I do not consider it necessary to review the recording of the hearing simply because I do not see anything in the panel's reasoning that either concludes that the Applicant had previously been in possession of any other unauthorised memory card, or that it has given any weight to the (disputed) oral evidence of the Applicant on that particular point. The panel gave weight to the fact that the Applicant had concealed the unauthorised memory card to which he had admitted, regardless of whether or not he had done similarly in the past.

54. It is also submitted that at points *iv* and *v* above, the panel has not applied the test for release correctly. Panels of the Parole Board do not apply the test for release to each individual piece of evidence. It is a panel's job to assess and weigh all the

written and oral evidence before it insofar as it relates to a prisoner's risk, and then to decide, as a whole, whether the test for release is met.

vi. Psychological assessment

55. It is submitted that the panel irrationally accepted a *'mixed understanding'* of the Applicant's psychological formulation put forward by the prison psychologist and affirmed by their supervisor.

56. It is for the panel to decide the weight it gives to all evidence, including psychological evidence. The panel also contained a psychologist specialist member to help it so decide. While the application disagrees with the panel's conclusion, the conclusion cannot be said to be an irrational one. It is based on written and oral evidence which the panel accepted, and which it is perfectly entitled to do. To say otherwise would be to undermine the psychologists' evidence, which, of course, the Applicant's legal representative would have had the opportunity to challenge within the hearing if they considered it to be fundamentally flawed to the detriment of the Applicant.

vii. Abscond

57. The final submission concerns a passage in the decision relating to concerns about the risk of abscond from open conditions.

58. This passage falls within the panel's reasons for not recommending a move to open conditions and this decision falls outside the scope of the reconsideration mechanism.

Other submissions

59. The closing part of the application largely reiterates the points dealt with above with the additional submission that *"although agreed in principle, the hearing proceeded via video links/telephone conference, it is submitted that considering the number of delays and adjournments this was unfair, as the Applicant's evidence has clearly been misinterpreted…and felt compelled to proceed in order to avoid further delays".*

60. The remote hearings were not agreed in principle. They were agreed in fact. It was for the Applicant or his legal representative to object to a remote hearing at any point in the proceedings. While a further delay would have been inevitable if a face-to-face hearing had been requested there is nothing to suggest that the Applicant was compelled to proceed remotely. Doing so was a decision for him and his legal representative. A remote hearing cannot be said to be retrospectively unfair unless there are manifestly obvious reasons for it being so, none of which I have found in this particular instance.

Decision

61. 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.

Stefan Fafinski
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