[2021] PBRA 71

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Application for Reconsideration in the case of Whitaker

Application

1. This is an application by the Secretary of State (the Applicant) for reconsideration of a decision of an oral hearing dated 13 April 2021 with respect to the decision of the panel 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 the application, the response to the application by the Respondent's legal representatives, the dossier, and the decision letter.

Background

4. In August 2008 the Respondent was sentenced to imprisonment for public protection (IPP) with a minimum tariff of 3 years 3 months (less 216 days on remand). This tariff expired on 26 April 2011. He was first released on licence in October 2012, recalled on in September 2012, released for a second time in February 2014 and recalled on in September 2016. This is the second review of that second recall, the first review not directing release but recommending that the Respondent be transferred to open conditions. At the time of the decision under reconsideration the Respondent was in open conditions.

5. The offence that triggered the IPP sentence was one of Wounding with Intent (GBH, s.18), and the Respondent was sentenced for Affray at the same time. The Respondent has a background of violent offending including offending while on licence. He was 25 years old when convicted to the IPP, he is now 38 years old.

Request for Reconsideration

6. The application for reconsideration is dated 7 May 2021.

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

(a) Irrationality

- The decision to release may be irrational on the basis of a lack of evidence of appropriate levels of risk reduction and failure to consider all evidence relating to remaining risk appropriately; and
- That there was a failure to apply the test for release appropriately and direct release alongside robust risk management plan (RMP).

(b) Procedural unfairness

- That there was a failure to assess this case with an appropriate panel via video link has led to an inadequate exploration and assessment of risk-related behaviours and evidence.

Current parole review

8. The Applicant referred this case to the Parole Board in December 2019. The referral asked the panel to consider release or failing release whether the Respondent remained suitable for open conditions. At the time of the referral the Respondent was in open conditions. The case was considered by a single member panel in December 2020, deferred for further information and reconsidered a few weeks later when an oral hearing was directed. That single member panel directed an updated psychological risk assessment as well as other reports, and directed that there be two members with no specialists on the panel. The single member also made it clear in those directions that a telephone link was suitable. Unfortunately, the template – a pre-COVID template for these directions, only has a field in the panel logistics section for a video hearing, however the free text box made it clear that a telephone hearing was being directed. No reasons were given for the directions for a 2-member panel or for a telephone link.

9. On 2 March 2021 the panel chair directions say the following (along with other brief comments): *"Unless the legal representative objects, the oral hearing will be held remotely."* No similar direction was made to the Applicant.

10. A panel of two independent members convened to hear the case over a telephone link on 1 April 2021. The letter noted that the hearing took place via telephone. The Respondent was represented, the Applicant had sent in no written representations about this case and was not present at the hearing. Evidence was taken from the Respondent's prison and community offender managers and the psychologist who had provided the updated report.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 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.

12. 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 Respondent 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)).

13. 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

14. 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."

15. 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.

16. 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

17. 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.

18. 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.

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

20. Justice must not only be done but be seen to be done and so procedural unfairness includes not only an unfairness of process, but also the perception of unfairness (for example, failure to deal with the arguments or evidence advanced in an appropriate manner or not at all).

21. It is for me to decide whether I consider the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties.

Other

22. In the cases of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the Respondent requires one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the Respondent in order to properly assess risk and where it is necessary in order to allow the Respondent to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the Respondent's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

23. 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 Respondent in addressing and reducing their risk;
    (b) the likeliness of the Respondent to comply with conditions of temporary release
    (c) the likeliness of the Respondent absconding; and
    (d) the benefit the Respondent is likely to derive from open conditions.

24. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the*

appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning." See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

25. 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.*"

26. 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 Respondent

27. The Respondent's representatives sent in full representations opposing the grounds of the Applicant's Application. These representations were dated 13 May 2021.

Discussion

28. I will deal with the ground of procedural impropriety first. The Application submits that there should have been a specialist psychologist on the panel, and that the hearing should have taken place by video link. The reasons given for this ground are that there were two reports by forensic psychologists and that they contained 'complex information' regarding risk and, with implications for the management of that risk.

29. The MCA member that sent this case to an oral hearing did so on 16 December 2020. I cannot find it reasonable that a party to the proceedings should raise objections about the logistics of panel make up or of type of hearing *after* the hearing is complete and the decision made. These directions are sent to both parties. Objections to any of the directions could have been made at any time before

the hearing between 16 December and 1 April 2021. Any objection would have been considered either by a Duty Member or, if the case had been listed, the panel chair.

30. On the issue of a video hearing as opposed to a telephone hearing, I accept that in the MCA directions form itself the 'template field' for a member to populate whether they consider the case suitable for a video hearing or not indicates it is suitable for an video hearing. This is an unfortunate result of there being no way in which this template field can be amended to say 'telephone' hearing. However, the MCA member made very clear in their direction that this case was suitable for a telephone hearing unless the panel chair considered otherwise, and this is in bold at the end of the free text box. It could not be clearer. There are also general indications throughout the template that indicate that any request to vary or revoke directions should be made by the parties on the appropriate form. Again, they are not precise enough to indicate that this includes the panel logistics, but it is completely reasonable in my view to rely on parties to understand that if they have any objection to any of the information or directions in this template they may make submissions.

31. In my experience, the Applicant understands their role in this respect, because they very frequently make representations to vary or revoke directions. Had they any concerns that this case should be heard by way of video (or face to face), I have no doubt they would have done so. They did not. They had a second opportunity when panel chair directions were issued on 2 March 2021 but did not seize this opportunity either. I regret that the panel chair direction only directed their request for objections to a 'remote' hearing to the legal representative. This has become standard practice (and is not appropriate) because the Applicant is so rarely engaged in hearings. However, I do not consider this to be a fatal failing in this matter. PPCS, representing the Applicant during the case management up to oral hearing, would have been in no doubt that a) this was a telephone hearing and b) they could make submissions about any concerns with respect to this.

32. Nevertheless, despite my rejection of the Applicant's submissions in this regard because of their non-participation in the Directions process, I still considered whether having a telephone hearing made the hearing itself unfair. The Respondent's representatives quite correctly point out the Parole Board guidance in this matter and I reviewed the guidance for this reconsideration. This guidance was produced solely to assist members making decision during the COVID-19 Pandemic, when face to face hearings were, until very recently, almost impossible to hold. Even now, there are huge restrictions on face to face hearings. The guidance I found most informative on this point is called *Parole Board COVID 19 Member Guidance and is dated October 2020*. This is a public document. As with many guidance manuals, it is not always as specific as one might like, but I found helpful the section relating to whether a member should direct a face to face hearing or not in the

pandemic. The section is titled *'Requests for Face to Face Hearings on the Grounds of Fairness*'. It was not meant for exactly the situation we find ourselves with in this case, but provides the appropriate guidance, which is to be found at paragraphs 4.1 onwards, too long to copy here. I will attempt to summarise the meaning of the guidance. These principles emerge from reading it:

- Fairness is a primary consideration;
- Once an oral hearing has been directed, consideration should be given as to whether a telephone hearing will 'suffice'. Factors that need to be taken into account when directing a hearing should include whether the panel need to see the Respondent's reactions for visual cues in order to properly assess risk. The guidance states that this would be the case where there are complexities including disputes or mitigations that need to be explored. Also, to be considered whether the Respondent has any issues (physical, mental health for example) that need to be taken into consideration; and
- That representations should be sought from both parties as to any submissions they might wish to make on a remote hearing, and they should be given 14 days to respond.

33. In this case, there is little evidence that fairness was not in the mind of the MCA member when directing this case to an oral hearing, and in my view there are no complexities that make this case necessary for a video hearing, where the Respondent can be seen by the panel. There is little evidence that the Respondent is vulnerable in the ways suggested in the guidance and therefore requiring a video (or indeed face to face) hearing. I am however troubled by the last bullet point above. I have indicated that there were opportunities for either party to object to a telephone hearing, and no objections were made. However, at no time did the MCA member or Panel chair invite *both* parties to make representations with respect to the hearing. The panel chair specifically only invited the Respondent's legal representative to do so, and gave no time limits.

34. In terms of general practice, the panel chair was not doing anything unusual. It is standard in panel directions for directions for submissions to be focused at the legal representatives (or the Respondent if they were not represented). This is by and large because of the complete absence of engagement by the Applicant in a vast majority of the proceedings. I accept however that this is a flawed approach.

35. Having stated that however, I do not think that this flawed approach led to any unfairness in this particular case. I am fully confident that the Applicant is aware that they may make representations at any time about cases, and in fact they frequently do, whether specifically invited to do so or not. They chose not to do so in this case.

36. Lastly, I considered whether for any reason a telephone hearing in this case meant that the evidence considered by the panel was in some way limited or restricted. For this I specifically considered whether visual cues were necessary in this case in order for, as the Application states, the Respondent's 'non-compliance, disengagement from witnesses and recent hostile and aggressive behaviour' could be tested, as well as his grievance thinking and communication style. I can see from the decision letter that the Respondent was indeed asked about his grievances, the suggestions of hostile behaviour and the breakdown of relationship with the Community Offender Manager (COM). Similar questions were put to the witnesses. It was clearly stated that release was not recommended by any of the professionals, and reasons given for their recommendations. I cannot see that issues of importance relating to risk were not fully discussed, or able to be discussed during the hearing.

37. In relation to visual cues, I note that there is research indicating that decision-makers can place too much emphasis on cues, making assumptions about them that may not be true. For example, if someone finds it difficult to meet your eyes during a conversation, it does not necessarily mean they are being evasive or lying, but that is often an assumption made (wrongly). Hesitation in speaking, or grimacing, might also be taken to mean negative things, but might instead be signs of uncertainty, nervousness and nothing sinister. There are occasions when being able to see the Respondent and for them to see the panel is important, but I cannot see that this is made out in this case.

38. I do not consider, taking into account all the factors in this particular matter, that a case has been made out by the Applicant that a telephone hearing led to a lack of ability for the panel to take relevant evidence in order to make a decision.

39. I turn now to the complaint that there should have been a specialist psychologist on the panel. My reading of the relevant guidance indicates that just because there are psychological reports to be considered by a panel does not automatically mean that there should be a forensic psychologist on the panel. A very large number of Parole Board cases have psychological information, whether a risk assessment, assessment of personality, assessment of treatment needs, cognitive functioning and so on, and I would hazard a guess that most of them are not directed as requiring a specialist of any type. Parole Board members are trained to understand and interpret these reports. Additionally, there is written guidance about the assessments and their meaning available to members. Parole Board members who are not specialists are able to effectively question and assess the authors of these reports. There would need to be a specific need for a psychologist on the panel in any case. The Application says that the two reports in the dossier – risk assessments undertaken in 2019 and 2021 respectively, were 'complex'. I have looked carefully

at both reports and the decision letter, and I have to disagree. The reports are in standard format and contain information and assessment which is 'bread and butter' information that parole board panels consider on a daily basis. I also note guidance that indicates that the outcome of a diagnostic assessment (risk assessment tool used by both psychologists) cannot be said to be reliable after 6 months. This means that by the time of the hearing, the 2021 report would be the current one for the said assessment, and it was the author of this report that was a witness in the proceedings. This would make the issues relating to psychological material even less complex. I cannot see that there was any procedural unfairness here.

40. I also rely on the fact that the Applicant made no representations at the time of the original MCA directions or at any point after that that a specialist member was required on the panel.

41. I turn now to the ground of irrationality. I bear in mind the test for irrationality, which sets a high bar as set out by Lord Diplock and explained above. I consider the Application's various points regarding this in turn.

42. Firstly, the Application appears to suggest that the panel did not properly take into account the Respondent's past offending. I can see that the decision letter adopts the analysis of former offending by the panel in 2019, this is accepted practice and it is clear that the analysis refers to a pattern of offending as indicated by the Application. A Respondent's offending history is important in assessing current risk, however it cannot be the sole or even most important element, because that would mean that no-one would ever be released on licence. The consideration of change over the custodial journey or sentence journey is equally if not, in many cases, even more important. The decision letter and the conclusion evidences careful attention to developments over time, in particular since the last review.

43. The main issue raised by the Application is in relation to concerning behaviours and attitudes–some of them recent–that led to the witnesses not recommending release. I have considered the evidence presented to the panel, and find that the panel weighed up the evidence before them appropriately, and came to a justifiable decision. The panel rightly focused on developments since the last review. Against the relatively small list of security concerns was the evidence of no adjudications, no negative comments on the Incentives and Earned Privileges (IEP) scheme and the fact that the Respondent remained enhanced on this IEP Scheme, which is the highest level of privilege and only provided to prisoners who have sustained good behaviour and usually done something to go over and beyond just complying with the regime. The panel recorded the suspicions that the Respondent had about the trustworthiness of professionals. There were concerns about his future contact with his children, and the panel had before it information from the Family Court about

future contact and no evidence that the Respondent had breached any directions from that court. The panel noted that despite his reluctance, the Respondent had complied with a direction to engage with mental health services, who found no evidence of mental health problems. The panel noted that the Respondent was holding down a job for four days a week with 12-hour shifts and had goals to be employed on release. He was appropriately asked questions by the panel about the breakdown of relationships with his Community Offender Manager, to which he responded.

44. Correctly applying the test for release: in the conclusion, the panel clearly summarised the concerns of all the professionals, and it then went on to explain its own position with respect to the evidence. It weighed the evidence appropriately, made findings, and then considered the test for release.

45. There are some typographical errors in the letter, and I accept that against the recommendations of all the witnesses it would have been useful for the panel to do more to explain their decision, however I keep in mind the test for irrationality, including taking into account any risk related (as opposed to risk management related) concerns.

46. I also accept that the evidence shows that the Respondent may well not be an easy person to manage in the community, and the lack of trust between the Respondent and professional staff is problematic. However, there is no clear evidence of a link between this attitude and risk to the extent that being suspicious and resentful of professionals will have a direct and unmanageable relationship to rising risk. There is on the other hand evidence that even when the Respondent does not agree with orders or directions, he does follow them. The test for release needs to be borne in mind at all times, and the test is about public protection and risk of serious harm, leading to the necessity of keeping someone in custody, not problematic attitudes towards professionals.

47. I turn now to the final point, which is about whether or not the risk management plan was sufficiently robust to manage risk, which, the Application states, could 'rise quickly', referring to the probation service assessment report relating to the high risk of serious harm to the public and staff. Many Respondents are assessed as a high risk of harm prior to their release, this is not a bar to their release. If it were to be, very few Respondents would ever be released by the Parole Board. A panel has to take into account this assessment of risk of serious harm against the evidence of change in relation, in particular, to the risk of violent re-offending. It is of note that the outcome of the probation service assessment report specifically in relation to the violent re-offending in this case, which I consider to be more relevant to the test for release, was medium.

48. The Risk Management Plan was presented by the COM. I accept that the wider aspects of the plan are not detailed in the decision letter, but I note that there was more to the plan itself in the COM's report, including weekly supervision sessions, oversight by Multi-agency Public Protection Arrangements' (MAPPA), checks to safeguard any known adults thought to be at risk, requirement to engage with partner agencies for employment and substance abuse for example. The Decision letter focuses more or less solely on monitoring and control arrangements including residence at Designated Accommodation, non-contact conditions and exclusion zone, however it is reasonable to consider that the panel took the wider plan into consideration when making its assessment of the robustness of the plan. Taken as a whole therefore I do not consider that the plan was any less robust than many other plans with offenders with similar profiles. The key concern of professionals was lack of open and honest engagement with supervision and the licence, and the panel quite rightly indicated that the Respondent was well aware of the consequences of breaching the conditions of his licence. The Application complains that too much reliance is given to the possibility of recall for the plan to work, however I see this as the panel providing a cautionary warning to the Respondent, not an over-reliance on the method of enforcement.

49. As I indicated, I accept that more could have been said about the risk management plan and the conclusion, however I consider that Lord Bingham's observations in the case of **Oyston** above are relevant here, the lack of the provision of chapter and verse for every possible issue does not necessarily make the decision unsafe. What is available to me in the decision indicates that the panel did consider the test for release taking into account the evidence before it, and was able to explain and justify their decision to release.

Decision

50. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

Chitra Karve
28 May 2021