[2022] PBRA 132

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Application for Reconsideration by Finnerty

Application

1. This is an application by Finnerty (the Applicant) for reconsideration of a decision of a Panel of the Parole Board following oral hearing on 22 July 2022. The decision letter is dated 27 July 2022.

2. The Panel did not direct release, and made no recommendation for a move to open conditions.

3. 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.

4. I have considered the application on the papers. These are the dossier of 504 pages (which includes the decision letter) and the application for reconsideration that runs to 9 pages.

Background

5. The Applicant as sentenced to IPP in 2009 for an offence of rape. The tariff was set at 4 years (with allowance for time on remand) and expired in 2012.

6. He was released from open conditions for the first time in December 2017 and recalled four years later in December 2021 after allegations of serious further offending against his partner were made.

7. These were subsequently subject to 'No Further Action' by the police. However, the Panel concluded that 'there was some sexual abuse' in the relationship.

Request for Reconsideration

8. The application for reconsideration is dated 3 August 2022.

9. The application was not made on the published form CPD 2, but set out in a separate document prepared by the Applicant's lawyer.

10. The grounds for seeking a reconsideration are that the decision was an irrational one.

11. The basis of this is not entirely clear, with the grounds being in a narrative format and largely being a re-argument of the case for release.

12. As part of this it was said that there were the following errors (which I have summarised and re-numbered):

    a) Insufficient reasons were given for not following the recommendation of the Community Probation Officer for release;

    b) Insufficient reasons were given for not accepting the Applicant's explanation for his offending;

    c) The conclusion that there was a risk of offending when the Applicant was sober as well as drunk was without foundation;

    d) Insufficient weight was placed on the fact that the proposed release plan was significantly different (and more robust) that the previous release plan;

    e) There was no risk reduction work for him to undertake; and

    f) The finding that there was some sexual abuse appears to be questioned.

13. In relation to (f) it was unclear what the grounds of complaint are, but it appeared to be that the finding that the Panel made (that there had been some sexual abuse) was irrational.

14. Reading the decision letter, I was concerned that the finding that the Panel made in relation to the recall allegations was not sufficiently clear as to what happened, and as to why they came to that conclusion.

15. For those reasons I considered it necessary to invite both parties to consider this and make any representations that they wished.

16. As a result, the Respondent provided a short letter dated 1 September 2022.

17. This sets out the material from the police that had been provided as to the allegation and the investigation and the Applicant's explanation. It is said that this 'could contribute to the reliability of this allegation' but stops short of making submissions either way.

18. The appellant has stated that he does not wish to make any further submissions in response.

Current parole review

19. The case was referred to the Parole Board by the Secretary of State in January 2021.

20. After an adjournment to establish the outcome of the police investigation of the recall matters, the case was directed to an oral hearing in July 2021.

21. The oral hearing was originally listed in December 2021 but had to be adjourned due to illness.

22. The oral hearing was heard remotely on 22 July 2022. The Panel had a dossier of 498 pages and heard evidence from the Prison and Community Probation Officers.

The Relevant Law

23. The panel correctly sets out in its decision letter dated 27 July 2022 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.

24. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

25. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)).

26. 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)).

Irrationality

27. 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."*

28. 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.

29. 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

30. 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.

31. 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.

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

The reply on behalf of the Secretary of State

33. The Secretary of State stated initially that he did not wish to make any representations.

34. Subsequently, he replied as set out above.

Discussion

35. In relation to (a)-(e) I consider that these are, in effect, simply a re-arguing of the Applicant's case.

36. It is telling that the conclusion that I am invited to draw at the end of the section entitled 'Submissions' is that the Applicant meets the test for release, which is not the test that I apply.

37. In brief, I consider that the finding of the Panel in relation to those points were

clearly open to it and sustainable in the evidence. The grounds are effectively a disagreement with the decision.

38. In those circumstances I turn to the last point, which is in relation to the allegation.

39. The recall was triggered because of an allegation by the Applicant's partner that he had (whilst intoxicated) threatened his partner 'J' with a knife when she objected to him leaving the house to buy alcohol.

40. J reported to the police that the Applicant *"had pinned her down and forced sex on her without her consent on numerous occasions".*

41. The Applicant's account was that *"J had agreed to anal sex once per month. He did not dispute the recall but was unable to remember the specifics of any incident because of the amount of alcohol he had consumed".*

42. The matter was not pursued after J did not wish to proceed with the allegation. That does not mean that the Parole Board could simply put them to one side (to do so would be an error of law).

43. It can be seen that there were two parts to the recall allegation. Firstly a threat with a knife and secondly an allegation of repeated sexual offending. Both are serious and, if accepted, would clearly relate to risk.

44. In the decision letter, the Panel said this about the allegations :

> *"The panel had a number of concerns in this case. [The Applicant] has a history of serious sexual offending, and it has now been alleged that he has threatened to kill and sexually assaulted his current partner who is de- scribed as vulnerable. [The Applicant] has no recollection of events re- lating to the allegations against him because of his level of intoxication at the time. On the balance of probabilities, and based on what is known about [the Applicant], the panel concludes that there was some sexual abuse within his relationship with J."*

45. It appears that there was no finding as to the allegation of the threat with a knife (which, whilst not accepted, it appears that the Applicant did not dispute). In relation to the allegation of rape, the findings are that there was 'some sexual abuse'.

46. The Parole Board had previously issued guidance to members that set out a structured approach to follow when a Panel is faced with an allegation that is not accepted by a prisoner and has not been adjudicated on.

47. However, following the Court of Appeal judgment in **R (Pearce) v Parole Board [2022] EWCA Civ 4**, the policy was withdrawn.

48. In the judgment the Court of Appeal said:

> *22. Mr Rule originally submitted that R(D) is authority for the principle that it will only be in an exceptional case that the panel should consider allegations of wider offending. However, during discussion with the court he finessed his argument to the extent that he conceded that whilst it is necessary for the panel to consider the materials to determine whether they do aid a more complete understanding of risk, it is for the panel to decide whether the investigation of any aspect of an unproven allegation of wider of- fending will be necessary in this regard. I consider this a realistic concession which addresses Ms Sackman's pertinent observation – on what basis is a case to be deemed exceptional in the absence of the necessary information. There is no suggestion that paragraph 8 of the Guidance which gives examples of potentially 'relevant' allegations, including those of harmful or risky behaviour, or which undermine the credibility of the prisoner's evidence or their reliability to comply with licence conditions, or which impact upon the weight that can be placed upon a professional witness who has not taken account of the allegations, misstates the authorities.*

49. The Court said this about the Panel's role :

> *35. It may be that the difference sounds more in form rather than substance. The question of what constitutes a fair procedure to make findings of fact, or evaluations of the information, will be fact specific as explained in West and is unlikely to entail the formality of public law family proceedings. The test posed in Considine at paragraph [37] provides that a fair analysis of all the information should inform the necessary judgment in relation to risk. Nevertheless, what is clear to me is that the panel must conscientiously evaluate the information before it to make findings of fact upon which to make the assessment of the prisoner's risk; in these circumstances neither public protection nor public law fairness will be compromised. Established or undisputed constituent or consequential facts to an overarching allegation may provide compelling and convincing indications of risk in them- selves, whereas simply to assess the seriousness of the nature of an allegation, provided there is some evidential basis for it is to embark down the route of 'no smoke without fire'.*

> *45. To illustrate the point, suppose that a dossier prepared for the parole review of a prisoner who had been convicted of sexual assaults against children, contains information that prior to the onset of his first conviction he had been arrested on suspicion of indecent assault of a child and otherwise questioned as a person of interest regarding another sexual assault in the periods between his convictions. Although he had not been tried for any of the of- fences these are potentially relevant allegations to the assessment of risk since they suggest that the prisoner has been*

involved in more extensive harmful behaviour and undermines his explanation of the trigger event which led to the offending for which he had been convicted. The information reveals that the reason for his first arrest was because the prisoner was often seen in the children's playground in which the child who had been assaulted had played; but that he was questioned in relation to the later allegation only because he was one of a number of men who had previous convictions for similar offences.

46. *I would expect the panel to identify the last allegation as a 'mere' allegation without any evidential basis and to immediately disregard it. However, the information concerning the first allegation would justify the panel in questioning the prisoner about his alleged behaviour. If the fact that he was often in the proximity of the children's playground is undisputed or established as a fact on the balance of probabilities then, unless there is a plausible explanation for his presence, it suggests that he had engaged in risky behaviour some significant time before his first conviction. In such a case, the panel would have made a factual finding (of frequenting the children's playground) falling short of the original allegation, but upon which it could base its assessment of future risk.*

47. *However, if the prisoner denies any attendance at the playground and the information is insufficient to enable the panel to be satisfied that the prisoner did frequent the playground, or if he was seen proximate to it that he was not taking a well-recognised route elsewhere, then if the current Guidance were correct, since there is some evidential basis for the allegation the panel may proceed to make an 'assessment' of the 'level of concern' that the prisoner had been alleged to have committed a sexual assault, attaching great weight to the serious nature of the allegation in accordance with paragraph 20(c) and, on the basis of Morris, concluding that if there was 'a significant chance short of a probability' that he had committed such an assault, proceed to take that into account when assessing risk. I consider this unjustified on a correct reading of the authorities. I regard Andrew Baker J's judgment at paragraph [12] in Delaney, unqualified by commentary in the case of Morris, to be correct. In short, if the panel cannot be satisfied on the balance of probabilities that the pris- oner was frequenting the playground at all, the allegation should be disregarded.*

50. When faced with unproven allegations the Panel must consider what findings of fact (if any) can be made. The decision letter should then set out the factual conclusions arrived at and how this impacts on the decision-making process.

51. The reasons do not need to be lengthy, but need to be sufficient to explain to a reader what conclusions the Panel drew from the evidence and why.

52. In this case the Panel noted that the allegation was made and that no further action was taken by the police.

53. However, the concern that I have is that the decision letter is silent as to the allegation of the threat with a knife. That was an important part of the recall and both parties were entitled to know whether the Panel accepted that this happened, in part because of the significance is has to the risk that the Applicant presented.

54. Further, whilst the Panel noted his level of intoxication at the time of the incident that led to recall, a finding was made *'that there was some sexual abuse with his relationship'.*

55. That was certainly a finding that was open to the Panel to make. However, it seems to me that the Decision letter is defective in that it failed to set out clearly what findings were made. The phrase 'some sexual abuse' is broad and relatively vague. It is also unclear whether this includes the allegation of the threat with a knife.

56. The Applicant, and anyone else reading the letter (including a future Panel) are entitled to know what it is that the Parole Board found. Further, the Applicant and Respondent were both entitled to know what the reasons for this were.

57. It is often the case that there will be a number of matters raised at a hearing that the prisoner disputes. A Panel does not have to make findings of fact on everything that is in dispute. Even when a Panel does so, it will often be possible to set out the Panel's conclusions in a sentence.

58. I have considered whether the findings that the Panel made (of 'some sexual abuse') is sufficient to sustain the decision. The difficulty with that is that I consider that the fair minded observer would conclude that the issues raised above infect that other part of the decision so as to make it unsustainable.

59. In those circumstances, I consider that the application must be granted.

Decision

60. Accordingly, I do consider, applying the test as defined in case law, that the decision of 22 July 2022 was procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

Daniel Bunting
20 September 2022