the Parole Board

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[2022] PBRA 161

Application for Reconsideration by Bidgway

Application

1. This is an application by Bidgway (the Applicant) for reconsideration of a decision of an oral hearing panel. The decision was dated the 10 October 2022. The panel made no direction for release.

2. 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.

3. I have considered the application on the papers and by listening to the recording of the hearing. The papers were the dossier consisting of 811 pages, the oral hearing panel decision, the Application for reconsideration submitted by the Applicant's solicitor and the response by the Secretary of State.

Background

4. The Applicant is serving a sentence of life imprisonment for the offence of murder. The minimum term specified by the judge was 14 years. The victim of the index offence was his wife. The Applicant was also sentenced to a period of 12 years imprisonment in relation to an offence of attempted murder (the offence occurring at the same time). The 12 year sentence has now expired. The tariff expired in June 2022. The facts of the offence were that the Applicant became angered by the fact that his wife was planning to leave the home. On the night of the murder the Applicant tried initially to smother his wife with a pillow. When she struggled he strangled her with his hands. He then attempted to murder his two year old son by placing a plastic bag over his head, he released the child when the son became distressed. The Applicant is now 53 years old. He was 39 years old at the time of the index offence.

Request for Reconsideration

5. The application for reconsideration is dated 31 October 2022.

6. The grounds for seeking a reconsideration are set out below. I have also set out the discussion in relation to each ground.

Current parole review

7. This was the first review by the Parole Board of the Applicant's sentence. The reference from the Secretary of State was to consider release and if not releasing to consider any recommendation relating to a transfer to an open prison. The case suffered considerable delays. The initial referral was made in October 2021. The background to delays were the difficulties that the panel encountered in securing requested information for the hearing. There were a number of adjournments.

The Relevant Law

8. The panel correctly sets out in its decision letter dated 10 October 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.

9. 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)

10. Pursuant to 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).

11. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These include indeterminate sentences (rule 28(2)(a).

12. 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**.

Illegality

13. An administrative decision is unlawful under the broad heading of illegality if the panel:
    (a) misinterprets a legal instrument relevant to the function being performed;
    (b) has no legal authority to make the decision;
    (c) fails to fulfil a legal duty;
    (d) exercises discretionary power for an extraneous purpose;
    (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
    (f) improperly delegates decision-making power.

14. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Irrationality

15. 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."*

16. 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.

17. 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

18. 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.

19. 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

20. 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 prisoner 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 prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner'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.

21. 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

22. The Secretary of State offered no representations.

Discussion

23. **Ground 1** - A failure to adjourn for further information, missing evidence and unfulfilled directions

Discussion

Allegations relating to strangulation

24. The Applicant's solicitor represents on behalf of the Applicant that allegations against the Applicant relating to violent and hostile behaviour had not been properly explored and that the panel had failed to continue to pursue seeking information about this evidence.

25. One allegation related to a matter which was alleged to be an instance of violence towards the Applicant's first wife (in 1992). There were two evidential sources which referenced this allegation. The first was a post sentence probation report. Within that report it was indicated that the police had interviewed the Applicant's first wife and that she had made allegations relating to the Applicant's violence towards her. Also contained in the dossier was a document which appeared to be an extract of a report (possibly by the police or by the Crown Prosecution Service addressed to the prosecuting barrister). In that report the report writer had headed the paragraph 'Bad Character Evidence'. The report writer then set out for the reader the possible bad character evidence which it is assumed might have been utilised in the Applicant's trial. The report summarised the allegations relating to strangulation which had been allegations made by the Applicant's first wife.

26. The Applicant's solicitor indicates that an issue had been raised at the start of the oral hearing concerning the nature of the bad character evidence document and whether any further witness statement had been used at the Applicant's trial. It was submitted by the Applicant's solicitor that further information would assist the panel regarding this issue. The panel determined not to pursue this aspect of evidence any further.

27. I have considered this matter. It appears to me that the fundamental issue is whether the oral hearing panel relied upon evidence relating to an allegation of strangulation (of the Applicant's first wife) and if they did so rely, the nature of the facts upon which they reached any conclusion.

28. In Parole Board hearings, allegations, if they are to be relied upon, must be dealt with in accordance with the Parole Board Guidance relating to allegations. The published guidance requires panels to assess the factual basis of any allegations and to reach conclusions relating to those allegations on the balance of probabilities.

29. In this case I have considered whether the panel, within their decision, indicate that they had relied upon the allegations relating to strangulation in reaching their decision concerning risk.

30. The panel within its decision referred to the fact that there existed evidence of an allegation of strangulation. The panel indicated that the Applicant within the oral hearing had accepted that the relationship had been "fractious". The panel also noted that the Applicant emphasised that "*the strangulation allegation only emerged when his first wife was giving evidence to the police before the trial for his index offence*".

31. There appears to be no evidence within the decision letter that the panel had come to any conclusion about the reliability or otherwise of the allegation. Particularly, however, there is no evidence that the panel relied upon these allegations in coming to its conclusion about the Applicant's risk. The panel within the decision noted the Applicant's position. Namely that no allegations have been made until the police had approached the Applicant's first wife in preparation for the trial relating to the index offence. The matter went no further and no reference was made to it by the panel in its concluding remarks.

32. In the absence of evidence that the panel relied upon the strangulation allegation, the fact that the panel did not pursue further information about the allegation does not, in my determination, amount to either a procedural irregularity or irrationality within the meaning set out above. It would be helpful, in writing decisions, if panels specifically indicated their position relating to allegations. In particular when allegations were not to be relied upon a recording of that position would be of assistance and should be recorded. However, in this case there is no evidence that the panel relied upon the specific allegation in relation to their assessment of risk. It is not therefore a matter which I find is amenable to reconsideration.

Adjourning to pursue further evidence

33. Also raised under this ground is the fact that the panel had failed to adjourn in order to pursue other material which it (the panel) had requested. That other material related to a conviction in 1992. The conviction itself was for serious violence. The conviction predated the index offence. The panel had requested the sentencing comments by the judge made in 1992. The panel had also requested the prosecution statements from the 1992 trial. Those documents had not been produced. The Applicant's solicitors accepted that they were unlikely to have been retained and therefore were unlikely to exist.

34. A third group of documents which had been subject to a request for production (by the panel) was the opening remarks by the prosecution in the index offence and the 'case papers' for the index offence. The Applicant's solicitors argue that, to ensure fairness to the Applicant, the Parole Board hearing should have been adjourned to secure these papers. The Applicant's solicitors in their appeal document do not indicate how these particular documents could be said to have been of further assistance. It is well settled and known that the contents of any opening remarks in a criminal trial would only provide a general guide as to the matters which the prosecution are seeking to establish. It is therefore rare for such documents to be requested because of the dangers of relying upon submissions which may have changed radically during the course of a criminal trial. I am not therefore convinced that the absence of the prosecution opening remarks could have had any realistic affect upon a decision relating to the Applicant's risk.

35. So far as the term "case papers" is concerned, in a criminal trial the majority of the evidence is adduced orally. The parties will have statements written by or on behalf of the witnesses, however the evidence which is relied upon to reach the conclusion is that which is taken orally.

36. Oral hearing panels place reliance upon the judge's sentencing remarks which will often reflect the findings of the jury. Also of assistance are reports by probation officers either before sentence or after sentence. In this case there was adequate evidence of the background and nature of the index offences and their circumstances. Whilst any decision-making body strives to secure as much information as possible, I am again not persuaded that the absence of the documents noted above (called 'case papers') would have assisted any further in reaching a decision concerning the Applicant's risk. Nor in my view did the absence of those documents create any unfairness. I am therefore not persuaded, that the fact that the panel did not adjourn to secure this information, had any effect upon the assessment of risk. I am also not persuaded that the documents would have benefited the Applicant in any real way. I therefore reject this ground.

37. **Ground 2** - Curtailment of Applicant's evidence.
Discussion

38. The background to this submission is that the oral hearing was lengthy. It was scheduled for a day. A day's hearing for the oral panel would have ordinarily been

between approximately 10 am and 4pm. In the event the matter ran over, and extended over 8 hours and 20 minutes.

39. I have listened to extracts of the oral hearing by way of the recording. I could detect no evidence of the matter being conducted unfairly because of time constraints. It is the duty of a panel chair to ensure that hearings are conducted fairly but also expeditiously. It is not unusual for a panel chair to intervene where a witness is taking the matter further than is required in terms of evidence relating to risk. It is incumbent on panel chairs to manage hearings assertively, fairly and reasonably. From time to time this will create a situation where the chair is required to ask a witness to move to the next point or to curtail the point being made.

40. Ideally an oral hearing should be adjourned when running late. The hearing can place pressures on all parties, and in particular, prisoners. However, it is well understood by panels that adjourning can create a lengthy delay because of listing difficulties. Panel Chairs must therefore balance the advantages of allowing as much time as possible for evidence to be adduced, against the disadvantages of allowing cases to run over creating a situation where the hearing may have to be adjourned, sometimes for some weeks, until a further date can be secured.

41. In this case I heard no evidence which indicated that the Applicant suffered unfairness as a result of the length of the hearing. I am reinforced in this view by the fact that no specific evidence of unfairness has been cited within the application for Reconsideration. I also note that the Applicant was represented by an experienced solicitor. If it was felt that the Applicant was suffering any form of unfairness, his legal adviser had every right to apply to interrupt the hearing at any stage and request that an adjournment be considered. The absence of any application by the Applicant's legal adviser, who was present at the hearing, has led me to the conclusion that there is insufficient evidence of unfairness as a result of time pressures in this case. Again therefore I find that there is no evidence supporting a contention that there was procedural unfairness.

42. **Ground 3**- Significant factual inaccuracy

Discussion

43. This ground arises in circumstances where the following comment was made in a paragraph in the decision letter. "*The panel was mindful that the murder of his wife and attempted murder of his son, although the most serious of his offences, were not the first incidences of violence in the context of relationships; serious violence in 1992 and 2008 had also arisen in similar circumstances following a relationship breakdown and resulted in very serious harm*"

44. The complaint so far as this extract is concerned, is that the evidence indicated that there was a criminal conviction in 1992. The only other serious violence, attributable to the Applicant, was said to be in 2008 and was the index offence. The Applicant's solicitors argue that the phrase quoted above implies that the panel had taken into

account another (possibly third) violent incident in 2008 which was in addition to the index offence.

45. Having considered this representation I fully accept that the drafting of this phrase was confusing and lacked clarity. It appears that the phrase "and 2008" had been included erroneously and was probably a typographical error. The clear sense of the wording is that there were two incidents of serious violence. In fact the two incidents were in 1992 and 2007, rather than 2008. Both the Applicant's solicitors and the panel had referenced the trial date rather than the date of the offence. The correct factual position was that the murder occurred in April of 2007. The Applicant's trial was delayed as a result of his illness until 2008.

Factual error – Further discussion and Law

46. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational. However, 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.

47. I have considered whether the words referred to above amount to a factual error or a typographical error. Having considered the decision as a whole, and the contents of the dossier, there is no evidence of any discussions being conducted relating to a third incident in 2008. As indicated above, it would have been impossible for there to have been an incident relating to violence in a relationship in 2008. The Applicant was in custody from 2007 until his trial in 2008 and thereafter remained in custody.

48. The fundamental issue however is whether the panel were relying upon three incidents, rather than two, in reaching their conclusions relating to risk. A careful reading of the decision makes no reference to any other serious incidents apart from the two referred to above in 1992 and 2007. There is therefore no evidence in my view that the panel had erroneously introduced a third incident upon which they relied. I therefore conclude that although there was a likely typographical error, there is no evidence of the error (whether typographical or otherwise) having any material effect upon the assessment of risk by the panel. In those circumstances therefore I am not satisfied that the error amounts to an irrational decision having been reached in the sense set out in the decisions indicated above.

Other factual errors

49. The Applicant's solicitor argues that there was a factually incorrect recording of an incident relating to an occasion when the Applicant had spent time in police cells. The argument adduced by the Applicant's solicitor is that the factual position was that the Applicant had been in police custody because of being associated with a friend and a violent incident, and not because he had in fact assaulted a friend. The panel clearly made little of this incident and noted that the Applicant had been released without charge. Again I am not persuaded that this was a material issue which would affect the decision relating to risk. The panel clearly concentrated their considerations upon the serious and established examples of violent behaviour when reaching their decision.

50. The Applicant's solicitor also argues that there was an error in a reference relating to alcohol use within the Applicant's relationship with the victim. The panel decision noted that the reporting psychologist had indicated (in evidence during the hearing) that the Applicant had considered that alcohol was a feature of his behaviour. However, he had (in fact) indicated that it was a feature of his behaviour in relation to his first marriage rather than a feature of his behaviour towards the victim who was his second wife. Again, I am not in a position to make a final judgement on this particular comment, however the wording itself indicates to me that the issue was not material to the decision. The material point as recorded by the panel was that alcohol may have been a problem in the past but was not a continuing problem. For this reason it is clear that the panel did not misuse information in reaching their decision concerning risk.

Ground 4 - Failure to give reasons for rejecting evidence
Discussion

51. The panel had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant and the witnesses.

52. 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 (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in DSD, they have the expertise to do it.

53. However, if a panel were to make 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.**

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

55. The Reconsideration Mechanism is not a process whereby the judgement of a panel, when assessing risk, can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as 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.

56. In this case the panel took account of the fact that the independently instructed psychologist was recommending the release of the Applicant. There were also positive reports from the Prison Offender Manager and a senior probation officer from within the prison. The reporting psychologist commissioned by the prison had also indicated that there was no major difference in the risk assessments between herself and that of the independently commissioned psychologist. However, as is now directed by the Secretary of State, no recommendations were offered by the prison-based professionals.

57. The fundamental issues identified by the panel in reaching a conclusion as to the ongoing risk in relation to this Applicant were identified by the panel and were; enumerated as follows :

- whether the Applicant had completed sufficient intervention and behavioural work in relation to partnership violence;
- whether there was a clear understanding of why frustration and anger had led to the index offence;
- whether the accounts and explanations given by the Applicant had been challenged and explored sufficiently to understand his motivation;
- whether the sexual element of the offending was accurately understood and finally whether the Applicant had reached a stage where he could safely manage his emotions outside the custodial environment.

58. The panel identified these fundamental issues. In general the professional view was that these issues had been addressed sufficiently by the intervention work and presentation of the Applicant in custody. The panel disagreed, and concluded that these issues remained outstanding and unaddressed and accordingly concluded that it remained necessary for the Applicant to remain in custody for the protection of the public.

59. The panel therefore explained its reasons for reaching its decision. By enumerating the issues about which they had concerns they illustrated the basis upon which they did not feel able to follow the recommendations and views of the professionals. I am

satisfied that the findings of the panel were sufficiently explained to justify its conclusion. I therefore do not determine that the decision was irrational or procedurally unfair, and accordingly the application for reconsideration is refused.

Decision

60. 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
15 November 2022