[2022] PBRA 67

Application for Reconsideration by Gray

Application

1. This is an application by Gray ('the Applicant') for reconsideration of the decision of a panel of the Board ('the panel') which on 13 April 2022, after oral hearings on 29 April 2021, 23 September 2021 and 21 March 2022, issued a decision not to direct the Applicant's release on licence and not to recommend that he should be transferred to an open prison.

2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.

Background, and history of the case

3. The Applicant is now aged 29. When he was aged 15 he tried to rape and then to kill a woman aged 31. He pleaded guilty to attempted murder (for which he received a sentence of detention for public protection) and to attempted rape (for which he received a concurrent sentence of 18 months detention).

4. These sentences were imposed on 28 September 2009 when he was aged 16. His tariff under the sentence of detention for public protection was fixed at 7½ years less six months which he had served in custody on remand.

5. The circumstances of the offences were summarised as follows by the sentencing judge:

"Round about 2 a.m. on March 8 this year you attacked [the victim] who was on her way home after a night out. You tried to rape her and then tried to kill her. You sat astride her and punched her in the face several times. You then got up and proceeded to kick her and stamp her on the face. Finally you lashed her on her unconscious body with a belt. It was a prolonged and vicious attack which one witness estimates to have lasted some 15 minutes. Having done that you then stole her mobile phone. As a result of your attack your victim suffered appalling injuries to her head …"

6. The Applicant's tariff expired on 28 April 2016. He has remained in closed conditions throughout his sentence. This is the third review of his case by the Board, the first two having been concluded on the papers.

7. There appears to be no doubt that the Applicant had a traumatic childhood, as a result of which he suffers from Post-Traumatic Stress Disorder, and that that is relevant to his risk to the public.

8. He has undertaken various interventions designed to reduce his risk to the public, and his behaviour in custody has gradually improved during his sentence.

9. Through no fault of the Applicant's this review of his case has been very long drawn-out. It was as long ago as 26 March 2020 that his case was referred by the Secretary of State to the Board to decide whether to direct his release on licence and, if not, to advise the Secretary of State about his suitability for release on licence.

10. At the time of the referral he was awaiting trial on an allegation of assaulting a prison officer in July 2018. He denied that offence, admitting that there had been some violence between himself and the officer but saying that he was acting in self-defence. Because of the COVID-19 restrictions his trial was repeatedly adjourned. It was eventually concluded in August 2021 when he was acquitted.

11. On 26 August 2020 a MCA member directed an oral hearing, and in due course the case was allocated to the panel to conduct that hearing. The panel comprised a judicial member, a psychologist member and an independent member of the Board.

12. On 29 April 2021 (after two adjournments on the papers) the panel convened for an oral hearing. It was agreed that the hearing would have to be adjourned until 23 September 2021 by which time it was anticipated (correctly) that the Applicant's trial on the assault charge would have been concluded.

13. However, the hearing fixed for 23 September 2021 had to be adjourned because of late service of information by the Secretary of State and a potential non-disclosure issue.

14. The much delayed oral hearing took place on 23 March 2022. The Applicant was not seeking a direction for release on licence. His application was for a recommendation that he should be transferred to open conditions.

15. Oral evidence was taken from the Applicant himself and from three professional witnesses: a prison psychologist (Mr A), the official responsible for supervising the Applicant in prison (Ms B) and the official prospectively responsible for supervising him in the community (Ms C).

16. Mr A supported a move to open conditions, though with the proviso that there would need to be ongoing support for trauma symptoms if he was progressed to such conditions: Mr A's opinion was that currently his trauma needs were 'not paramount' but he would need trauma support to be available if his symptoms worsened.

17. Ms B, in accordance with the current protocol for officials in her position, does not appear to have offered an opinion.

18. Ms C, in a report in February 2022, supported a move to open conditions, perhaps at a particular prison (X) where she believed the necessary support could be accessed. However in a further report in March 2022 she changed her recommendation, not as a result of any change in the Applicant's behaviour or attitudes but as a result of concerns expressed by colleagues about *'a potential gap in treatment for general violence'* which would mean that he needed to undertake a further risk reduction programme in a closed prison.

19. That was her position at the hearing. However, the panel in its decision stated: *'The panel are of the firm view that [the suggested risk reduction programme] has been previously considered by psychologists and viewed as unnecessary and indeed possibly counter-productive. In that previous assessment, it was the view of the prison psychologist … that the programmes [the Applicant] has undertaken would have addressed the risk of general violence, as well as sexual violence, to an appropriate level.'* That finding obviously meant that little reliance could be placed on Ms C's recommendation.

20. On 24 March 2022 (the day after the hearing) the panel issued the following direction:

"Before the panel makes its decision some further information is required concerning availability and facilities at [an open prison, in particular X which had initially been suggested by Ms C] or [a closed prison offering a progression regime]. This information was not readily available at the hearing. The panel is conscious that [the Applicant's] review has been much delayed for reasons set out in the dossier, and a short adjournment period is set for the provision of this information by [Ms B]. An adjournment review date of 08/04/2022 is set. No further hearing is required and the review will be concluded on the papers."

21. Specific directions were then made as to the matters about which Ms B was to make enquiries. It was emphasised that the panel was particularly interested in trauma support as opposed to trauma treatment.

22. The Applicant's legal representative was not invited to submit any further representations in the light of the directed further information, and the professional witnesses were not directed to submit any comments in the light of that information.

23. Ms B submitted an undated report, as directed, outlining the information which she had gathered. None of the information from any of the sources which she approached was particularly conclusive, but the information from X (the open prison) certainly did not rule out the possibility of the Applicant being accepted there and receiving the necessary trauma support.

24. On 13 April 2022 the panel issued its decision, in which it did not direct release on licence and did not recommend a move to open conditions.

25. In its decision the panel referred to the information gathered by Ms B but did not express any particular views about it or explain its relevance (if any) to the panel's decision not to recommend a move to an open prison. Instead the panel's explanation for that decision was:

'The clear need for availability for trauma support is paramount, as is testing in a new environment. The panel accepts that there is no further core risk reduction work to complete. Consolidation and confidence in stability are the goals for the future, as well as development of a support network for release. The panel is grateful for the further information provided by Ms B after the hearing. The panel have come to the firm view that the risks that [the Applicant] represents currently outweigh the benefits arising from a transfer to open conditions.'

The Relevant Law

The test for release on licence

26. The test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the panel at the start of its decision.

The law relating to reconsideration of decisions

27. Under Rule 28(1) of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.

28. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by
    - a paper panel (Rule 19(1)(a) or (b)) or
    - an oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or
    - an oral hearing panel which makes the decision on the papers (Rule 21(7)).

29. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both of two grounds: (a) that the decision is irrational or (b) that it is procedurally unfair.

30. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration.

31. The decision not to recommend a move to open conditions is not in itself eligible for reconsideration. However, procedural unfairness may result in the whole case having to be reconsidered: see paragraphs 40-41 below.

The test for irrationality

32. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin) (the "Worboys case")**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It stated 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."

33. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.

34. 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.

35. The Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see **Preston [2019] PBRA 1** and other cases.

The test for procedural unfairness

36. 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 from the issue of irrationality which focusses on the actual decision.

37. It has been established that the things which might amount to procedural unfairness include:
    (a) A failure to follow established procedures;
    (b) A failure to conduct the hearing fairly;
    (c) A failure to allow one party to put its case properly;
    (d) A failure properly to inform the prisoner of the case against him or her; and/or
    (e) Lack of impartiality.

    This is not an exhaustive list. The fundamental question on any complaint of procedural unfairness is whether, viewed objectively, the case was dealt with fairly.

38. It is important to distinguish between procedural unfairness and a procedural irregularity. Procedural irregularities of one kind or another are not uncommon. A procedural irregularity may or may not result in procedural unfairness. It will not do so if it is insignificant or if the panel's decision would clearly have been the same if the irregularity had not occurred.

39. Whilst a decision not to recommend a move to open conditions is not in itself eligible for reconsideration, if there has been procedural unfairness resulting in the whole hearing being fatally flawed the panel's decision cannot be allowed to stand and reconsideration is necessary. This was established in the case of **Wylie 2021 PBRA 146**. In that case (in which I had to deal with the reconsideration application) the prisoner had serious mental health problems and a video link hearing had been directed because of his serious mental health problems, but the hearing had actually been conducted over the telephone.

40. In **Wylie** the prisoner was not seeking release on licence but was asking the panel to recommend a move to an open prison. There was clear evidence that he had not been able to do himself justice when giving his evidence, and I had little difficulty in finding that there had been procedural unfairness. The more difficult question was whether, given that the prisoner was not seeking a direction for release, I could and should direct reconsideration of the panel's

decision. I decided that as follows:

> *'The remaining question which I have to decide is whether this undoubted procedural unfairness should result in a direction for reconsideration of the panel's decision. There are two possible ways of looking at that question.*
>
> *'One is to say that, since it is only the decision not to direct the Applicant's release on licence which is susceptible to reconsideration and that decision would obviously have been the same if the procedural unfairness had not occurred, I should refuse this application.*
>
> *'The other is to say that the procedural unfairness meant that the whole hearing was fatally flawed and there should be a rehearing.*

'On careful consideration I am satisfied that the second of these views is the correct one. That is because, if I were to refuse the application and allow the panel's decision to stand, an unsatisfactory and unfair situation would arise.

'Although the decision whether to transfer the Applicant to an open prison rests solely with the Secretary of State, he is entitled to have the benefit of advice from the Board, and I believe that that advice should be based on a fair hearing and not one that is flawed by a serious procedural failure. If I were to allow the panel's decision to stand, the Secretary of State would not have the advice which he should have. That would be unfair both to the Secretary of State and to the Applicant.'

Request for Reconsideration

41. The Applicant's solicitors advance the following grounds for reconsideration of the panel's decision:

Procedural Unfairness

42. The solicitors make two criticisms under this head:

Ground 1: *This case was complicated by the issues that the prison psychologist [Mr A] is no longer working for the prison service and attended the hearing by prior agreement to leaving his role. During the course of the hearing, the panel requested documentation relating to the [scores on the structured risk assessment system used by psychologists], however they were unavailable during the course of the hearing. [Mr A] was asked to provide his scores from memory. We would respectfully submit that this is not procedurally correct for a psychologist to provide these scores on the spot and is unlikely to remember them all is such significant detail as required by a panel of the board.*

Ground 2: *Further information was requested by the panel following the conclusion of the evidence, however there was no direction for the witnesses to make a comment as to whether this made an impact on their assessments and recommendations. We would submit that this is procedurally unfair to have information provided at the end of a hearing without exploration of professionals views and further submissions.*

43. The solicitors submit that as a result of these points *'the risk assessment undertaken by the parole board is procedurally unfair and undermines the*

ability to consider release and progression to open conditions. Despite the application being for open conditions, the panel must undertake a full risk assessment and consider release as per the terms of the Secretary of State's referral. Due to the above points, we would submit that the panel was unable to meet the terms of this referral.'

Irrationality

Ground 3: *[The Applicant] has completed a substantial amount of offending behaviour work and the panel, in their decision, considered that there is 'no further risk reduction work to complete'. The panel stated 'that consolidation and confidence in stability are the goals for the future,' however instructing solicitors would submit that the extensive evidence taken through a long hearing, was able to provide this quite clearly…..*

Ground 4: *All professionals giving evidence have had the opportunity to interview [the Applicant] for hours relating to the information in the dossier and most had come to independent assessments that risk was manageable in the open estate and that the risk of serious harm was not imminent. Whilst the panel are invited to make their own decision, it is in stark contrast, to the point of irrationality, to the evidence heard on the day of the hearing alongside assessments made.*

44. The solicitors submit that as a result of these points *the* risk assessment undertaken by the parole board is irrational and undermines the ability to consider release and progression to open conditions. Despite the application being for open conditions, the panel must undertake a full risk assessment and consider release as per the terms of the Secretary of States referral. Due to the above points, we would submit that the panel was unable to meet the terms of this referral.

45. The solicitors further submit that the decision goes against the evidence and the cogency of the arguments put forward by all attending on the day.

Representations on behalf of the Secretary of State

46. The Secretary of State did not submit any representations in response to this application.

Documents considered

47. I have considered the following documents for the purpose of this application:

- The dossier provided by the Secretary of State for the Applicant's case, which now runs to page 605 and includes a copy of the panel's decision letter;
- The representations submitted by the Applicant's solicitors in support of this application; and
- An e-mail from PPCS stating that on behalf of the Secretary of State they offer no representations in response to this application.

Discussion

48. I am grateful to the Applicant's solicitors for their clear and concise representations in support of this application for reconsideration. I will deal with their grounds separately.

Ground 1 (Procedural unfairness)

49. I agree that it was unfortunate that Mr A did not have the scores available to him. I have therefore considered carefully whether that fact had any effect on the fairness of the proceedings.

50. Mr A's risk assessment appears to have been consistent. In his assessment report of January 2022, he reached conclusions that there was a moderate risk of general violence and a low risk of sexual violence. He stated that the Applicant's risk would be higher if he were released, but that it would not be imminent unless risk factors combined in circumstances, and that the Applicant would be more likely to commit a further violent offence than a sexual offence. Unsurprisingly this appears to have been his evidence at the hearing. Mr A and the other witnesses agreed that there would be a high risk of serious harm if the Applicant were to re-offend.

51. Almost immediately after reciting Mr A's evidence in its decision the panel stated: '*The panel agrees with the moderate risk of future violent re-offending and moderate risk of future sexual reoffending'.* The panel gave no reason for differing (if it was differing) from Mr A's assessment that the risk of future sexual reoffending was low, and it may be that its reference to a medium risk of such offending was a slip. However that may be, the difference is not significant for present purposes.

52. I am satisfied that, whilst the unavailability of the scorings at the hearing might be regarded as a procedural irregularity, it had no significant effect on the panel's decision and therefore did not amount to procedural unfairness.

Ground 2: procedural unfairness

53. I am much more troubled by this ground. It is a general principle that a prisoner's representative should have an opportunity to see and be able to make representations about any evidence considered by the panel considering his or her client's case. The Applicant's solicitor was not accorded that opportunity: the panel's directions of 24 March 2022 did not invite any representations from her but made it clear that the panel would simply issue a decision on the papers when it had seen Ms B's report. A further point made by the solicitor is that the witnesses should have been given an opportunity to comment on that report.

54. Regrettably I am bound to conclude that the failure to provide the Applicant's

solicitor with the opportunity to make further representations was a significant procedural irregularity. If the solicitor had had that opportunity, she might well have made the reasonable request for a further hearing to be held so that the matters reported by Ms B could be further explored, further evidence could be obtained and the professional witnesses asked to comment on the new evidence. Such a request might well have been granted.

55. I next have to consider, of course, whether this procedural irregularity had a significant effect on the overall fairness of the proceedings. I have considered a number of matters in that connection.

56. First, this was not an open and shut case. There was substantial evidence (including Mr A's professional opinion) to support the solicitor's submission that a recommendation for open conditions would be appropriate.

57. The panel itself seems to have been in some doubt, after hearing all the evidence at the March hearing, as to whether a recommendation for open conditions was appropriate: otherwise it would not have adjourned for further evidence. Although the panel stated in its decision that it had *'come to the firm view that the risks that [the Applicant] represents currently outweigh the benefits arising from a transfer to open conditions',* it had clearly not reached that view when it adjourned for further information after the hearing. There is no evidence that the Applicant's risks had increased between the hearing and the decision.

58. The panel offered no analysis of the risks and benefits which it was required to balance against each other, and it did not point to anything in the new material obtained by Ms B as an explanation for its current firm view. A panel is of course entitled to change its mind on reflection, or to firm up on a previously held view, but this panel's previous uncertainty confirms that this was a difficult and finely balanced case.

59. In those circumstances I cannot be sure that the panel's decision would have been the same if the procedural irregularity had not occurred. It might have been, or it might not. Further representations by the Applicant's solicitor and/or further evidence adduced at her request might have made a difference to the panel's thinking.

60. I must therefore (regretfully and with sympathy for the desire of the panel to conclude this long-delayed review without further delay) conclude that the procedural irregularity did have a significant adverse effect on the fairness of the proceedings and that the complaint of procedural unfairness is therefore made out.

61. I have not found this case to be as easy as **Wylie**, but on balance I have concluded (for the same reasons as in that case) that the panel's decision must be reconsidered on this ground. If I were to allow the panel's decision to stand, the Secretary of State would not have the advice (based on a hearing not flawed by procedural unfairness) to which he is entitled (as is the Applicant).

Grounds 3 and 4

62. In the light of my conclusions on procedural unfairness, I do not need to consider the grounds based on irrationality. Indeed, it would be undesirable and probably inappropriate for me to express any view about them given that, even if they were to succeed, they could not afford any grounds for reconsideration of the panel's decision.

Decision

63. For the above reasons I must grant this application for reconsideration, but only on Ground 2 above and on the basis which I have explained.

Jeremy Roberts
24 May 2022