[2022] PBRA 69

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Application for Reconsideration by Revson

Application

1. This is an application by Revson (the Applicant) for reconsideration of a decision not to direct release dated 29 April 2022, made following an oral hearing on 26 April 2022.

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 Oral Hearing Decision;
   - Reconsideration Representations (undated);and
   - The dossier, which consists of 543 numbered pages, ending with the Decision Letter

Background

4. The Applicant is now 28 years old. She is serving an extended determinate sentence, consisting of a custodial period of 6 years and 8 months, and an extension period of 4 years, imposed on 24 March 2017, when she was 23 years old. Her conditional release date is in March 2023, and her sentence expires in March 2027.

5. The circumstances of the index offences are that the police were called out because she threatened to take her own life. They took her to hospital, where she attacked hospital staff with a razor blade. She later said (in the Pre-Sentence Report) that she had taken an intentional overdose of her medication, and had been drinking alcohol and smoking crack cocaine. She was sentenced for 2 offences of wounding with intent to cause grievous bodily harm, 2 offences of battery and an offence of threatening with an offensive weapon.

6. She has previous convictions dating from when she was 20, for threatening behaviour, wasting police time and assaulting police officers, battery, harassment and possession of a blade.

Request for Reconsideration

7. The application for reconsideration is undated, but was received within the time permitted under Rule 28.

8. The grounds for seeking a reconsideration are lengthy, repetitive and ill-organised, but can be simply summarised. The panel is said to have erred by:

   (1) Proceeding with the final hearing instead of holding a case management hearing and adjourning the Applicant's case for further evidence, including an updated independent Psychological Risk Assessment (PRA);
   (2) Failing to give adequate reasons for this decision;
   (3) Finding that the Applicant's risk could not be managed in the community, when if a deferral had taken place and further evidence adduced a workable Risk Management Plan (RMP) could have been found;
   (4) Finding that the Applicant had not internalised learning or risk reduction without taking into account her learning disability and ASD traits, which would explain her challenging behaviour;
   (5) Failing to take account of the Applicant's traits of autism when conducting the hearing and deciding what weight to place on her evidence;
   (6) Failing to give adequate reasons for disagreeing with the unanimous view of the professional witnesses in favour of release with a robust RMP.

Current parole review

9. This was the first referral of the Applicant's case. On 5 March 2020 the Secretary of State requested the Parole Board to consider release. On 30 July 2020 a Member's Case Assessment decision directed that the Applicant should not be released. That decision was appealed, and on 17 August 2020 a Duty Member directed a face-to-face hearing not before January 2021. The Covid pandemic affected the listing of the case. The oral hearing was listed for 15 July 2021. The hearing was adjourned on 24 June 2021 following the Applicant's legal representative's request for a number of additional assessment/reports. The hearing was listed for 14 December 2021, but again adjourned before the hearing at the representative's request, for further information to be obtained.

10. The hearing was due to take place on Tuesday 26 April 2022. On the afternoon of Monday 25 April 2022 the Applicant's legal representative served a Stakeholder's Response Form (SHRF) asking that the oral hearing be replaced by a case conference. She wanted to challenge the validity of a Council Care Act Assessment dated 27 January 2022, that is, 3 months earlier, and take counsel's opinion on it; she wanted the author of the report to attend as a witness; she stated that the independent psychologist had been unable to complete her addendum PRA as the RMP had not been updated.

11. The panel considered the SHRF and decided to continue with the hearing, seeking clarification from the witnesses where necessary. The panel stated that if it was both necessary and fair to the Applicant to adjourn for an updated Care Act

Assessment they would do so. Should a further hearing be necessary the report author could becalled at that stage.

12. The panel, consisting of two independent members of the Board and a psychologist member, held the face-to-face hearing on 26 April 2022. It considered the dossier and heard evidence from the Prison Offender Manager (POM), the Community Offender Manager (COM), the prison psychologist, an independent psychologist and an independent social worker.

13. A solicitor represented the Applicant throughout the hearing, and made oral submissions at the end. The Secretary of State was not represented and made no written submissions.

14. It should be noted that the independent social worker's Care Needs Plan is dated 29 September 2021. It recommends that the Applicant met the criteria for funded care, and should be provided with supported housing with 16.5 hours per week support. The Local Authority's Social Care Needs Assessment is, as mentioned, dated 27 January 2022, and found that the Applicant did not meet the criteria to have care funded by the Local Authority.

The Relevant Law

15. The panel correctly sets out in its decision letter the test for release.

Parole Board Rules 2019

16. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).

Irrationality

17. 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."

18. 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.

19. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

20. More recently, in **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with respect to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied."*

Procedural unfairness

21. 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 focuses on the actual decision.

22. 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.

23. 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).

24. 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

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."

The reply on behalf of the Secretary of State

26. The Secretary of State has indicated he does not wish to make any response to this application.

Discussion

27. The panel cannot be criticised for continuing with the hearing despite the application contained in the SHRF served the afternoon before. Apart from anything else, the SHRF system provides for the Secretary of State to have the opportunity to make his own representations on the subject-matter of the SHRF, which was impossible on the timing of this SHRF. There is no acceptable explanation in the SHRF or elsewhere for the lateness of the application. The SHRF concludes with the legal representative saying simply *"Apologies for this being late in the day – I have only been able to discuss this with [the Applicant] this morning."*

28. It was, however, incumbent on the panel to keep the question of adjournment under review during and at the end of the hearing. The panel considered the legal representative's request in her closing submissions to adjourn for an updated RMP (Decision Letter 4.11), and in particular the timetable for such a plan to be considered and prepared. What would be required was a challenge to the Local Authority's Care Act Assessment (this was the evidence of the independent social worker). The options were: getting another assessor to interview the Applicant; progressing with a Judicial Review; or by a Local Government Ombudsman following a complaint. At a minimum, the evidence was, an adjournment of 3 months would be required for the assessment process and, if the Applicant was found to be eligible for a care package, a tender process would be followed with providers. None of the professionals had been able to identify a potential care/accommodation provider in the relevant area. The panel concluded that *"There would clearly be a further prolonged delay required for the Parole review to enable all these aspects to be explored."*

29. That conclusion was evidence-based, and fully explained. It provides a proper and reasonable basis for the panel to refuse an adjournment, the outcome of which was in any event entirely speculative.

30. The panel went on to say *"The management of [the Applicant's] risk in the community would be wholly reliant on an extremely robust risk management plan, and this option was not available to the panel."* If the panel refused the application for the adjournment, as it did, this was an unavoidable conclusion, consistent with the views of all the professional witnesses.

31. I cannot therefore find that the complaints I have numbered (1), (2) and (3) have been made out. As to complaint (6), the panel found that there was no sufficiently robust Risk Management Plan in existence, which all the witnesses agreed would be a pre-requisite for release.

32. The panel was fully alert to the Applicant's difficulties. She was represented throughout, and no doubt if her legal representative, who was with her at all times, had thought she needed, for example, more breaks or was otherwise disadvantaged in the hearing she would have said so. In any event, the reason for the decision was the absence of a sufficiently robust RMP, and the Applicant's evidence did not bear on that issue.

33. I do not find any of the complaints made out. The panel's decision not to direct release was not irrational, nor was there any element of procedural unfairness as defined above.

Decision

34. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly I refuse the application for reconsideration.

Patrick Thomas
31 May 2022