[2023] PBRA 12

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Application for Reconsideration by Clark

Application

1. This is an application by Clark (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 30 November 2022 not to direct his 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. This is an eligible case, and the application was made in time.

3. I have considered the application on the papers. These are the dossier (which contains the decision) and the application for reconsideration. I have also listened to the audio recording of the hearing and seen various items of correspondence between the Parole Board and the parties prior to the hearing. I have also seen the Member Case Assessment (MCA) dated 1 March 2022 which had not been paginated into the dossier.

4. There was clearly a technical issue with the recording, in that none of the panel chair's dialogue had been captured, although all other participants in the hearing were clearly audible. The audio recording system currently used by the Parole Board requires the panel chair to switch on the recording of their microphone manually before recording begins, and I suspect that either the panel chair did not do so or there was some other issue. While this frustratingly means I have been unable to hear the words of the panel chair (which are material to one of the grounds pleaded), I am satisfied that I have been able to piece together much of what happened from the context and the words spoken by others and I therefore have had no need to make further enquiry of the panel chair (for instance, to seek a copy of any contemporaneous notes).

Background

5. The Applicant received an extended sentence on 15 June 2018 following conviction for wounding with intent to do grievous bodily harm. The custodial period was set at six years and eight months, with a five-year extension period. His parole eligibility date passed on 10 June 2022. His conditional release date falls in August 2024 and his sentence expiry date falls in August 2029.

6. The Applicant was 30 years old at the time of sentencing and is now 35 years old. This is his first parole review.

Request for Reconsideration

7. The application for reconsideration is dated 13 December 2022 and has been drafted by solicitors acting for the Applicant.

8. It submits that the decision was procedurally unfair as:

    a) The panel refused to adjourn the case for a full risk management plan;
    b) The Applicant was unable to challenge evidence; and
    c) The Applicant was prevented from properly putting his case by the panel chair (who was also in error regarding oral evidence given during the hearing.)

9. It also submits that the decision was irrational.

10. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No submissions were made regarding error of law.

Current Parole Review

11. The Applicant's case was referred to the Parole Board by the Secretary of State in September 2021 to consider whether or not it would be appropriate to direct his release.

12. On 1 March 2022, the case was directed to an oral hearing. Directions and panel logistics were set accordingly.

13. The case was listed for an oral hearing on 29 November 2022.

14. On 2 November 2022, the Public Protection Casework Section (PPCS) contacted the Prison Offender Manager (POM) and Community Offender Manager (COM) on record to chase directed reports. The Applicant's former Prison Offender Manager (POM) then advised PPCS by email that she was no longer the Applicant's POM. The new POM then asked for clarification of the date of the hearing and the deadline for her report. PPCS confirmed the date and asked the Parole Board to issue a timetable.

15. Internal Parole Board correspondence of 4 November 2022 shows that there was no panel chair allocated at that time.

16. On 11 November 2022, the Applicant's legal representative contacted the Parole Board and PPCS, noting that he had heard from "*the probation officer in this case"* about emails which caused her concern. He not been made aware of the issue of a lack of panel chair and sought clarification of the situation as well as an explanation of why he had not been made aware of the difficulty.

17. On 15 November 2022, the Parole Board replied, noting that there was still no allocated panel chair and that if a chair could not be found then the hearing would be administratively cancelled. The reply did not engage with the legal representation's request for an explanation of why he only discovered there was an issue via the Probation Service.

18. Also on 15 November 2022, PPCS contacted the (new) POM and COM, repeating the directions for reports and asking for a "*response BY RETURN*". The POM replied noting that the POM and COM had only recently been made aware that the reports were overdue. The POM committed to completing her report by 22 November 2022. The COM replied to say that she had not received any requests for reports or unavailability dates, and also had some annual leave booked prior to the hearing so would not be able to provide a report beforehand.

19. On 22 November 2022, the Parole Board advised the parties that the case had been assigned a panel chair and would be going ahead. Panel Chair Directions (PCDs) were then issued by the panel chair which made no changes of substance to the hearing set up.

20. Also on 22 November 2022, the POM forwarded the chain of correspondence between PPCS and the POM and COM to the Parole Board noting:

> *"[The COM report] is a significant piece of work for her to do in such a short amount of time. I want it to be made clear to the Parole Board that the lack of knowledge and potentially reports is due to the lack of communication from PPCS and not our fault. I can get my report done by the end of this week but again this will be lacking in knowledge".*

21. A timetable and joining instructions were issued on 25 November 2022.

22. The case proceeded to an oral hearing on 29 November 2022, before a three-member panel consisting of two independent members and a psychologist specialist member. It was held remotely by video conference. The Applicant was legally represented throughout the oral hearing. Evidence was taken from the Applicant, the POM, the COM, and a prison forensic psychologist.

23. The decision notes as follows:

> *"Neither the prison nor the community offender managers were provided with the usual period of notice that the hearing was to take place, in consequence they did not have as long as would usually be the case to prepare their reports. The report from the community offender manager lacked a detailed risk management plan, in particular an identified release address and whether he would be required to reside initially in approved premises. The panel told [the Applicant's] legal representative (who in any event was not applying for an adjournment), that if, after considering the evidence, the panel was satisfied that subject to a robust risk management plan it would direct release, it would adjourn with a direction for a risk management plan and would then initially consider the case on the papers and either finalise the decision or resume the oral hearing. [The Applicant's] legal representative agreed that this was the best way to proceed."*

24. The panel did not direct the Applicant's release, concluding that the Applicant had core risk factors outstanding which needed to be addressed in custody, and, as such, he could not be safely managed in the community, even with the most robust risk management plan.

The Relevant Law

25. 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.

26. The decision incorrectly states the risk period under consideration as approximately seven years. The Applicant is serving an extended sentence and, following **R (Secretary of State for Justice) v Parole Board of England and Wales [2022] EWHC 1282 (Admin) (Johnson)** risk should be considered over an indefinite period (at para. 29):

> *"To say that risk after the expiry of the custodial term is irrelevant to the Board's consideration of that exercise ignores the fact that the statutory test has no temporal element."*

Parole Board Rules 2019

27. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

28. 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)).

29. 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

30. 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."

31. 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.

32. 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

33. 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.

34. 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.

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

The reply on behalf of the Secretary of State

36. The Secretary of State (the Respondent) has submitted no representations in response to this application.

Discussion

37. First, as noted above, there is a clear error of law in the decision, in that the panel has considered risk over a finite, rather than an indefinite term. However, there is no error of law pleaded in this application. Moreover, as the panel did not direct release on the basis that the Applicant's risk was not manageable over a seven-year time period, it is unlikely that it would have reached a different decision when considering risk over an indefinite period of time.

Ground (a) – refusal to adjourn

38. It is first submitted that the panel "*refused to adjourn the case"* so that the COM could prepare a full risk management plan.

39. The Applicant's legal representative was content to proceed on the basis set out in the decision, knowing the limitations of the COM report. He agreed with the panel's view that if it was satisfied that the Applicant was releasable then it would adjourn for a full risk management plan. In closing submissions, having heard all evidence, he reminded the panel that, as the Applicant was seeking release, it would benefit from a full risk management plan, so release could be considered "properly". He submitted that if the panel was looking to consider all options, then it could adjourn to allow the COM four weeks to flesh out the plan but "*obviously if the panel are saying no, then that's a matter for them*".

40. The panel decided that the Applicant had core risk reduction work outstanding and therefore chose not to adjourn for a more detailed risk management plan. This was an approach agreed by the Applicant's legal representative from the outset and, at the end of the hearing, no application for an adjournment was made: in fact, the matter was explicitly left to the panel's discretion. A panel cannot be said to refuse something for which it was never asked.

41. This ground therefore fails.

Ground (b) – CCTV evidence

42. The next submission is concerned with CCTV evidence relating to an incident which took place on 5 September 2022. The panel was particularly concerned about the incident in which it is said that he was observed on CCTV assaulting another prisoner.

43. It is submitted that it was procedurally unfair for the panel to have relied on the POM's interpretation of what she gathered officers would have believed from watching the CCTV footage, and the panel should have adjourned for the footage to be made available so it could have formed its own view, rather than making a "*lousy risk assessment"* in which it found the Applicant's version of events as being less plausible than the officers' view.

44. The decision notes that the POM told the panel that several officers had viewed the footage and were satisfied that the Applicant had assaulted another prisoner. The Applicant maintained he was play fighting with a friend.

45. Shortly after the incident, the Applicant was assaulted by another prisoner and suffered a concussion. The Applicant said the two incidents were unrelated and the assault on him was a case of mistaken identity.

46. In oral evidence, the POM stated that different officers had viewed the CCTV and said it was not a play fight. She noted multiple accounts and concluded that "*from what they said, this was an assault perpetrated by [the Applicant]".* The Applicant explained that the other prisoner has told officers that they were "*messing about*" on the wing and they were still friends.

47. The Applicant said he pleaded guilty at adjudication and received 14 days' loss of privileges suspended. He regained his enhanced status and employment promptly. The decision notes this and comments that it "*may indicate the seriousness with which the establishment viewed his behaviour".* It is not clear whether the panel considered that the establishment viewed the matter seriously or lightly.

48. In oral evidence, it was put to the Applicant that play fighting was still violent. He said that he "*held [his] hand up to that"*.

49. It is submitted that is was procedurally unfair for the panel to use hearsay evidence from unknown officers without the ability to challenge the evidence and then use it to justify a potential increase in risk of harm or a lack of using relevant skills.

50. The panel decided that the Applicant's version of events was less plausible than that of officers from whom it had not heard, having not seen the CCTV evidence, and based upon the POM's understanding of what it was those officers thought they had seen, together with the subsequent assault on the Applicant. The Applicant pleaded guilty at adjudication, because physical force must plainly have been used, and he openly admitted to play fighting in his evidence.

51. The adjudication paperwork is not contained within the dossier.

52. Rule 24(6) provides that a panel may receive in evidence any information whether or not it would be admissible in a court of law. This would include hearsay evidence.

53. However, in **Osborn v Parole Board [2013] UKSC 61**, Lord Reed noted (at para. 2(vii)) that the Parole Board "*should not be predisposed to favour the official account of events, or official assessments of risk, over the case advanced by the prisoner*". While Osborn was concerned with the circumstances in which the Parole Board should direct an oral hearing, this general principle of fairness must apply to evidence within an oral hearing just as equally as it does to a decision made on the papers.

54. I cannot say whether the panel was predisposed to favour the official account of events. However, it was prepared to give considerable weight to the official account of events. While actual fighting and play fighting both involve the use of violence, and I accept that it may be possible for a play fight to escalate into something more malign, there remains a significant difference in levels of risk of future violence. On balance, I find that the Applicant was unfairly disadvantaged by the absence of the primary CCTV evidence and/or witness statements or oral evidence from the officers present at the time. I find that the panel had insufficient first-hand evidence before it safely to conclude fairly that the Applicant was, in fact, involved in a violent incident that went directly to his risk.

55. This amounts to procedural unfairness, and this ground succeeds.

Grounds (c) and (d)

56. Having already found procedural unfairness sufficient for the application to be granted, I do not have to consider the remaining grounds in detail (or, indeed, at all). However, for completeness, even if ground (b) had not been made out, I also find procedural unfairness on the ground (c) on the basis that the Applicant was prevented by the panel chair from putting his case properly during his legal representative's questioning of the prison psychologist. I also find that the panel chair's assertions regarding oral evidence given earlier in the hearing relating to the Applicant's alcohol use were incorrect and any conclusions founded on this would be unsound.

57. I do not find that the panel's decision was so illogical that any other panel would have decided otherwise, so there is no irrationality and ground (d) fails accordingly.

Decision

58. I find the decision not to release the Applicant to be 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 at an oral hearing.

Stefan Fafinski
14 January 2023