[2023] PBRA 181

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Application for Reconsideration by Williams

Application

1. This is an application by Williams (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated the 3 September 2023 not to release the Applicant or make a recommendation for open conditions following an oral hearing on 27 April 2023.

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. These are the application for reconsideration, the dossier and the decision dated 3 September 2023.

Background

4. On 20 January 2006 when the Applicant was 23 years old, he was sentenced to an indeterminate sentence of imprisonment for public protection (IPP) for the offence of robbery. His tariff was set at 3 years and expired on the 20 September 2009. The Applicant was initially released by the Parole Board in June 2018 but recalled back into prison in August 2018 following several breaches of his licence and also due to allegations of domestic violence and rape. These were subsequently discontinued.

5. The Applicant's case was previously before the Parole Board in May 2020 at which time his review was concluded on the papers at this behest. The panel in 2020 did not direct the Applicant's release, nor did it recommend a progressive move to open conditions. During the current review, the Applicant's case has experienced significant delays, and been subject to several adjournments. A substantive hearing took place in November 2021. This was adjourned part heard. Further hearings were listed in July 2022, December 2022 and at a final hearing in April 2023. On that date the Applicant's case was further adjourned for updated enquiries linked to the proposed risk management plan. It is reported in the decision that "*throughout the review the panel's task has been complicated by the late or non-fulfilment of its directions".*

Request for Reconsideration

6. The application for reconsideration dated 20 September 2023 was provided via email on the 26 September 2023. It consists of typed submissions from Solicitors acting on behalf of the Applicant.

7. The grounds for seeking a reconsideration are that the decision is irrational, procedurally unfair, and that it contains errors in law.

8. The Applicant submits that the panel's insistence that certain elements of the proposed risk management plan (RMP) should be precisely defined before a release decision can be made, "*set an impossible set of parameters to be fulfilled before the Applicant could be granted re-release so long as the Local Authority maintain their stance that they will not assess the Applicant to confirm the extent of s.117 aftercare and move on accommodation until he is released and back in the community*". Those instructed argue that this is both procedurally unfair and also irrational.

9. The Applicant further submits the panel erred in law in that:

    a. The oral hearing (OH) decision does not properly establish an evidential link that potential instability on moving from an approved premises (AP) placement to alternative accommodation would lead to an elevation of the risk of serious harm to a level which could not be safely managed in the community.
    b. The OH decision does not expressly state that after moving on from an AP, the Applicant would then commit offences which would cause serious harm to the public.
    c. The decision does not establish an evidential link between a lack of life skills and unacceptable high risk of serious harm in the Applicant's case.
    d. The decision fails to properly establish that the unproven allegations lead to the conclusion that the risk of serious harm to the public is at a level where it is necessary for the Applicant to remain in custody.
    e. The panel misapplied the legal test for release.

Current parole review

10. The Applicant's case was considered at the Member Case Assessment (MCA) stage on 26 April 2021 at which time it was sent to an oral hearing.

11. A hearing date was set for the 23 November 2021. On that occasion evidence was taken but the case was adjourned for more information.

12. The Applicant's hearing was relisted for the 18 May 2022. Prior to that hearing a request for adjournment was made by those instructed due to some adverse developments in the prison and for one to one work with the Prison Offender Manager (POM) to conclude.

13. The case was relisted on 26 July 2022, however, a day before that hearing a letter was disclosed to the panel which contained new and relevant information to its risk assessment. The hearing was convened but later adjourned for updated reports, including a psychological risk assessment.

14. The Applicant's case was again listed on the 2 December 2022, but was again adjourned for further information. A new hearing date was set of 27 April 2023.

15. The Applicant's case was heard at a final hearing on the 27 April 2023, but again adjourned for further information in relation to the proposed RMP, specifically what support the Applicant would receive with his mental health under s.117 of the Mental Health Act and for further details about move-on accommodation. This information was duly provided by the Community Offender Manager (COM) in a report dated 10 August 2023.

16. Closing legal submissions were provided after the hearing dates on 6 June 2023 and 20 August 2023.

17. A decision was made on 3 September 2023.

18. The Applicant is now 41 years old.

The Relevant Law

19. The panel correctly sets out in its decision letter dated 3 September 2023 the test for release.

Parole Board Rules 2019 (as amended)

20. 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)).

21. 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)).

22. 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**.

Procedural unfairness

23. 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.

24. 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.

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

Irrationality

26. 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."

27. 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.

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

The reply on behalf of the Secretary of State (the Respondent)

29. The Respondent offered no representations in response to the Applicant's reconsideration application.

Discussion

30. The Applicant's oral hearing took place on the 27 April over videolink.

31. I will deal first with the Applicant's submission with regards to irrationality. Those instructed on behalf of the Applicant argue that the panel's insistence that elements of the RMP, such as the s.117 aftercare provisions and move-on accommodation, should be precisely defined before a release decision could be made, was irrational and unfair in that it *'set an impossible set of parameters'* for the Applicant to fulfil. Having reviewed all of the evidence before me I do not accept this proposition. It is clear from the panel's decision that the panel was exercised by the Applicant's behaviour when last in the community and there is evidence within the papers to suggest that his behaviour deteriorated significantly on licence when he moved to his own accommodation. This is set out in the decision of the previous panel (2020) and adopted in the current decision (paragraph 1.4). The panel was also concerned about episodes of ongoing instability in custody since recall (paragraph 2.5). Furthermore, the panel placed weight on the views of the psychologist report writers, both of whom highlighted the need for ongoing support and monitoring, as set out at paragraph 2.12 of the decision: *"[The prison psychologist] and [prisoner appointed psychologist] underlined the importance of continuing psychological, mental health and other support, particularly after his move-on from Approved Premises; dislocation in accommodation could be an important destabilising factor. They noted that Section 117 aftercare (for which it has now been established that [the Applicant] qualifies) could make a significant difference"*. Given the Applicant's assessed risk scores, including his high risk of causing serious harm to the public and known adults in the community, the circumstances of his recall, and his instability in custody at times during the review period, it seems to me that the panel would have been careless in its own duty had it not placed due weight on the proposed RMP, including the s.117 provisions and move-on accommodation. I note that throughout the latter part of the Applicant's parole review the panel consistently highlighted its ongoing concerns around the sufficiency of the proposed RMP in adjournment notes and panel chair directions, and the panel went to significant effort to try and remedy the deficits within the proposed RMP, by seeking further information. Ultimately, following the submission of the updated Post Tariff Parole Assessment Report in August 2023, it seems to me that at that time, based on all the information before it, the panel was simply not satisfied that that final RMP was sufficient to manage the Applicant's risk, as it is tasked to do. It is clear that the panel felt the final RMP, especially in relation to move-on accommodation and s.117 provision was simply too uncertain. Indeed, the panel state in terms, *"in these circumstances the panel is unable to conclude that a robust plan is in place that will allow the Applicant to be safely managed in the community".* In my opinion the panel was entitled to make such a finding when completing its risk assessment and it should not be criticised for relying on the evidence before it at that time. Every follow-on plan will need some fine tuning which can be done only after release; it is a question of degree. Given the dearth of information about what was likely or unlikely to happen once the Applicant left the designated accommodation, the panel was entitled to say that the plan was underdeveloped and to rely on that as a significant factor in the decision making process.

32. Accordingly, I do not accept that the panel's decision could be considered irrational.

33. Turning now to the issue of procedural unfairness, the grounds for reconsideration are the same as those set out in paragraph 8 above and so I do not intend to repeat them here. However, those instructed submit that the panel's insistence in relation to certain elements of the RMP *'set impossible parameters'* and left the Applicant without *'the remotest sense he was or could be afforded a fair hearing'*. After considering all of the information before me, I do not accept this submission. Whilst it was unfortunate that a more detailed RMP could not be provided, I find that that the panel went to significant lengths to try to remedy this situation and acted fairly at all times. Following the substantive hearing in April 2023, the Applicant's case was adjourned for an updated RMP to be provided and detailed instructions were set by way of comprehensive panel chair directions (12 June 2023). At that time the panel was clearly exercised by the lack of certainty around the RMP, but rather than simply concluded the case on the papers, as it could have done, the panel adjourned the case for further updated information. I do not consider that the panel could have done more to advance the Applicant's case in this regard.

34. As noted, whilst it is unfortunate that the Probation Service could not provide all of the information sought by the panel in the panel chair directions of 8 June 2023, I do not consider that this automatically renders the hearing to have been procedurally unfair. When reaching its decision the panel had to consider the Applicant's case on the information before it, such as it was. The panel had made it clear that it was concerned about the lack of clarity in relation to move-on accommodation and the scope of s.117 support available. It stated, in terms, that this information would form an important part of its risk assessment, which would include a full assessment of the proposed RMP. When the Probation Service was unable to provide all of the information directed, the panel had to conclude its review based on the information available to it at that time. In the instant case, the panel did not consider that the Applicant could be safely released without greater certainty around how his risk would be managed beyond his AP placement. In my view, this is a fair approach based on the Applicant's assessed risk scores, the circumstances of his recall and evidence of ongoing need, in relation to his mental health and emotional management, as highlighted by two professional psychologist witnesses. Whilst it is unfortunate that the s.117 assessments could not take place prior to release, this is not the fault of the Board, nor within its power to change. Furthermore, had the Applicant had a different risk profile it is possible that the panel might have been able to countenance less certainty in relation to the proposed RMP. As such I do not find that the panel's insistent in this regard could properly be described as being procedurally unfair. Further, I do not consider that one can rightly accuse the panel of setting *'impossible parameters'*. If the Applicant is able to access further support in custody around his mental health issues, engage with the In-Reach Team, or complete further psychologically informed work, it may be that he is able to evidence a reduction in risk what would render such issue less manifest in the future. The decision made by the panel was based on the Applicant's current circumstances, which may be subject to change over time. In summary I do not find that the panel set *'impossible parameters'* or any evidence of procedural unfairness.

35. The final ground for reconsideration cited by those instructed on the Applicant's behalf is that the decision contains errors in law as set out in paragraph 9 above.

36. I have very carefully considered all of the submissions above, but again I am not persuaded by the arguments submitted. Firstly, it is evident from the current panel's decision that it adopted the previous panel's findings in relation to the circumstances of the Applicant's recall, which clearly evidences a deterioration in the Applicant's behaviour following him moving out of the approved premise (see paragraph 1.4). It states in terms "*you moved to your own accommodation, and within a week there were ongoing concerns about your behaviour".* This suggests that when last released the Applicant's risk did indeed increase when relocated to move-on accommodation and, in my view, the current panel is entitled to place weight on this evidence when considering the impact of a similar move in the future, especially when ongoing instability and poor emotional management are still being identified as key risk triggers.

37. It is right to say that neither the 2020 panel, nor the current panel, made any findings of fact in relation to the recall rape allegation. Indeed, the rape allegation is hardly mentioned in the 2023 decision at all. As such I find it reasonable to assume that the current panel placed limited, if any, weight on this allegation when completing its own risk assessment. I do not accept the panel erred in law because it failed to make such a finding, in such circumstances. Furthermore, it should be noted that the Applicant was already assessed as posing a high risk of serious harm to the public even before the rape allegation.

38. In my view, it is clear from the panel's conclusion at paragraph 4 of the decision letter that it's decision not to release the Applicant was linked to multiple concerns, including his unstable behaviour in prison, the uncertainty around the proposed RMP, and the Applicant's identified outstanding treatment needs, especially in relation to his mental health and emotional management. At paragraph 4.1 the panel states in terms "*his history shows how quickly his emotional state can deteriorate and his evidence to the panel demonstrated that he is prone to reacting emotionally and impulsively to new ideas or things he does not like. This has to be set in the context of his previous use of violence, the difficulties he has experienced in managing personal, professional, and intimate relationships, and his neediness and tendency to blame others for his own misfortunes"*.

39. For these reasons I do not accept that the panel's decision contains errors in law. The decision provided is comprehensive and robust in my opinion and provides a detailed analysis of the evidence considered, the weight placed upon it, and its own findings.

Decision

40. Refusal – For the reasons I have given, I do not consider that the decision was irrational, procedurally unfair or that the panel erred in law and accordingly the application for reconsideration is refused.

Heidi Leavesley
16 October 2023