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[2021] PBRA 142

Application for Reconsideration by Woolger

Application

1. This is an application by Woolger (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 6 September 2021 not to direct his release.

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 decision letter, the dossier and the application for reconsideration.

Background

4. The Applicant is serving two concurrent indeterminate sentences:

    a) Life imprisonment imposed on 6 November 1997 following conviction for rape, false imprisonment, threats to kill and four counts of indecent assault on a female aged 16 or over; and

    b) Imprisonment for public protection (IPP) imposed on 3 March 2008 following conviction for affray and committing an offence (affray) with intent to commit a sexual offence.

5. The minimum terms for both indeterminate sentences have now passed.

6. The Applicant was aged 39 when his life sentence was imposed and 50 at the time of the IPP. He is now 63 years old.

Request for Reconsideration

7. The application for reconsideration is dated 27 September 2021 and has been submitted by solicitors acting for the Applicant.

8. The grounds for reconsideration are indistinct, but seem to be:

    a) The oral hearing panel was not "*quorate*", and a three-member panel should have heard the case;

b) The panel should have adjourned for further development of the risk management plan; and

c) The risk of serious harm was not imminent and therefore the Applicant met the test for release.

9. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

10. The Applicant's case was referred to the Parole Board by the Secretary of State in November 2017 to consider whether or not it would be appropriate to direct his release. If release was not directed, the Parole Board was invited to advise the Secretary of State whether the Applicant continued to be suitable for open conditions. The Applicant was in open conditions at the time.

11. The case has a lengthy procedural history. In short:

a) 9 February 2018: directed to oral hearing;
b) 30 March 2018: deferred (on the application of the Applicant's legal representative) for the opportunity for him to undertake periods of overnight temporary release;
c) 18 July 2018: the Applicant was returned to closed conditions;
d) 14 August 2018: directed to oral hearing (in closed establishment);
e) 31 August 2018: adjourned (on the application of the Applicant's legal representative) for independent and prison psychological risk assessments;
f) 2 May 2019: directed to oral hearing;
g) 13 June 2019: adjourned for further psychological work; and
h) 20 July 2021: directed to oral hearing.

12. The case proceeded to an oral hearing on 17 August 2021. This was held face-to-face before a two-member panel, including a psychologist specialist member. The panel hear evidence from the Applicant, his Prison Offender Manager (POM) and Community Offender Manager (COM). The Applicant was legally represented throughout. The POM and COM recommended the Applicant's release. The panel did not direct release (but did recommend a transfer to open conditions).

The Relevant Law

13. The panel correctly sets out the test for release in its decision letter dated 6 September 2021.

Parole Board Rules 2019

14. 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)).

15. 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

16. 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.

17. 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.

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

Irrationality

19. 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."*

20. 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.

21. 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

22. The Secretary of State submitted representations on 6 October 2021 in response to the point made in the application that, due to the COVID-19 pandemic, transfers to open establishments are *"suspended"* and prisoners are *"no longer able to access"*

periods of temporary release from open conditions. The Secretary of State advised that transfers to open conditions from the Applicant's current establishments are taking place (although subject to a ten-month wait) and that the availability of temporary release from open conditions is not linked to COVID-19.

Discussion

Procedural unfairness: composition of the panel

23. It is submitted that the two-member panel was 'not quorate' and a three-member panel should have heard the case. It notes the timetable issued prior to the oral hearing named three panel members (including a psychologist specialist member and a judicial member) but the judicial member was delayed on the day of the hearing and the hearing proceeded with the two remaining panel members.

24. In support of this, reference is made to the Parole Board Oral Hearing Guide (the "Guide") as follows:

"The Rules permit the Board to proceed with 1-3 members on panels. At present, all ISP review and recall cases are normally listed for 3-member panels.

Sometimes a member is unavoidably detained or ill and cannot attend. The remaining members should immediately discuss and decide whether they are satisfied that the hearing can go ahead.

The following should be borne in mind:

(a) If the appointed chair is missing and one of the remaining members is a qualified chair the case may go ahead provided the members are satisfied they can determine the issues;
(b) Where the missing member is a 'specialist', for example a psychiatrist or psychologist, and the crucial issues turn on that member's expertise the presumption will be that the hearing will not go ahead. July 2014 (Updated August 2018);
(c) Where a hearing goes ahead with two members, and following the hearing they are unable to reach agreement on the decision, then the entire review must be deferred and the Board will re-list the case for a fresh panel".

25. First, the Guide states the Parole Board Rules 2019 permit the board to proceed with 1-3 members on panels. In fact, rule 5 (which deals with the appointment of panels) provides the Board must appoint "*one or more*" members to constitute a panel. There is no theoretical maximum, although in practice panels generally have no more than three members.

26. Next, the Guide states all indeterminate sentence prisoner cases are normally listed for three member panels. This case was no exception.

27. With regard to the listed matters a panel should bear in mind if a panellist is unavoidably detained:

a) The appointed chair was not missing;

b) The missing member was not a specialist (and the listed psychologist specialist member was present); and
c) The two-member panel was able to reach agreement on the decision.

28. There is nothing in the Rules or Guide which suggests that the panel was not properly formed or there was any breach in procedure in its formation.

29. Even if there had been, the application notes it was "*agreed by all that the oral hearing should go ahead"* and this fatally undermines this submission. No objection to the fairness of the panel's composition was raised by the Applicant or his legal representative on the day: the same legal representative who drafted this application for reconsideration. While any objection would have inevitably led to further delay and given the Applicant a difficult choice to make, he nonetheless chose to proceed with a two-member panel which he must have thought was fair at the time. It is not open to him to cry foul later if the panel did not produce the outcome he wanted.

30. There is no procedural unfairness relating to the composition of the panel and this ground fails.

Irrationality/procedural unfairness: decision not to adjourn

31. The panel noted one-to-one psychological work had been identified and the psychologist who recommended this work was clear it was core risk-reduction work. The Applicant was not willing to engage with this work. His POM and COM supported release in the hope the Applicant would be compliant with his licence and directed psychological work in the community. The panel did not share their view.

32. It is submitted that it was both irrational and procedurally unfair for the panel to have concluded the case rather than adjourning for this further one-to-one psychological work to be completed (and the risk management plan to be strengthened).

33. 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 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. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and its stated reasons should be sufficient to justify its conclusions (**R (Wells) v Parole Board [2019] EWHC 2710**).

34. The Applicant's COM told the panel past evidence suggested the Applicant would be unlikely to engage with the identified psychological work, either in custody or in the community. An adjournment may have been indicated if the Applicant had shown willingness to engage and/or arrangements has been made for the delivery of the identified work in a specific timeframe, but this was not the case here.

35. Moreover, the panel's decision makes it plain that the lack of psychological intervention was not the only reasons it was not as optimistic about the Applicant's prospects of success as his POM and COM. It was also not persuaded by the Applicant's lack of responsibility-taking, his working relationships with professionals, the extent of his own internal controls to manage his behaviour, his likely compliance with his licence or his openness in supervision. The clearly articulated views of the panel demonstrate the psychological work was not its sole concern. The panel did not fall short in its common law duty to give reasons for its decision neither is its decision outrageous in the sense expressed above.

36. It is open to the panel to conclude the review if, in its view, the Applicant does not meet the test for release and an adjournment is not appropriate. I do not find any procedural unfairness in concluding the review at this point, nor any irrationality on the panel's part in deciding to do so.

37. It was also submitted that it was irrational for the panel to conclude that progression to open conditions would be a suitable alternative to release. It was argued that a negative decision would create an excessive and unjustified wait for the Applicant to re-apply for release, particularly in light of the COVID-19 pandemic. The Secretary of State responded to say that the availability of prison transfers to open conditions and opportunities for temporary release from open condition was not hindered by COVID-19.

38. Regardless, the test for release is one of public protection. Provided the panel's decision has been made fairly and rationally, that is the end of its involvement in the matter. If the panel concluded that the test for release was not met but recommended open conditions, then what happens next becomes a matter for the Secretary of State. As I have already found, the panel did not act irrationally or procedurally unfairly in concluding the review when it did and thus any argument regarding its impact on the Applicant must fall away.

Irrationality: Test for release

39. It is submitted it was evidenced that the risk of serious harm was not imminent and therefore the Applicant meets the test for release. As such the decision not to release him was irrational.

40. The decision documents the view of the COM thus: "*[He] did not consider [the Applicant's] risk to be imminent so thought there would be time to engage with [him] and he was hopeful [the Applicant has] have some understanding of the need for disclosure".* This is the only mention of imminence in the decision.

41. The test for release is not simply a matter of imminence. The test for release is whether it is necessary for the protection of the public that the Applicant remains confined, and imminence is but one factor under consideration when the panel turns its mind to answering that question. The panel carefully set out its reasons (which I have already listed) why it formed the conclusion the Applicant did not meet the test for release. It was not irrational for the panel to reach the conclusion it did. This ground also fails.

Decision

42. For the reasons I have given, I do not consider that the decision not to direct the Applicant's release was procedurally unfair or irrational and accordingly the application for reconsideration is refused.

Stefan Fafinski
12 October 2021