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[2023] PBRA 115

Application for Reconsideration by Green

Application

1. This is an application by Green (the Applicant) for reconsideration of a decision of a paper panel (the panel) dated the 22 March 2023 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.

3. I have considered the application on the papers. These are:

   a) The Decision Letter dated the 22 March 2023;
   b) A request for reconsideration from the Applicant's legal representative;
   c) The dossier, numbered to page 299, of which the last documents are representations from the Applicant's legal representative dated the 21 April 2023 seeking an oral hearing following the panel's refusal to direct his release; and
   d) The decision by a Duty Member of the Parole Board dated the 26 May 2023 refusing the Applicant's application for his case to be considered at an oral hearing.

Background

4. The Applicant is now 46 years old. In 2011, when he was 34 years old, he received a life sentence following his conviction for four offences of robbery, two offences of assault with intent to commit a sexual offence and assault occasioning actual bodily harm (the index offences). The Applicant's tariff was set at four years and 304 days. His tariff expired on 10 November 2015. At the time of the index offences, the Applicant had accrued an extensive history of offending.

5. On the 2 September 2022, the Secretary of State referred the Applicant's case to the Parole Board for it to determine whether or not his release could be directed. If not persuaded to direct his release, the Parole Board was asked to advise the Secretary of State on the Applicant's suitability to be transferred to an open prison. This was the fourth referral of the Applicant's case to the Parole Board.

6. The panel considered the Applicant's case at a paper review on 22 March 2023. The Applicant had not submitted any representations either personally or via his legal representative. The panel noted concerns reported about the Applicant's behaviour in custody and his attempts to engage with work to address the identified risk

factors in his case. An alternative, long-term, treatment pathway had since been identified for the Applicant, although the panel noted that he was unwilling to engage with it. The panel determined that the Applicant still needed to complete risk reduction work in custody and did not direct his release. The panel did not recommend that the Applicant be moved to an open prison because of the need for further work to be completed. The panel was not persuaded that the case should be heard at an oral hearing.

7. The panel's paper decision was provisional under the Parole Board Rules. The Applicant could either accept the panel's paper decision or apply, within 28 days of receipt of the Decision Letter, for his case to be heard at an oral hearing. On the 21 April 2023, the Applicant's legal representative applied for the Applicant's case to be considered at an oral hearing.

8. The Applicant argued that he had not had an oral hearing for many years, was significantly past his tariff expiry on his sentence and that he wanted to be released. The Applicant complained that additional relevant information had not been considered by the panel at the time it made its decision not to direct his release. The Applicant suggested that his treatment pathway should be reviewed. The Applicant relied on the principles of **Osborn [2013] UKSC61** in his application for an oral hearing.

9. It was of course open to the Applicant to have made representations to the panel prior to it making its paper decision if he felt that there was material it should consider that was not within the dossier. Although the Applicant was correct in noting that he had not had an oral hearing for some time, his last Parole Board review had been listed at an oral hearing in 2021. On the day before the hearing, the Applicant asked for his case to be concluded on the papers so that he could engage with further treatment in custody.

10. On the 26 May 2023, a Duty Member of the Parole Board considered the Applicant's request for an oral hearing and refused it. The Duty Member noted the Applicant's comments about the proposed treatment pathway in his case but highlighted that he had provided no explanation as to why he was unwilling to follow the proposals or why he would be willing to undertake an alternative pathway referenced in his representations.

11. The refusal meant that the panel's paper decision remained provisional under the Parole Board Rules because it was eligible for reconsideration under Rule 28.

12. An application dated the 5 June 2023 for reconsideration of the panel's decision of the 22 March 2023 was then submitted by the Applicant's legal representative. Having asked for the dates to be checked, I am advised by the Parole Board Secretariat that the application is in good time.

Request for Reconsideration

13. The application for reconsideration is that the panel's decision of the 22 March 2023 was irrational and procedurally unfair, in that:

Procedurally Unfair

a) Significant information was out of date within the dossier or was missing from the dossier.

b) The Head of Psychology at the prison had recommended that a psychological risk assessment be undertaken, and the probation officer and official responsible for the case in custody had agreed with this recommendation. As a result, a full and fair assessment of risk was not undertaken by the panel.

c) The Applicant is post-tariff and required an oral hearing in order to have a fair review and the principles outlined in **Osborn [2013] UKSC61** meant that his case should have been considered at an oral hearing. As the Applicant had not submitted representations to the panel, the need for an oral hearing was more prevalent to ensure that he was able to participate in decisions about his future.

Irrational

d) Information within the dossier was out of date and *'very possibly'* factually inaccurate.

e) The Head of Psychology, the probation officer and the official responsible for the case in custody were of the view that a psychological risk assessment was required.

f) A fair and independent assessment of risk was not undertaken by the panel because additional information was required before the panel could reach any decision.

14. The Applicant also makes submissions about his application to the Duty Member for an oral hearing following the panel's paper decision. The decision of the Duty Member in refusing an oral hearing is not eligible for reconsideration and I have confined my consideration of his submissions to those that relate to the panel's Decision Letter of the 22 March 2023.

The Relevant Law

15. The panel correctly sets out in its decision letter dated the 22 March 2023 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

16. 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.

Parole Board Rules 2019 (as amended)

17. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A).

18. 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)).

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.

Procedural unfairness

22. 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.

23. 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.

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

Other

25. In the cases of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

26. 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.*"

27. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

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

28. In an email of the 15 June 2023, the Respondent confirmed that he had no representations to make.

Discussion

Procedurally Unfair - Grounds a-c

29. The dossier of evidence in this case was prepared by the Respondent. Prior to the panel considering the written evidence, the Applicant had an opportunity to submit his own written representations and/or his own evidence. He did not do so.

30. The Applicant refers to the recommendation that a psychological risk assessment (PRA) be undertaken. In a '*Psychology Case Advice Note'* dated the 12 July 2022

and within the dossier, it was noted that an earlier PRA (27 January 2021) had identified outstanding treatment needs which could be best met by the Applicant's engagement with a specialist unit in the prison. It was this unit that the Applicant had been planning to resume his engagement with when he asked the Parole Board in 2021 to conclude his oral hearing on the papers. The psychology note went on to report that the Applicant had engaged with the unit on 1 September 2021 but had been deselected on 18 November 2021. As a result, a list of alternative treatment pathways, which were also of high intensity, was provided.

31. The Applicant did not consent for referrals to be made to the alternative treatment pathways. Psychological support was offered to the Applicant, including bespoke individualised work (12 sessions) between the 12 April 2022 and the 27 June 2022. The psychology note went on to recommend that a PRA be completed as part of the parole process to evaluate the Applicant's progress following the bespoke work.

32. In a report dated the 17 November 2022 from the official supervising the Applicant in custody (the custody report), it was noted that the bespoke work was not available to the intensive levels needed by the Applicant. The custody report noted that the specialist unit end of placement report (dated the 22 February 2022) had been reviewed, together with a report of the bespoke work with a psychologist (dated the 22 July 2022).

33. In the probation officer's report dated the 21 November 2022, it was noted that the bespoke work was not intended to replace the high level treatment needed in this case. The probation officer had interviewed the Applicant in custody and he had said that the bespoke work was merely '*interactions*' which he considered to be '*abusive, wrong and non-procedural'*. He considered the subsequent psychological report of the 22 July 2022 to be '*based upon lies'* and the probation officer's view was that the Applicant struggled to trust professionals.

34. The Applicant told his probation officer that the proposed high intensity treatment pathways would take five years and he believed this to be punitive. The probation officer indicated that there remained outstanding treatment needs and that there was a treatment plan in place, albeit not one the Applicant welcomed.

35. The panel's Decision Letter fairly records the Applicant's progress in custody. It noted that report writers considered there to be a need for further work to be completed and that there was an identified treatment pathway, although not one the Applicant wished to engage with. It was not for the panel to determine the suitability of a particular course or treatment unit, its focus was on any outstanding risk to be addressed. It determined that there was further work to complete in custody and so it did not direct the Applicant's release.

36. The panel may well have found the report from the specialist unit and the report of the bespoke work helpful. No explanation is offered from the Respondent as to why he didn't include these reports in the dossier. It was open to the panel to adjourn and direct that the reports be produced, however, it did not and it concluded the case. That was a matter for the panel and the absence of the reports was not fatal to its decision and it was not an unfair approach for the panel to conclude the case in the way it did. Although the reports were available, there is little to suggest that they were necessary.

37. It was open to the Applicant to make submissions on the necessity of the material prior to the paper panel concluding his case but he did not do so. Sufficient material was in the dossier detailing his progress on the specialist unit and in the bespoke work. In my view, it was clear, in the panel's mind, that there was a need for further risk reduction work to be completed.

38. Although the psychology note had recommended a PRA be produced, this recommendation was made prior to the Applicant concluding the bespoke work, and prior to his negative view of that work and of the psychologist who completed it with him. I don't agree with the Applicant's submission that his probation officer and the official supervising his case in custody had also recommended a PRA be completed. However, even if that was the case, it was open to the panel to make its own mind up as to whether a PRA was necessary. The absence of any direction for a PRA was not an unfair approach to the case given the wealth of information before the panel.

39. There was nothing procedurally unfair in the panel's approach to this case and it was entitled to conclude the review on the papers based on the available evidence. The evidence before the panel was sufficiently detailed to allow it to undertake its assessment of the case and to complete a full and fair review. The Applicant may be post-tariff, however, this does not mean that an oral hearing must be directed. The panel considered the case on its merits and reached a decision that it could conclude the review on the papers. Much of what the Applicant now seeks to argue are matters that he could have and should have put to the panel prior to it considering his case. The fact that he did not submit any representations was not sufficient, on its own, to indicate to the panel that an oral hearing was necessary.

Irrational – Grounds d-f

40. The Applicant's arguments for irrationality seek to rehearse the arguments put forward for procedural unfairness. There was nothing irrational in the panel's decision in this case. It was open to him to make representations to the panel and he did not do so.

41. The panel approached his case fairly and completed a full assessment of his risk. The fact that the Applicant does not agree with the panel's assessment and seeks to argue an alternative view does not make the decision not to direct his release irrational. He may believe that information in the dossier was missing or was out of date, however, I am satisfied that there was sufficient evidence before the panel to allow it to conclude the case in the way it did.

42. This was on any view a serious and troubling case. Two crucially important issues I must decide are first, whether I am satisfied that the conclusions reached by the panel were justified by the evidence and secondly, whether their conclusions were adequately and sufficiently explained.

43. I am satisfied that the decision not to direct release was fully justified on the totality of the evidence. In a thorough and carefully reasoned decision, which takes fully into account all of the evidence given to the panel, the panel in my judgment

satisfied the public law duty to provide evidence based reasons that adequately and sufficiently explained the conclusions it reached.

Decision

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

Robert McKeon
23 June 2023