[2023] PBRA 69

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Application for Reconsideration by Goldrick

Application

1. This is an application by Goldrick (the Applicant) for reconsideration of a decision of an oral hearing dated 24 March 2023 not to direct 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.
   b) The Application for Reconsideration dated 5 April 2023.
   c) The Dossier, which now runs to 681 numbered pages, the last document being an email from a psychologist added at the hearing.

Background

4. The Applicant is 62 years old. In 2002, when he was 42, he received a sentence of life imprisonment for murder. The tariff was 15 years less time served on remand, expiring on 1 January 2017. He battered and stabbed to death a 64-year-old man in his own home, the probable motive being robbery.

5. The Applicant denied and still denies the murder. He has resisted doing any accredited offending behaviour work, on the ground that to do so would be an admission of guilt. He had a number of previous convictions for 97 offences including robbery, assault occasioning actual bodily harm, possession of drugs, perverting the course of justice and arson. He was in a car accident in 1987 which left him with epilepsy, for which he receives medication, and leg injuries. His epilepsy is relevant as background to the issues in this application.

Request for Reconsideration

6. The application for reconsideration is dated 5 April 2022.

7. The grounds for seeking a reconsideration are as follows:

   A. Procedural unfairness
      1. The oral hearing panel focused entirely on the Applicant's health, asking questions of witnesses outside their area of expertise. The application accepts that the witnesses told the panel they could not answer such questions.

2. The Applicant's legal representative suggested to the panel that they might consider an adjournment to the papers in order to obtain additional medical information from the Health Care Department. The application submits that this parole review should have been adjourned on the papers to enable further information to be provided.

B. Irrationality
   1. The decision reached was outside the range of reasonable decisions and wholly at odds with the evidence given by professional witnesses. Two of the three witnesses supported release, the third did not feel able to make a recommendation.
   2. The panel focused to an extent over and above what was required in relation to the Applicant's health issues.
   3. The panel failed in its duty to test out its own thesis of the professionals, other than in relation to the medical issues, and to explain clearly its reasons for coming to a different view.

Current parole review

8. The Secretary of State referred the Applicant's case to the Parole Board in January 2021, for consideration of release or continued suitability for open conditions. This was the second review. The panel initially convened the hearing by video link in November 2022. It took the view that further information was essential to assist the panel with its assessment of risk and manageability: a psychological risk assessment, an assessment of personality, and a healthcare report.

9. The panel, consisting of two independent members and a psychiatrist member of the Parole Board, reconvened on 21 March 2023 for a hybrid hearing, with two panel members and the Prison Offender Manager (POM) in the hearing room, and the others concerned attended by video link. The panel considered the dossier as set out above, and heard evidence from the POM, the Community Offender Manager (COM), a forensic psychiatrist and the Applicant. A solicitor represented the Applicant. The Secretary of State (the Respondent) was not represented.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 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.

11. 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.

12. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

    "The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The

exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."

Parole Board Rules 2019 (as amended)

13. 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).

14. 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)).

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**.

Irrationality

16. 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."*

17. 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.

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

19. 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. … [T]his approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury *… but it is preferable in my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion."*

Procedural unfairness

20. 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.

21. 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.

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

23. 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 Respondent

24. The Respondent has indicated that he does not wish to make any submissions in this case.

Discussion

25. As to A.1. above, the panel expressed concern about the Applicant's presentation both in the hearing and as reported on other occasions. The panel noted reports about the Applicant behaving strangely both in custody and while in the community on temporary licence and becoming threatening and abusive.

The POM, for example, said there were incidents when the Applicant had outbursts during which it was impossible to understand him, or banged on the windows of the wing office, which he later denied all knowledge of or apologised for, suggesting he had episodes of going into a kind of seizure or bubble of which he seemed to lack awareness. The Applicant said he did not know what the POM meant by this description as, if he had an epileptic fit, he fell to the ground.

26. While on temporary leave in February 2022 the Applicant apparently became confused and returned to prison instead of his hostel accommodation. In May 2022 he took a bottle of brandy into the hospital, against the rules, saying he did so in order to demonstrate his abstinence from drink and drugs.

27. On 7 March 2023 he was unsteady on his feet and slurring his words. Healthcare considered he might be reacting to the cold weather, or lack of food or medication. He was being seen regularly by Healthcare, said the POM, and they had no concerns about him.

28. The panel's concern about these (and other incidents) are in my view perfectly understandable, and cannot be said to amount to procedural unfairness (or, though this is not pleaded, irrationality). The application makes it clear that witnesses who were asked questions outside their area of competence said so. There is no suggestion that the panel did not accept such answers.

29. As to A.2., an unreasonable refusal to grant an adjournment can amount to procedural unfairness. However, whether an adjournment is necessary in any given case must be primarily a matter for the panel. The application does not point to any specific information that would, could or even might be contained in an updated Healthcare report. The report in the dossier is dated 14 February 2023, 5 weeks before the hearing. There is no suggestion that there had been any change in circumstance which would make a further Healthcare report necessary or informative. The panel considered the suggestion that it may consider an adjournment to obtain additional information from the Health Care department, and was satisfied it had sufficient information on which to make a decision. There was no application to adjourn in order to obtain any other report.

30. I do not find the complaint of procedural unfairness to be made out.

31. The first complaint in relation to irrationality relates to the alleged failure of the panel to follow the views of the professional witnesses. 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 that 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.

32. The suggestion in the application is that the POM and the COM supported release, while the psychologist did not feel able to make a recommendation.

33. The panel stated (at Paragraph 4.5. of the Decision Letter) that the POM was of the view that the Applicant's risks were manageable in the community subject to the risk management plan. The psychologist, in light of the evidence she heard at the hearing, and her concerns that there were limitations to her assessment as a result, recommended that the Applicant remain in custody to complete the recommended work, which she considered could be appropriately undertaken in open conditions. The work she suggested was intended to reflect on the Applicant's difficulties with staff, to consider how he could manage these interactions more pro-socially and refresh the one-to-one work he had previously completed as well as any other skills that would support positive engagement and problem solving. He also needed to work with his offender management team to develop detailed plans to identify and manage high-risk situations. The COM said she had considered the Applicant to be manageable in the community but, having heard evidence at the hearing, she had reservations, which she described as a "*half recommendation".*

34. It follows that Ground B.1. not only does not set out a ground for a finding of irrationality but does not reflect the evidence as recorded by the panel.

35. Ground B.2. is a complaint that the panel focused excessively on health issues. The Decision Letter in fact focuses mainly on behavioural matters, risk factors and protective factors. In particular, the panel was concerned that, despite his having been in open conditions for a considerable time and having had experience of being on temporary licence, the Applicant's understanding of the risk management plan appeared to be quite poor. He was unable to identify any factors relating to risk other than finding suitable accommodation and determining where that would be. He was unable to give an example of when he had dealt with feeling angry in a healthy way.

36. The panel was indeed concerned that the Applicant's falls, odd behaviour and ill-tempered outbursts, occasional aggression and apparent lack of cognitive awareness, had not raised more concerns or generated further investigation. The COM commented that if he were to have similar outbursts whilst in accommodation in the community as he has had at his current prison, his risks may be considered to have increased.

37. This complaint is misconceived.

38. The final complaint is that "*The panel failed in its duty to test out its own thesis of the professionals, other than in relation to the medical issues, and to explain clearly its reasons for coming to a different view*." This seems to involve two separate matters. The first, which is not very clearly expressed, seems to be that the panel had a duty to discuss its ultimate decision with the professionals, which duty it failed to perform. I do not consider that a panel has any such duty. Rather the contrary: professional witnesses give evidence and express opinions. A panel weighs the evidence, including the opinions proffered (if any), and comes to conclusions about risk and risk management. Its final view (which is what I interpret the application to mean by "*its own thesis*") can only come when it has heard, and then considered, all the evidence.

39. The second matter which seems to arise under this heading and is repeated in the summary that concludes the application, is that the panel failed to explain

clearly its reasons for rejecting the recommendations of professional witnesses that the risk posed by the Applicant is manageable in the community.

40. I have discussed above the suggestion that the witnesses were united in the view that the Applicant's risk was manageable in the community, which they were not, and the significance of the panel's disagreement with that view. What I have set out already demonstrates that the panel explained its reasoning very clearly.

41. The fact that the Applicant disagrees with the panel's conclusion, or indeed its approach to the evidence, does not demonstrate irrationality as defined above.

Decision

42. 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.

Patrick Thomas KC
18 April 2023