

[2020] PBRA 190

Application for Reconsideration by Howells

Application

1. This is an application by Howells (the Applicant) for reconsideration of a decision of an oral hearing dated the 2 November 2020 not to direct release or to recommend progression to open conditions.
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 dossier (including the decision letter) amounting to 389 pages and the representations on behalf of the Applicant.

Background

4. On 25 November 2011, when aged just under 40, the Applicant was sentenced to an indeterminate sentence of Imprisonment for Public Protection, with a minimum tariff of 2 years, 3 and a half months (less time spent on remand) for offences of wounding with intent to cause grievous bodily harm, assault occasioning actual bodily harm, threats to kill and a racially aggravated assault on a police officer. The tariff expired on 1 March 2013.
5. The offences of wounding and assault were directed at the Applicant's then girlfriend. The threats to kill were made to another occupant of the shared accommodation and at the time the Applicant was brandishing a large kitchen knife. The offences took place in the early hours of the morning when he was heavily in drink.
6. In August 2007, the Applicant was convicted of manslaughter and sentenced to 7 years imprisonment. He had been drinking and got into an argument with his lodger and attacked him, causing injuries from which he subsequently died.
7. The Applicant was within the at risk period for that offence when he committed the index offences.

Request for Reconsideration



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8. The application for reconsideration is dated 20 November 2020 and is brought under procedural unfairness. However, in the final paragraph of the submissions, the solicitor for the Applicant refers to irrationality and it may be the grounds would have been more accurately pleaded under that head.
9. The grounds for seeking a reconsideration are as follows:
 - 1) *"The decision in itself fails to adequately attend to the areas that the Secretary of State invites the Parole Board to take into account when determining a move to open conditions"*.
 - 2) *"That the Parole Board has erred in not being able to extract from the evidence a full assessment of the risk factors. The panel must satisfy themselves that they have sufficient information to determine a full and comprehensive assessment of risk"*
 - 3) *"The panel's decision has not adequately explained the evidence from the witnesses. The panel have not adequately explained why they have rejected the recommendations made by three of the report writers nor have they adequately sought to summarise the evidence heard."*

Current parole review

10. The Secretary of State referred the Applicant's case to the Parole Board in May 2018.
11. The oral hearing took place on 5 October 2020. Due to the current Covid-19 restrictions, the hearing was heard remotely by telephone link.
12. The panel consisted of two independent members and a psychologist member who had significant experience of individuals with development disorders affecting communication and behaviour, specifically within the forensic field.
13. The Applicant is now aged 49.

The Relevant Law

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 in a 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."

Procedural unfairness

17. 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.
18. 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.

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

19. 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 Secretary of State

20. The Secretary of State made no representations in response to this application for reconsideration.

Discussion

21. There are two reasons why this application for reconsideration must be refused:
- (a) The reconsideration mechanism does not apply to decisions to recommend or not to recommend a move to open conditions; and
 - (b) In any event the panel's decision did not amount to procedural unfairness.

22. The panel in this case made two decisions: (1) the decision not to direct release and (2) having made that decision, a decision not to recommend a move to open conditions.
23. The representations on behalf of the Applicant do not suggest that the first decision was impeachable. Such a suggestion would clearly not have been sustainable. None of the professional witnesses supported release and the Applicant did not ask for release.
24. In most circumstances, that would be an end to this application. However, in deference to the careful submissions made by the solicitor on behalf of the Applicant, I add the following observations.
25. The panel, in the course of the decision letter, identified a number of significant factors.
26. The panel had found it difficult to extract from the evidence a full assessment of the risk areas; however, they were alcohol, relationships, attitudes and emotional well-being. The panel thought lifestyle was not a driver to offending but at the same time thought stability of lifestyle would be a protective factor.
27. In 2017, the Applicant had declined to engage in sentencing planning in time for the oral hearing of that year.
28. The panel said the salient features of the case included:
- a) The Applicant's good behaviour and compliance;
 - b) The last incident of violence had been in February 2017;
 - c) The Applicant had completed no formal risk reduction work since the last hearing and his willingness to engage in such work tended to fluctuate with his Prison Offender Manager at any given time.
 - d) The Prison Offender Manager, the Community Offender Manager and the independent psychologist recommended (to some extent) progression to open conditions;
 - e) The prison psychologist did not support progression.
29. The panel identified the disagreement between the psychologists was the independent psychologist was of the opinion that a developmental disorder affecting communication and behaviour set the Applicant up to fail the programmes available, but the prison psychologist did not believe the developmental disorder was a barrier to further work being undertaken. The prison psychologist believed further work on a range of risk factors was necessary but that the particular programme could not be identified until an assessment of the Applicant's needs in respect of offending behaviour programmes had been completed.



30. The submissions in respect of Ground 1 rely on the duty imposed on the Parole Board by **section 239(2) of the Criminal Justice Act 2003**. More precisely, this ground relies on the Secretary of State's Directions to the Parole Board on the Transfer of Life Sentence Prisoners to Open Conditions (August 2004). Those directions set out four tests that the panel should consider. The Directions are mandatory, apply to prisoners serving sentences of Imprisonment for Public Protection and the panel must consider all four tests – **D’Cunha v the Parole Board [2011] 128 (Admin)**.

31. The directions are generally paraphrased in the decision letter along these lines:

"A move to open conditions is based on a balanced assessment of risk and benefit; considering the extent to which you have made sufficient progress in addressing and reducing risk to a level consistent with protecting the public from harm; the extent to which you are likely to comply with any form of temporary release; the benefits of testing you in a realistic environment and the risk of absconding".

32. Good Practice strongly suggests that all four tests should be included in the letter, but that is not mandatory.

33. The decision letter reproduced more closely the wording of the Direction in respect of the first test:

"The Board may recommend you progress to open conditions if it considers that you have made sufficient progress in addressing and reducing your risk to allow the public to be protected in circumstances where you would be in the community, unsupervised, on licensed temporary release".

34. However, the letter then failed to mention the remaining three tests.

35. I have read the letter carefully several times and I have concluded it is not deficient by reason of carelessness or oversight; it is a careful but highly focused document which identifies the determining factors, sets them out and tends to ignore subsidiary matters.

36. In essence, the letter says the Applicant failed to meet the first test to such an extent that even if he met the other tests it could not alter the balance which is firmly against progression.

37. I have considered sending the case back to the original panel, asking them to address the remaining tests and so make explicit what is presently implicit.

38. However, I bear in mind that the reconsideration mechanism as far as possible, replicates the practice and procedure of the Divisional Court. The remedy is discretionary and, as sending the case back could not alter the outcome of the reconsideration process (**Barclay [2019] PBRA 6**), it would be a pointless exercise.

39. Ground 2 is constructed on very shaky foundations. Many panels have difficulty extracting relevant factors from the evidence. That does not mean the panel cannot come to a decision. What was lacking here was an up-to-date assessment of the

Applicant's needs in respect of offending behaviour programmes. This would be a voluntary assessment and, as such, could not be ordered by a panel. By way of substitution there were two psychological assessments. The panel took the view that further work was required but the precise nature of that work has still to be identified. I have read the dossier; I am satisfied the panel had sufficient information in the dossier to enable it to apply the Guidance to Members, 11 July 2013, amended 5 August 2013.

40. As to Ground 3, the panel plainly considered that the outcome of this case would be determined by which of the psychological assessments it preferred. In those circumstances, the panel did not rehearse the evidence of the other professional witnesses.
41. The solicitor for the Applicant contends that the Prison Offender Manager and the Community Offender Manager both made significant submissions that were independent of the psychological assessments. Unfortunately, the solicitor does not specify those submissions, so it is difficult for me to consider them.
42. The Prison Offender Manager referred to the recommendation of the independent psychologist and then acknowledged the Applicant's contrary view that he should go to open conditions; she then appeared to consider the points supporting that course without setting out the points against it.
43. My reading of the Community Offender Manager's rather longer statement dated 28 August 2020 is that she followed very carefully the opinions expressed by the independent psychologist. Her recommendation was not simply for progression to open conditions. The first sentence of her recommendation paragraph reads as follows:

"Due to the outstanding offending behaviour intervention programme, which [the Applicant] is yet to undertake in close condition, I would suggest a move first to a Progression unit such as [a named prison] until he can demonstrate further risk reduction for violence, through access to trauma recovery work which he is motivated to complete".
44. The Community Offender Manager, like the Prison Offender Manager, then acknowledged that the Applicant's view was that he should go to open conditions and she appeared to endorse his views.
45. The panel was manifestly entitled to take a different view; it should be remembered that one of its findings was *"The panel did not see sufficient evidence from you or in the papers to show that risk of serious harm was fully understood (by you or by professionals)"*

Decision

46. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair; in addition, the reconsideration panel lacks jurisdiction in respect of a refusal to recommend progression to open conditions.
47. Accordingly, the application for reconsideration is refused.



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17 December 2020

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