[2021] PBRA 108

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Application for Reconsideration by Kaleher

Application

1. This is an application by Kaleher (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 16 June 2021 not to direct 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:
   (a) The decision letter dated 16 June 2021;
   (b) Legal representations dated 6 July 2021; and
   (c) The Dossier, numbered to page 631, of which the last document is the decision letter.

4. The issues in this case, as will appear, include a complaint that the panel misheard an answer given by one of the witnesses. It is suggested that, in addition to that, and perhaps explaining the alleged mishearing, the sound quality of the 'hybrid' hearing (the Applicant, his representative, the Prison Offender Manager (POM), the mental health (MH) nurse and the drug and alcohol Worker (DART) all being together at the prison, while the panel, the prison psychologist, the independent psychologist and the Community Offender Manager (COM) all participated remotely) was so poor that other mishearings may have occurred.

5. I therefore sought the assistance of the Panel Chair, and received further information:

   (a) Access to the recording of the hearing, to parts of which I have listened;
   (b) The Panel Chair's handwritten notes of evidence; and
   (c) A comment in an email from the Panel Chair as to the suggestion that the sound quality of the hearing was inadequate for a fair hearing.

6. I reproduce the Panel Chair's comment in its entirety, so that no-one can imagine that any attempt has been made to influence my decision:

   ' I recall we had a few sound challenges but none that were not rectified at the time. No issues about sound quality were raised in the closing remarks

by the solicitor either. The solicitor was in the prison with [the Applicant], the MH worker, the POM and the DART worker.

The order of witnesses was as follows:
POM
MH worker
DART worker
The Applicant
Prison psychologist
Independent psychologist
COM

It was a full day's hearing so there would be a lot to listen to. Frequent breaks were offered but my notes do not show the timings. I do have handwritten notes of the hearing if that might help.'

7. I will deal with the alleged mishearing in due course. So far as the Panel Chair's handwritten notes are concerned, I take the view that they constitute at this stage a private document and should not be disclosed further unless absolutely necessary. I have used them only to find the parts of the recording I needed to hear and have not regarded them as a source of evidence. The record of the hearing is the recording. The notes were supplied for my assistance in navigating through the recording and deciding which parts of the 5 hours and more I needed to listen to. If there was anything in them which assists the Applicant, I would say so and seek permission to make use of it.

8. A copy of an email from the witness whose evidence is said to have been misheard accompanies the legal representations. A reconsideration pursuant to Rule 28 of the **Parole Board Rules 2019** is not a rehearing, and therefore in principle further evidence is not admissible at this stage. I have read the email, which says that the witness does not think the decision letter accurately summarised his evidence on this point. It is sensible to ask what the status of such a statement is. If the recording were to show that, whether he meant to say it or not, his evidence was what the panel said it was, his later email could not be of assistance on a reconsideration application. In other words, the recording must be the only source of information as to exactly what was said in evidence, and I must ignore the witness's email.

9. Having listened to what seemed to be relevant parts of the recording I find it to be very clear in itself. It was recorded via the Panel Chair's laptop. From time to time individuals dropped out of the hearing and struggled to get back in, or froze, but the recording itself remained crystal clear, until the end of the evidence. Thereafter the panel chair had connection difficulties, and the recording ceased. The Panel Chair seems to have omitted to press the recording button again when she rejoined the hearing. I have therefore, in fairness, relied on the application itself and the contents of the decision letter for information about the submissions.

Background

10. The Applicant is now 49 years old. In August 2006, when he was 34, he received a sentence of life imprisonment, with a minimum tariff expiring in May 2016, for two

offences of false imprisonment. He was released on licence on 10 March 2015 and recalled in May 2017. He was sentenced in November 2017 for the assault occasioning actual bodily harm that led to his recall. He had other, relatively minor, convictions before the index offences.

11. The Applicant committed the index offences and the offence that led to recall while under the influence of drugs. At the age of 22 he was diagnosed with a mood affective disorder. The index offences were committed in the context of a hypomanic episode, characterised by delusional beliefs and increased unpredictability. The recall offence occurred in the context of escalating stress about his living circumstances, drug relapse and a failure to take his medication.

Request for Reconsideration

12. The application for reconsideration is dated 6 July 2021.

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

Ground 1:

(i) The technical difficulties in the hearing led to the Panel mishearing crucial evidence.
(ii) The detail of this is that the MH Nurse gave evidence about whether it was possible that the Applicant's sleepiness in the mornings was consistent with the effects of his medication rather than substance (specifically Illicit Drug) abuse. In the decision letter the panel said '*[The nurse] did not think this would explain why you appeared sleepy next day as the dose had not changed when you moved wings.'*
(iii) The Applicant also complains that there was no mention of the prison psychologist agreeing that an adjournment could be a reasonable way forward.
(iv) The Applicant complains that there is no way of knowing if this omission, and possible other misunderstandings, were due to the panel not hearing this evidence.
(v) He submits that the decision cannot stand when there is such a crucial error.

Ground 2:

(i) The decision was made without a fully formed risk management plan.
(ii) The Applicant's primary application was for an adjournment for a fully-formed risk management plan to be in place.
(iii) The decision letter states "*The designated accommodation is not currently doing drug or alcohol testing."* The Applicant asserts the COM said she did not know whether the designated accommodation (there were several addresses suggested) to which she had referred the Applicant would be carrying out drug testing. It is suggested that this was a crucial area which an adjournment could have explored.
(iv) The decision letter says "*The panel does not believe that [the necessary] level of support will be available … [in the community], especially while alternative delivery models are in place, and once [the Applicant] move[s] on from the [designated accommodation]*."
(v) The COM said she had not prepared the risk management plan with a view to release, as she did not support release. The Applicant argues that it was procedurally unfair of the panel to make a decision on release when material they felt was missing from the risk management plan could have been provided with an adjournment.

(vi) It is not asserted that the panel's decision was irrational. However, another way of expressing Ground 2 would be to say that when the panel chose to decide the case rather than to adjourn for further information it was acting irrationally.

Current parole review

14. This was the second review following the Applicant's recall in May 2017. In January 2017 a panel of the Parole Board did not direct release, nor did it recommend a move to open conditions.

15. The oral hearing panel met remotely, as discussed above, on 9 June 2021. It received evidence from the POM, COM, DART worker, a Health Care worker, a prison psychologist and an independent psychologist as well as the Applicant himself. The Applicant was represented throughout by a legal representative, who asked questions of the witnesses and made representations at the close of the evidence.

16. A noteworthy feature of the case was that the Applicant told the professionals that he had smoked a substance Illicit Drug on the Sunday before the hearing (which was on a Wednesday). Discussion took place at the hearing about the significance of this: should it be treated as a lapse or a relapse, or was it too early to tell?

17. The issue of a recommendation for a transfer to open conditions was a live one at the hearing. However, the only decision that can be the subject of reconsideration is the release decision, one way or the other, not the question of open conditions. In fact, as the case developed, it is apparent that the real issue was whether the panel should decide the case on the evidence it had received or whether the case should be adjourned for further information. This is certainly the way the matter is put in the legal submissions. In any event, I must consider whether the proceedings were procedurally unfair so as to make them fundamentally flawed, in which case the decision not to direct release must be reconsidered.

The Relevant Law

18. The panel correctly sets out in its decision letter 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.

Parole Board Rules 2019

19. 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)).

20. 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

21. 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."

22. 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.

23. 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

24. 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.

25. 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.

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

27. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the*

mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning." See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

28. It is a well-established ground for judicial review that the tribunal has taken into account information which it is accepted is inaccurate. The grounds for reconsideration mirror those for judicial review and therefore it is also a ground for reconsideration. I accept that it is capable of being both irrational and procedurally unfair to take into account inaccurate factual information in making a decision. It is important that decisions are not only fair but are also seen to be made according to a fair procedure. If incorrect information is included in the decision letter, the fairness of the procedure is called into question.

29. However, it will not invariably follow that if there is an inaccurate fact or facts in the decision letter that an application for reconsideration will be granted. Reconsideration, like judicial review, is a discretionary remedy and, if I am satisfied that the incorrect fact did not affect the decision then the application is likely to be refused.

The reply on behalf of the Secretary of State

30. The Secretary of State has informed the Parole Board that he does not wish to make any submissions in regard to this application.

Discussion

31. The first question in respect of Ground 1 is whether the panel in its decision letter did inaccurately record the MH Worker's answer as alleged.

32. I have listened carefully to the relevant section of the recording, starting at about time marking 1:10 but including a significant period both before and after the crucial passage in order to be sure of context. It is not possible to be absolutely sure of every word spoken by the witness, because he appears to be some way from his microphone and there is a small element of overspeaking, but this is the best I can do after several hearings:

> *Q: Could they [that is to say, apparent sleepiness in the mornings, lack of motivation] also be a symptom of his mental health deteriorating?*
> *A: That could be a symptom of his mental health, it can be a result of his medication, [medication named] which is quite sedating, he is also on [name of medication I could not catch].*
> *Q: Was his dose changed when he changed wings?*
> *A: No, he saw a psychiatrist in preparation for the parole hearing, and the dose was not changed then.*
> *Q: So his sleepiness and the other changes that have been seen by others is not necessarily due to his medication?*

A: No, it was just the medication, yes.

33. The last part of that last answer was difficult to pick up, due to the problems I mentioned above, and it took several hearings before I was satisfied that I had at last got the sense of the answer.

34. It follows that when the decision letter states

> *'He [the MH Worker] did not think this would explain why you appeared sleepy next day as the dose had not changed when you moved wings'*,

the panel, having only caught the first word of the last answer, misstates what the witness said.

35. No-one who has any understanding of the burdens placed on a panel chair by a remote hearing could reasonably criticise any member of the panel, or the panel as a whole, for this, and legal representations do not seek to do so. The panel chair was simultaneously listening to the evidence, assessing its significance, making a note of it, and checking that everyone participating (visible postage-size on a laptop screen) was still there and able to see and hear.

36. The legal representations are therefore correct in asserting that the panel misheard the MH worker's evidence. It should be stressed that this was not due to a general deficiency in communication during the hearing. The problem at this point was overspeaking/distance from the microphone and, perhaps, a touch of mumbling, as a result of which the panel heard the first word of the answer but not what followed. It is overstating the position to say, as the legal representations do, that '*the hearing was not procedurally fair because it was not possible for the Panel to hear the evidence correctly'*.

37. The legal representations go on to say '*given this crucial error, we also have no way of knowing what else was misheard or missed entirely, or what other misleading impressions have been formed which influenced the decision'.* This is, of course, an invitation to speculate, which I must decline.

38. If there were any material in the decision letter which the Applicant's representative wished to allege indicates a misunderstanding, she would no doubt be specific, as she has been about the evidence of the MH Worker and, later, the COM.

39. Part of what is complained of is that the effect of the mishearing is such as to render the proceedings unfair, because it influenced the ultimate decision. In other words, it is argued that the mishearing, and the mistake of fact which followed from it, was fundamental to the panel's decision, rendering the decision irrational: see Paragraph 26 above, the reference to **Alconbury Developments Ltd** - playing a material, though not necessarily decisive, part in the panel's reasoning.

40. Reading the decision letter with care, I do not find that the mishearing played a sufficient part in the process of decision-making to qualify as material as defined above. The two factual concerns that dominated the panel's thinking were first, whether the Applicant's decision to take drugs a few days before his parole hearing indicated a lapse or a relapse, and in any event what it meant about his manageability in the community; and second, whether there was a (RMP) in place

that could manage the risk the Applicant presents to the public by giving him the support he needs.

41. The Conclusion and Decision section in the decision letter is long and detailed. The only reference to the use of drugs recently is to the agreed use of Illicit Drug on the Sunday. There is no mention of any finding or even suspicion of drug use leading to the symptoms of sleepiness and lack of motivation which were the subjects of the question leading to the misheard answer. In other words, the misheard evidence does not feature in the conclusion and decision.

42. I am therefore satisfied that the mishearing did not play a material part in the panel's decision, and the decision is not on that ground flawed by irrationality or procedural unfairness.

43. As to Ground 2 (that the decision was made without a fully formed risk management Plan), that led to the Applicant's representative asking, as her primary application to the panel, for an adjournment for a fully formed risk management plan to be in place. There is no dissent expressed from the panel's finding that it was not convinced that the risk management plan was sufficiently robust to manage the Applicant's risk.

44. The decision letter states that '*the designated accommodation is not currently doing drug or alcohol testing'*. The legal representations assert that this was not the evidence that the COM gave.

45. Again, the recording shows that the decision letter does slightly misstate the evidence. The COM's connection with the hearing kept freezing and dropping out at this stage. What she said is perfectly audible, but somewhat disjointed. In summary, the COM said that drug tests are not available at all designated accommodation at present. She did not know which premises could operate drug tests at this juncture. She had referred the Applicant to three premises in London. The waiting period for a bedspace was 3 months from the decision to release. She would not know which designated accommodation would be available for the Applicant until then. She knew that the premises local to her was not operating drug tests, but that was not one of the three to which she had referred the Applicant. She said '*I am not privy to any list of designated accommodation that are.'* The evidence was, therefore, that it might not be known until the release decision was made whether drug tests would be available where he was residing.

46. The panel noted the legal representative's application for consideration to be given to adjourning the Applicant's hearing to enable him to undertake further one to one work and for the risk management plan to be strengthened. It went on to say "*the panel was not persuaded that an adjournment for a short period to enable your risk management plan to be strengthened would lead to them reaching a different conclusion*."

47. The legal representations indicate disagreement with this conclusion, but no sufficient basis for suggesting it was irrational in the sense set out above. There is a linked complaint about the panel saying it did not believe that the level of support

necessary for the Applicant would be available to him, especially while alternative delivery models are in place and once, he moved from the designated accommodation. Again, it is suggested that an adjournment would have resolved this issue.

48. Whether to grant an adjournment or not is a matter for the discretion of the panel, and for refusal of an application for an adjournment to call for reconsideration it would have to be irrational or procedurally unfair in the sense set out above not to grant the application.

49. In deciding whether to grant an adjournment the panel was entitled to and did take into account all the evidence, including the Applicant's relapse into drug use on his earlier licence, which he concealed from those supervising him, and his coping with the stress of an impending parole hearing by using drugs on this occasion. The panel noted in the decision letter, and therefore took into account, the failure of the COM to contact the Applicant's former partner, and two family members. The decision to which the panel came, not to grant an adjournment on the basis that it was not persuaded that a short adjournment would lead to a different release decision, was one to which it was entitled to come on the evidence and which it adequately explained.

Decision

50. 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
30 July 2020