[2021] PBRA 132

Application for Reconsideration by Carter

Application

1. This is an application by Carter (the Applicant) for reconsideration of a decision of a Panel of the Parole Board dated 9 May 2021 following an oral hearing on 27 April 2021. The hearing was conducted remotely via video-link, due to current Covid-19 restrictions on face-to-face hearings.

2. The Panel made no direction for release or recommendation for a move to open conditions.

3. 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.

4. I have considered the application on the papers. These are the dossier of 1106 pages (that includes the decision letter) and the application for reconsideration.

5. Due to the content of the representations, I issued directions seeking further information as to the application. A five-page document headed '*Witness Statement* for the purpose of an Application of Reconsideration' was submitted, which I have also taken into account.

6. Although this is said to be a witness statement, it is a mixture of factual statements (although with no statement of truth) and submissions.

7. Unfortunately, the hearing was not recorded and there were no official notes of the hearing available. Statements were provided by the community and prison Probation Officers to assist with the factual matters.

Background

8. The Applicant was aged 33 at the time of sentence and is now aged 59 years old. He was sentenced to life imprisonment on 6 June 1994 for an offence of murder. The tariff was set at 20 years (with allowance for time on remand) and expired on 22 October 2013.

9. The Applicant has remained in custody since being sentenced.

Request for Reconsideration

10. The application for reconsideration is dated 28 May 2021.

11. The Applicant relies on both irrationality and procedural impropriety. These can be broken down as follows:

Irrationality

a) Failure to refer to the evidence of a psychologist;

b) Placing excessive weight on the evidence of two experts; and

c) Placing insufficient weight on the written report of a psychiatrist.

Procedural Impropriety

d) Failure to require witnesses to attend in person;

e) Failure of the Panel to admit further evidence from the Applicant;

f) Failure to respond to a complaint from the Applicant that the proceedings were unfair;

g) The Panel continually interrupted the Applicant during his evidence, so as to deprive him of a fair hearing; and

h) Failure to explore the Risk Management Plan with the Applicant.

Current parole review

12. The Applicant's case was referred to the Parole Board as long ago as September 2017. An oral hearing was directed to be heard in June 2018. This was adjourned on the day, at the request of the Applicant, in order for him to engage with an assessment with a psychologist as to future treatment options.

13. The hearing was re-listed in February 2019 where it was again adjourned, again at his request, in order for him to engage with a further assessment.

14. The case was due to be heard in November 2019, but it was adjourned due to the Applicant moving prisons.

15. The fourth listing, on 12 May 2020, was adjourned due to the Covid-19 pandemic (it had previously been identified that the case should be a face-to-face hearing and the Panel did not consider at that stage that a remote hearing would be fair).

16. The oral hearing was then conducted remotely on 27 April 2021. The Panel heard evidence from the Applicant, as well as from a prison psychiatrist, a prison psychologist, the prison probation officer and the community probation.

The Relevant Law

17. 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 suitability to remain in open conditions.

Parole Board Rules 2019

18. 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)).

19. 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

20. 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."

21. 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.

22. 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

23. 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.

24. 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.

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

26. 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.

27. In **<u>Oyston</u> [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

28. The Secretary of State has stated that he does not wish to make any representations.

Discussion

29. I shall consider the grounds individually before considering whether the decision as a whole was flawed.

Ground (a) – Failure to refer to the evidence of a psychologist

30. It is said that the Panel does not refer to the evidence of a psychologist to the effect that there were no outstanding treatment needs.

31. It must be remembered that this relates to the evidence of a psychologist given at a case management hearing more than two years previously.

32. The Panel had a dossier of over eleven hundred pages. In those circumstances it is unsurprising that the decision letter does not contain a summary of all the evidence. There is no obligation to set out such a summary.

33. There was no application by the Applicant to call the psychologist as a witness, which it was open to him to do so if felt that her evidence would assist.

34. The Panel concentrated on the oral evidence, and the evidence in relation to recent events. That is not something that they can be criticised for. I do not consider that the failure to specifically refer to this evidence is an omission.

35. It should also be noted that after she had given the evidence referred to by the solicitor, the psychologist provided a further written report that shows that since her previous comments the Applicant's engagement and behaviour had deteriorated substantially.

Ground (b) – Placing excessive weight on the evidence of two experts

36. The Panel received oral evidence from two experts (a psychologist and a psychiatrist). No evidence was called by the Applicant to rebut their evidence.

37. In those circumstances, the Panel were clearly entitled to rely on their evidence.

38. The Applicant criticises the fact that their evidence was more than a year old. There is no reason given as to why that would make their evidence unreliable. This is something that was explored with the psychologist (and, it would seem, with the psychiatrist) at the hearing.

39. Both experts gave reasons as to why they considered that their conclusions were still valid.

40. Further, both would have had access to the full dossier that contained up to date information and had the opportunity of hearing the oral evidence (including the oral evidence of the Applicant).

41. In those circumstances, I do not consider that there was any error.

Ground (c) – Placing insufficient reliance on the report of a psychiatrist

42. This relates to a report that was written in 2014.

43. It is hard to see how, given that it was from some seven years ago and there had been a number of reports subsequently, the Panel could have said to have erred by not placing weight on this.

44. It is plainly not irrational for the Panel to rely on the recent evidence that they had rather than this report.

Conclusion on irrationality

45.The Panel were faced with four witnesses, all of whom recommended that the Applicant (who was still a Cat A prisoner) remain in closed conditions.

46.In those circumstances it is difficult to see how the decision could be said to be an irrational one. None of the points raised seem to me to raise any concerns over the decision.

47.I then turn to the question of procedural fairness.

48.Before doing so, it is necessary to note that six pages of representations were submitted after the hearing. This has the form of a speaking note by the Applicant's lawyer that may have started out as being his notes for closing submissions.

49.In these, there is no complaint raised as to the fairness of the hearing, other than a sentence which reads - '*[the Applicant] during the hearing raises his concerns about fairness?*'.

50.I understand that an advocate may be reluctant to raise issues surrounding the conduct of the hearing for obvious reasons. However, I consider that it is the duty of an advocate (certainly an advocate who is regulated by a professional body as in this case) to raise this during the hearing or, at the latest, in submissions.

51.This will mean that if there is a misunderstanding, it can be resolved there and then. If there is a proper ground for complaint then it may be that the Panel will be able to take action to reassure the prisoner or, if necessary, re-panel the case if that is what fairness requires.

52.This does not mean that a complaint subsequently will not be well-founded, and it should be considered on its merits, but it does mean that a reconsideration panel is entitled to take account of the fact that the advocate did not consider it necessary to raise it at the time.

Procedural Impropriety

Ground (d) – Failure to require witnesses to attend in person

53.On 10 May 2020 the case had been listed for a face to face hearing. However, by the time that it was heard, all witnesses attended remotely.

54.It is said by the Applicant that this was permitted a week before the hearing. This ground is that '*The Panel should have considered whether the witnesses at the hearing should have required to attend in person*', with reasons given.

55.When the directions were made on 10 May 2020, the Panel Chair would not have known how long the pandemic would have lasted. I imagine that they would not have anticipated that the Covid-19 restrictions would be in place for as long as they have been.

56.By the time the hearing case listed, a face to face hearing would not have been possible. For that reason, presumably, the directions were amended to allow witnesses to attend remotely.

57.The grounds state that the Applicant *'did not want to challenge this as he had already been waiting over 3 years for this case to be heard'*.

58. I accept that the Applicant had a difficult decision to make as to whether to seek to adjourn for a face to face hearing. However, he had full advice from his lawyer and decided not to make an application.

59. In light of that, and the lengthy delay, it is difficult to criticise the Panel's decision to proceed with the witnesses remotely.

60.Further, no reasons have been given as to why the Applicant was disadvantaged by the witnesses attending remotely.

Ground (e) – Failure to admit further evidence

61.The grounds refer to additional document. It is not said in the grounds what these documents are, nor have they been provided with the application so that the Reconsideration Assessment Panel can assess them.

62.It appears that this may have included the police evidence for the index offence. However, without details of what the evidence was, and why it was of relevance, I do not consider that it can be said that any unfairness was caused.

63.Further, as noted above, the review was nearly four years old, and started well before the Covid-19 pandemic. If it was the police evidence, then there is no explanation of why that had not been provided to the Applicant's solicitors previously. In those circumstances, difficulties caused by the Covid-19 pandemic cannot explain why it was not provided before.

64.In those circumstances, I do not consider that the Panel fell into error.

Ground (f) – Factual to respond to a complaint from the Applicant

65.The Ground reads '*[the Applicant] expressly complained that he did not feel that his case was being dealt with fairly and that the panel had already decided against him at an early stage*'.

66.I do not consider that this is actually a Ground for reconsideration. The question is not whether the Applicant considered the Panel had decided the case against him, but rather whether it was unfair.

67.In those circumstances, I do not consider that this takes the Applicant any further.

Ground (g) – Interruption of the Applicant's evidence

68. In relation to this ground the Applicant has put forward a document that is entitled *'Witness statement in support of recon'* that appears to be from the Applicant's representative.

69. However, this is not signed, nor is there a statement of truth. It is a mixture of factual matters, comment and submissions. The lawyer's notes of the hearing have not been provided.

70. Neither is there a statement from the Applicant himself in support of his assertions.

71. Against that, there are short statements from the Prison and Community Probation Officers. These are measured and, understandable given the passage of time, there are a number of matters that neither feel able to comment on.

72. They do not provide support for the argument that is put forward that the Applicant's evidence was interrupted.

73. I remind myself that it is not suggested that there was any complaint made by his lawyer at the time of the hearing, which would be expected if there was a concern.

74. It is for the Applicant to make his case, and I do not consider that what he has put forward is sufficient

Grounds (h) – Failure to explore the release plan

75. It is said that the Panel did not 'fairly or properly' explore the release plan.

76. It appears that the Applicant was seeking release to a therapeutic community, with the complaint being that this had not been fully explored by the community probation officer.

77. However, there was no application to adjourn in order for this to be explored. Neither had there been any application before the hearing for a direction to the community probation officer to explore this.

78. The Panel has to consider the plan that is put in front of it. Particularly when a prisoner is represented and is not making an application, there is no obligation to adjourn to consider an alternative release (although a Panel can do so if it feels it to be necessary).

79. The Applicant had been in Cat A conditions for a number of years. It would be exceptional (but not impossible) to be released directly from Cat A. That did not relieve the Panel of the obligation to consider release, but I consider that in the absence of an application to adjourn, it cannot be said to have been unfair to proceed in the circumstances.

Conclusion on procedural impropriety

80. For the reasons set out above, I do not consider that any of the arguments put forward by the Applicant establish that the hearing was unfair (or that a reasonably informed observer would consider that it was).

Decision

81. 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.

Daniel Bunting
25 August 2021