[2021] PBRA 32

the Parole Board
working with others to protect the public

Application for Reconsideration by Hunter

Application

1. This is an application by Hunter (the Applicant) for reconsideration of a decision of the Parole Board dated 5 February 2021, following an oral hearing on 3 February 2021, not to direct his 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 the dossier comprising 553 pages, the Decision Letter dated 5 February 2021 and the Reconsideration Application. The Secretary of State has not made any representations in response to the application.

Background

4. The Applicant is now aged 55. He was found guilty after trial and given a Mandatory Life Sentence for Murder on 6 September 2004, with a minimum term of 15 years (less remand time). At the same time, he received concurrent determinate sentences of 10 years and 8 years imprisonment for offences of robbery and assault with intent to rob, to which he had pleaded guilty. The trial judge noted that the index offence was not a premeditated killing, but it was a premeditated robbery armed with a knife and the killing was done for gain, to support the Applicant's drug addiction. The Judge also noted that the Applicant had lived by committing crime on a daily basis and had a "quite dreadful criminal record", which spanned 3 decades.

5. The minimum term expired on 6 February 2019. At his first Oral Hearing before the Parole Board, on 16 May 2019, the Applicant submitted that he was not ready for release but asked the panel to recommend his transfer to open conditions. That position was supported by all four professional witnesses - the Offender Supervisor ("OS"), Offender Manager ("OM"), prison psychologist and independent psychologist - and was accepted by the panel, which concluded that he did not meet the test for release but recommended his transfer to open conditions.

6. The Applicant was transferred to an open prison in May 2019 but was returned to closed conditions after 4 months following various breaches.

7. The Applicant remains in closed conditions. At his most recent oral hearing he sought a direction for release (or a recommendation for open conditions if that was not

successful). Once again, the professional witnesses (the same OM who attended the previous oral hearing but a different OS and a different psychologist) were unanimous in recommending open conditions, but not release. Once again, the panel accepted these recommendations and did not direct release but did recommended his return to open conditions. Thus, it is this decision not to direct release which is the subject matter of the present application for Reconsideration.

Request for Reconsideration

8. The application for reconsideration is dated 26 February 2021.

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

   (a) The panel did not have sufficient information to proceed due to the lack, or inadequacy, of a risk management plan, including the lack of identified approved accommodation; as a consequence, the panel failed to consider whether external controls would be robust enough to manage risk on release;

   (b) The proposed exclusion zone was excessive and disproportionate, and the panel prevented the Applicant's legal representative from challenging this;

   (c) The panel did not consider the risk factors posed by the Applicant, his protective factors and the extensive licence conditions; and

   (d) The panel failed to set out in its Decision Letter why the Applicant's risk was not manageable in the community.

10. Accordingly, the Applicant submits, the decision not to direct release is both irrational and procedurally unfair.

The Relevant Law

Parole Board Rules 2019

11. 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)).

12. 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**. Accordingly, the panel's recommendation that the Applicant is suitable for open conditions is not amenable to challenge by the Applicant and will not be considered in this Reconsideration decision.

Irrationality

13. 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."*

14. 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.

15. 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

16. 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.

17. 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.

The Reply on behalf of the Secretary of State

18. The Secretary of State has made no representations in respect of this application.

Discussion

19. The first ground for challenge raised by the Applicant is that the panel did not have sufficient information with which to proceed. This was due to the lack of a risk management plan" ("RMP"), although elsewhere in the Application the complaint is not that there was an absence of a RMP but rather that it was an inadequate RMP. It is clear from a perusal of the dossier that the panel did, in fact, have available to it a RMP which incorporated release to Designated Accommodation, professional

supervision, keyworker support, monitoring and strict licence conditions. The precise location of the Designated Accommodation had not yet been identified but this was not unusual and it was clear that the necessary accommodation would be provided within 12 weeks of the panel's decision, if the panel were to direct release.

20. The Applicant's preference, however, was for accommodation that was situated within an exclusion zone, and therefore unavailable to him unless the panel revised the boundaries of the exclusion zone. Other than this objection, the Applicant does not specify in what respect this RMP was inadequate to the extent that, as the Applicant submits, this panel had insufficient information with which to proceed. I note that no application to adjourn was made by the Applicant either prior to the hearing or on the day of hearing so that further information could be obtained. The courts have recognised that it is a matter for the panel to decide how much information it needs: **Walker [2008] EWCA Civ 3**. In **DSD *(ibid)*, para.144** the court reiterated that "*there are statements of the highest authority to the effect that the scope of inquiry in any particular case must be a matter for the board*".

21. In the Applicant's case, it was open to the panel to adjourn, after hearing evidence, and to direct further evidence if it considered there was any deficiency to the RMP that impacted upon its decision whether or not the Applicant met the test for release. There is no evidence in the dossier or in the Decision Letter that the unsuitability of the Applicant's preferred Designated Accommodation within the exclusion zone was a relevant factor in the opinions of professional witnesses, accepted by the panel, that the test for release was not met. On the contrary, all three professional witnesses – i.e. the OS, OM and psychologist – put forward the view that before he could be safely released the Applicant required further testing in conditions of lower security after so long a period in custody and his recall from open conditions. This was, the panel noted, so that he could hone his coping skills, prepare plans for resettlement, and take temporary releases on licence. I cannot conclude, therefore, that the Applicant's complaint regarding the asserted inadequacy of the RMP has any relevance to the panel's decision making in this case.

22. The Applicant's second ground relates to the exclusion zone proposed as part of licence conditions for release, at the request of the victim's family. He complains that the zone is excessive and wholly disproportionate but that his representative was prevented by the panel chair from challenging this. However, it is clear from the dossier that both the OS and the OM shared the Applicant's view (the psychologist expressing no view) that the zone was unlawfully wide; indeed, the OS had had recent contact with the Victim Liaison Officer, who not only agreed with that view but was actively engaging with the victim's family with a view to narrowing the extent of the zone. It is unclear, therefore, whom the representative was seeking to challenge about the extent of the zone. It is not suggested that the representative was prevented from addressing the issue in closing submissions. I cannot see, therefore, any unfairness or disadvantage to the Applicant if the Panel Chair did

indeed limit the scope of questioning in relation to the zone, when that evidence was in agreement with the Applicant's case.

23. Furthermore, the panel was only required to make a determination regarding the proper and lawful extent of the zone if it was directing release (and therefore setting licence conditions). The panel did not direct release and, in recommending open conditions, it had no legal standing to adjudicate on the proper extent of the zone. It was entirely proper therefore for the Panel Chair to marshall or limit questioning to what was relevant to the issues it had to determine.

24. The Applicant's third ground for reconsideration is that the panel did not consider the Applicant's risk factors, protective factors or extensive licence conditions. No further specifics are given in support of this ground and I can only therefore point out that the voluminous dossier details these matters extensively, and I have no reason to believe that the panel did not consider the dossier properly. These issues go to the heart of a risk assessment, which the panel must carry out in considering the Secretary of State's referral and making its decision. It is difficult to imagine an oral hearing which does not focus on these issues. The Decision Letter, certainly, sets out the panel's conclusions regarding the Applicant's risk factors and protective factors. Licence conditions are not recorded but they have no applicability where, as here, there is no release direction. There is no evidence before me which supports this ground of complaint.

25. Finally, the Applicant asserts that the panel failed to set out in its Decision Letter why the Applicant's risk was not manageable in the community. I accept that in an appropriate case insufficiency of reasons is a proper ground for a finding that a decision is flawed but I do not find that this ground is made out here. The facts as found by the panel are set out in a clear, concise and coherent narrative. The decision logically flows from the stated reasons. The statutory test for release was correctly cited and applied. The panel explained how it had analysed, weighed and balanced the written and oral evidence presented to it. It pointed to factors favourable to the Applicant, including the completion of significant work on his offending behaviour, long periods of compliance with the prison regime, the development of coping skills and the absence of physical violence for some years. The panel balanced these positive factors against concerns that militated against release, including the failure in open conditions, recent threats to members of prison staff, and recent lapses into using NPS, even in the last few weeks prior to the hearing date. The panel noted that there was no support for release from the professional witnesses. The conclusion is a succinct and well-rounded summation of the relevant matters that makes the rationale of the decision letter obvious to the reader.

26. In **Oyston [2002] 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 draftmanship."

27. I am satisfied that the Decision Letter shows that the panel clearly understood the case; nothing of note was missed and there was no inadequacy of inquiry. The panel made clear and sustainable findings of fact and its conclusion was a balanced and fair analysis of the matters which were relevant. It was correctly focussed on risk throughout and was reasonably entitled to adopt the risk assessments and the recommendations of the OS, OM and psychologist. The legal test of irrationality is a very strict one. This case does not meet it.

Decision

28. 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.

Elaine Moloney
16 March 2021