[2021] PBRA 4

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Application for Reconsideration by BROWN

Application

1. This is an application by (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 16 December 2020 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 decision letter, the dossier and the application for reconsideration, together with the oral hearing decision of 1 March 2018, the direction to oral hearing of 22 May 2020 and panel chair directions of 23 November 2020. I have also considered **R v Portwine [2007] EWCA Crim 1351** which was raised in the application and **R (Stokes) v Parole Board [2020] EWHC 1885 (Admin)** which was submitted with the application.

Background

4. The Applicant was sentenced to imprisonment for life on 29 March 2004 following conviction for murder to which he pleaded guilty. A minimum term of 16 years was imposed. This was replaced on appeal to 12 years. His tariff expired on 13 October 2015. The Applicant was 38 years old at the time of sentencing and is now 54 years old.

5. He was released on licence on 16 April 2018 following an oral hearing. His licence was revoked on 12 August 2018, some four months later, and he was returned to custody the following day.

6. The murder took place in the context of an initially consensual sexual encounter, which turned non-consensual. The trial judge's sentencing remarks considered that the nature of the sexual conduct was an aggravating feature, along with the Applicant's heavy consumption of class A drugs and alcohol.

7. The recall resulted from allegations of rape and assault by penetration on which no further action was taken. Both complainant and Applicant are reported to have been drinking prior to the incident which gave rise to the allegations.

Request for Reconsideration

8. The application for reconsideration is dated 19 October 2020 (presumably in error) and has been submitted by solicitors acting for the Applicant. It was received by the Parole Board on 6 January 2021.

9. It sets out three grounds for reconsideration as follows:

   (a) It was procedurally unfair for the panel not to have adjourned to consider a post-therapy report and/or the judgment of the Court of Appeal;

   (b) It was irrational for the panel not to have adjourned to consider the post-programme report and/or the judgment of the Court of Appeal; and

   (c) The panel failed to provide adequate reasons in its decision.

10. This submission is supplemented by written arguments to which reference will be made in the Discussion (para 26) section below.

Current Parole Review

11. The Applicant's case was referred to the Parole Board by the Secretary of State in January 2020 to consider whether or not it would be appropriate to direct his release and, if release was not directed, to advise the Secretary of State on whether the Applicant should be transferred to open conditions. This was his second parole review since recall, having received a negative decision following an oral hearing on 13 May 2019.

12. On 22 May 2020, the case was considered on the papers by a Member Case Assessment panel (the 'MCA panel'). It noted that both his Community Offender Manager and the oral hearing panel that considered his first review since recall in April 2019 suggested that a psychological risk assessment (PRA) should be directed to inform the current risk assessment. A PRA was directed, and the case was directed to an oral hearing before a three-member panel, to include a psychologist specialist member.

13. In addition, the MCA panel directed two past psychological reports and the end of course report from a training course addressing decision making and better ways of thinking that the Applicant had completed in February 2019.

14. On 23 November 2020, the now-appointed panel chair set directions for the oral hearing. They noted that the directions from the MCA panel had been met, permitted the hearing to take place remotely, and set a further direction for an updated security intelligence report.

15. At the oral hearing, held via telephone conference due to COVID-19 restrictions, the panel heard evidence from the Prison Offender Manager (POM), the Community Offender Manager (COM) and the prison psychologist author of the PRA. The POM supported release. The COM also supported release (while accepting that more specialised bespoke work regarding sexual interests and sexual practices withing relationships would be beneficial). The prison psychologist supported release with some reservations.

16. The panel did not direct release or recommend open conditions. It was not satisfied that the Applicant's risk had been reduced to a level that could be managed in the community or in open conditions.

The Relevant Law

17. The panel correctly sets out the test for release its decision letter dated 16 December 2020.

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)). This is an eligible decision.

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.

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

The reply on behalf of the Secretary of State

25. The Secretary of State has submitted no representations in response to this application.

Discussion

Ground (a): Failure to review post-therapy report and/or Court of Appeal judgment: procedural unfairness

26. The first ground for reconsideration is that the panel should have adjourned to consider a post-therapy report (from a time that the Applicant was within a regime to help people recognise and deal with a wide range of problems) and/or the Court of Appeal judgment which reduced his tariff from 16 to 12 years. I shall deal with these two matters separately.

27. With regard to the post-therapy report, it is submitted that the panel placed great reliance on the Applicant having completed only a medium-intensity training course addressing better management of relationships rather than a higher-intensity intervention.

28. The panel deals with this straightforwardly in its reasons. While acknowledging that the post-therapy report was not in the dossier, it found there was no evidence before it to suggest that the Applicant "*failed to graduate*" from therapy and the panel which directed release in 2018 noted that the Applicant had "*done extremely well*". It further notes the evidence of the COM that it was not considered necessary for the Applicant to complete a higher-intensity programme due to the level of progress made in therapy.

29. I find nothing in the panel's reasoning that suggests the lack of a higher-intensity course was material to its decision. The reasons that the Applicant did not do so are well-documented and have been known since 2015. While the panel notes that the post-therapy report may be of use to the next panel, there is nothing on the evidence before me to suggest that its content would have been at odds with the information within the dossier and which was affirmed by oral evidence. I therefore find that the panel did discharge its duty of inquiry insofar as it relates to the Applicant's time in therapy and the reasons that he undertook a lower-intensity course. There is no procedural unfairness on this point.

30. Turning next to the Court of Appeal judgment (**Portwine**), the application first takes issue with the panel's view that the allegations of rape/assault by penetration which led to recall had *"paralleling issues with the index offence"*. The application first draws reference to the report of the Senior Crown Prosecutor contained within the dossier. In discontinuing the case relating to recall, the CPS noted in its report that the issue was one of sexual consent, and that there was sufficient weakness in the complainant's evidence relating to her consent such that there may not be a realistic prospect of conviction.

31. The CPS report further comments (in relation to the likely admissibility of bad character evidence) that *"on the face of it the cases are entirely dissimilar".* It acknowledges that a bad character application relating to the index offence could be undermined as the admission of the evidence of the murder conviction would be *"far more prejudicial than probative"*.

32. The index offence and the allegations that led to recall could reasonably be said to be entirely dissimilar: the first involving loss of life, and the second some uncertainty in establishing whether or not the complainant consented to sexual activity. However, there are also similarities. In its analysis, the panel points out the misuse of alcohol, the blurring of sexual boundaries and inappropriate sexual activity. It also notes the prison psychologist's evidence that the use of alcohol was paralleling of the Applicant's *"old lifestyle".* The panel's analysis here cannot be faulted. It cannot be said to have misunderstood the issue of consent; neither is the matter of consent central to its assessment of the Applicant's risk. In any event, the Applicant admitted that the victim of the index offence did not, in fact, consent to what amounted to an assault by penetration.

33. The panel notes that the Court of Appeal judgment may be of use to the next panel. This could be taken implicitly to mean that it was of such value that the panel should itself have considered it. However, if the Court of Appeal judgment (and for that matter the post-therapy report) was so material to the application for release, it was open to the Applicant to disclose and directly refer to it in evidence or, if in any doubt, to make his own application for an adjournment for it to be provided. The content of the dossier was known prior to the hearing and the Applicant was legally represented throughout. The Applicant had opportunities before, during and after the oral hearing to introduce such evidence and did not do so. The same could also be said of the post-therapy report.

34. Unlike the panel, I have had the benefit of reading the Court of Appeal's judgment. It said the fact that the *"[Applicant] and the victim indulged in perverted behaviour, to which the victim consented, is not an aggravating feature"*. The application submits that this statement from the Court of Appeal deals with the issue of consent in the index offence, effectively rendering it a non-issue insofar as sexual risks are concerned.

35. However, in reading on, the Court of Appeal continued by saying that *"the circumstances of the killing, involving as it did, the [Applicant] for his own gratification going beyond consensual sexual activity and then losing his temper, are relevant to how the court must view the particular gravity of this killing".* It is

clear from this that the Court of Appeal was satisfied that the boundaries of consent were, in fact, crossed in the index offence. While the perverted sexual behaviour was initially consensual, it is clear that the victim's complaint and withdrawal of consent (a withdrawal of consent that was acknowledge by the Applicant in his own oral evidence) precipitated the violence which ultimately cost her life.

36. I have therefore found no procedural unfairness on this ground.

Ground (b): Failure to review post-therapy report and/or Court of Appeal judgment: irrationality

37. It is next submitted that the failure to review the post-therapy report and/or Court of Appeal judgment referred to in ground (a) was "*Wednesbury unreasonable".*

38. No reasons for this submission are given, save for a passage from **R (Plantagenet Alliance Ltd) v Secretary of State for Justice [2013] EWHC 3164 (Admin)**. This is a restatement of the principle from **R (Bayani) v Kensington and Chelsea Royal LBC (1990) 22 HLR 406** which dealt with the scope of a reviewing court's power to interfere on the ground of the insufficiency of inquiry by a local authority to whom a homelessness application had been made.

39. As set out above, the authority that is most relevant here is **DSD**. However, there is nothing in the application that submits any reasons as to why the failure to adjourn for the post-therapy report and/or the Court of Appeal judgment was irrational. It is not for me to engage in conjecture. This ground is not argued and therefore must fail.

Ground (c): Duty to give reasons: procedural unfairness

40. Finally, it is submitted that the panel failed in its duty to give reasons. In doing so, it cites various case authorities, before stating that the panel's reasoning "*fell below an acceptable standard in public law"* and that the Applicant "*was entitled to know why the panel rejected the evidence and recommendations from the three professional witnesses".*

41. 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.

42. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board [2019] EWHC 2710 (Admin)**.

43. The application also provided a copy of **R (Stokes) v Parole Board [2020] EWHC 1885 (Admin)** which essentially applies **Wells** to the duty to give reasons in the context of a reconsideration application and not an oral hearing decision. In any event, I accept that such a duty exists.

44. The section of the decision letter headed 'Conclusion and decision of panel' is indeed short. However, that is not to say that the overall decision was unreasoned or unfounded. The reasons for the decision permeate the panel's weighing of the evidence rather than being listed in the conclusion section. Failing to list a set of reasons or not explicitly labelling them as such does not mean that those reasons do not exist. In the section of the letter headed 'Panel's assessment of current risk', the panel carefully sets out its concerns and balances the competing matters in favour of and against release. It has provided sufficient evidence of its thinking to explain why it did not follow the recommendations of witnesses. I do not find that it has fallen short of its duty to give reasons.

Decision

45. 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.

Stefan Fafinski
29 January 2021