the Parole Board
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[2021] PBRA 69

Application for Reconsideration by Bell

Application

1. This is an application by Bell ('the applicant') for reconsideration of the decision of an oral hearing panel of the Board ('the panel') which on 22 April 2021, after a hearing on 15 April 2021, decided not to direct his release on licence or to recommend a move to open conditions.

2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.

3. The following documents have been provided:
   - The 707-page dossier provided by the Secretary of State, which includes the panel's decision;
   - Representations submitted on 4 May 2021 by the applicant's solicitor in support of this application; and
   - An e-mail from PPCS dated 12 May 2021 stating that on behalf of the Secretary of State they offer no representations in response to this application.

Background

4. On 29 November 2006, at the age of 42, the applicant received a sentence of imprisonment for public protection for sexual offences against two young girls, one of whom had learning difficulties. His minimum term was set at 3½ years less time served on remand. He had previous convictions for sexual offences. He is now 57 years old.

5. He was released on licence, by direction of the Parole Board, on 9 July 2018. However, on 11 March 2019 he was recalled to custody as a result of allegations of (a) inappropriate sexualised behaviour involving a vulnerable female, (b) assaulting her partner and, (c) failing to be honest and open with his supervising officer. The first two allegations were not substantiated but after the applicant's recall further evidence of lack of honesty and openness emerged.

6. His case was referred by the Secretary of State to the Board to decide whether to direct his re-release on licence and, if not, to advise the Secretary of State about his suitability for a transfer to an open prison.

7. On 16 September 2019 a single-member panel of the Board directed that his case should proceed to an oral hearing. For various reasons there was a substantial delay in the hearing taking place, and there was a change of panel chair.

8. The hearing which eventually took place on 15 April 2021 was a 'hybrid' one in which the applicant, his solicitor and a prison psychologist were all at a hearing room in the prison where he is detained while the three panel members, an independent psychologist and the other two witnesses (the probation officers who are responsible for managing the applicant's case in prison and the community respectively) all participated remotely by video link.

9. None of the professional witnesses supported the applicant's re-release on licence. The independent psychologist recommended a move to an open prison. The prison psychologist and the two probation officers all recommended that he should remain in a closed prison and progress to a regime designed and supported by psychologists.

10. As indicated above, the panel did not direct re-release on licence or recommend a move to an open prison.

The Relevant Law

The test for re-release on licence

11. The test for re-release on licence is whether the applicant's continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the panel in the introductory section of their decision.

The rules relating to reconsideration of decisions

12. Under Rule 28(1) of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.

13. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by
    - a paper panel (Rule 19(1)(a) or (b)) or
    - an oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or
    - an oral hearing panel which makes the decision on the papers (Rule 21(7)).

14. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both of two grounds: (a) that the decision is irrational or (b) that it is procedurally unfair.

15. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. It is made on both grounds. The decision not to recommend a move to an open prison is not eligible for reconsideration.

Irrationality

16. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin) (the "Worboys case")**, 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."*

This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.

17. 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.

18. The Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under rule 28: see **Preston [2019] PBRA 1** and other cases.

Procedural unfairness

19. 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 from the issue of irrationality which focusses on the actual decision.

20. It has been established that the things which might amount to procedural unfairness include:
    (a) A failure to follow established procedures;
    (b) A failure to conduct the hearing fairly;
    (c) A failure to allow one party to put its case properly;
    (d) A failure properly to inform the prisoner of the case against him or her; and/or
    (e) Lack of impartiality.

21. This is not an exhaustive list. The fundamental question on any complaint of procedural unfairness is whether, viewed objectively, the case was dealt with fairly.

"Duty of enquiry"

22. Another situation which may give rise to a finding of irrationality or procedural unfairness is where a panel has made a decision in the absence of an important piece of evidence which might have made a difference to the decision and which the panel might reasonably have been expected to obtain (adjourning the hearing, if necessary, for that purpose). This area of the law is still in the course of development. The principle involved is sometimes referred to as a "duty of enquiry".

Request for Reconsideration

23. The applicant's solicitor's representations are quite lengthy but boil down to two basic submissions:

    a) That it was procedurally unfair to proceed with a "hybrid hearing": the panel should have adjourned or deferred the case until a fully face-to-face hearing could be accommodated.

    b) That it was irrational and/or procedurally unfair for the panel, having concluded that the proposed risk management plan was robust but that the applicant's internal controls were insufficient to enable his risk to be managed safely in the community, not to adjourn the case.

Discussion

24. It is convenient to consider the two grounds separately.

The decision to proceed with a "hybrid" hearing instead of adjourning or deferring

25. The question what form of hearing would be appropriate in this case was considered on a number of occasions by members of the Board.

26. When an oral hearing was directed on 16 September 2019 the single member stated (without giving reasons) that the case was not suitable for a video link hearing.

27. The hearing was initially listed to take place on 15 April 2020. It appears that on 31 March 2020 the then panel chair issued directions stating that the case was suitable for a telephone hearing. Those directions are not in the dossier but further directions issued by the panel chair on 7 April 2020 stated:

    "Following the panel chair directions issued on the 31 March 2020, the panel received representations from [the Applicant's] legal representative that a teleconference hearing would not be appropriate in [the Applicant's] case, due to learning difficulties and mental health issues, and the complexity of the case. The panel chair accepts those representations and, accordingly, the hearing is adjourned for a face-to-face hearing to be listed."

28. The case was then listed for a face-to-face hearing on 19 August 2020 but had to be deferred because of the solicitor's difficulty in obtaining an independent psychological assessment. The panel chair's deferral directions issued on 14 August 2020 again specified that the hearing should be a face-to-face one.

29. On 30 December 2020 the case was reviewed by a duty member as part of a Parole Board review of all cases currently directed to face-to-face oral hearings. The review was carried out in view of the continuing COVID-19 restrictions. Its purpose was to determine whether any of these cases could be progressed another way, bearing in mind the Parole Board's duty to conduct timely reviews. The duty member's ruling was as follows:

"Legal representations dated 9 December 2020 emphasised that an oral hearing was still required in this case, and submitted that the hearing should take place face-to-face, due to the complexities of the case and the disputed matters. The representations did not comment on whether a face-to-face hearing could take place effectively by video-link, but the duty member has considered that …."

"The duty member considered carefully whether, given the continuing Covid-19 restrictions, a video-link hearing which would allow some 'face to face' interaction, would be both effective and fair to [the Applicant]. Given [the Applicant's] learning difficulties, his mental health issues, his current attitude towards engagement with professionals noted in the most recent reports, the disputed matters and differing recommendations, the complexities of the case, and the fact that there will be five witnesses, the duty member has decided that a video hearing may not enable the panel to gather the evidence required, may not be fair to [the Applicant], and would be difficult to manage given the number of participants. A face-to-face hearing, to be conducted at the prison, is necessary. To reduce the numbers of participants who need to be physically present, it may be possible for the panel and [the Applicant's] solicitor to be present at the prison, with witnesses (or some combination thereof) giving evidence by video-link or telephone. The chair of the oral hearing panel will consider these arrangements once it is known what could be safely accommodated by the prison."

30. The case was then listed for hearing on 15 April 2021 by a fresh panel, and panel chair directions were issued on 17 March 2021 by the new panel chair. Those directions stated:

    "The [prison where the Applicant was detained] have confirmed that currently a maximum of six people can be accommodated in the hearing room. Having read the dossier and considered the current position, the panel chair has concluded that rather than delay the hearing any further, [the Applicant] can be afforded a fair hearing by some attendees being present at the prison and others attending remotely. The panel chair notes that since the request for a face-to-face hearing, [the Applicant] has engaged in remote interviews with the probation service and with the independent psychologist. Further consideration needs to be given to who will attend in person and who will attend remotely and will be communicated at a later stage."

31. On the basis of the information from the prison the hearing could not have accommodated all 9 of the participants (the three panel members, the applicant, his solicitor and 4 witnesses).

32. On 29 March 2021 the panel chair issued the following further direction:

    "Further to the panel chair directions dated 17/03/2021, enquiries have been made with all parties as to who, given the Covid-19 pandemic, is able to attend in person and who cannot. As a result, the panel chair has decided that the following will attend the hearing from the prison:
    - *The legal representative*
    - *The prison psychologist.*

    and the following will attend by video-link:
    - *The panel.*

- *The prison and community offender managers.*
- *The independent psychologist."*

33. This was the arrangement followed at the hearing.

34. I have every sympathy with the Applicant and his solicitor: it must have been extremely disappointing that the hearing was not a fully face-to-face one as they would have preferred.

35. As the solicitor acknowledges, the COVID-19 pandemic has created unprecedented difficulties for the Parole Board, and indeed for all concerned in the system. The Board's policy of reviewing all cases currently directed to proceed to face-to-face oral hearings to see if they could be progressed in other ways cannot be faulted: it required the duty member or panel chair carrying out the review of each case to assess the fairness or unfairness of any alternative to a face-to face hearing, and only to direct an alternative procedure if satisfied that it would be fair.

36. Each case reviewed under that policy needed to be carefully considered by the duty member or panel chair on its own facts, the overriding requirement being to ensure that the hearing was conducted fairly. In many cases a video hearing, whilst not ideal, would still be fair to both parties (the prisoner and the Secretary of State), whilst in others fairness would require the whole of the hearing to be conducted face-to-face. In some cases a "hybrid" hearing such as was directed in this case, would meet the requirement of fairness even if a fully remote hearing might not.

37. There may be cases in which the initial decision by the duty member or panel chair for a remote hearing cannot be faulted but in the course of the hearing it becomes clear that there is a real danger of unfairness resulting from the fact that the hearing is being conducted in that way. Where that is the case, it may well be that a decision to continue the hearing remotely can be said to amount to procedural unfairness.

38. It follows that my task in considering this application for reconsideration can be broken down into two stages. The first stage is to decide whether the panel chair's direction for a hybrid hearing was fair or unfair. If it was unfair, I must order reconsideration of the panel's decision; if not, I must go on to the second stage. The second stage is to decide whether, in the light of how events unfolded at the hearing, the panel should have discontinued the hearing and directed a fully face-to-face re-hearing.

39. Stage 1: I have very carefully considered the evidence on which the duty member and ultimately the panel chair had to make their decisions, and I am satisfied that those decisions cannot be faulted. There is no doubt that a fully face-to-face hearing would have been preferable and the hybrid hearing was not ideal, but the decision had to be made in the light of the circumstances in which the Board and the parties found themselves. The Board is under a duty to conduct timely reviews, and to adjourn all cases where a fully face-to-face hearing was desirable until such time as it could take place would have been to prolong many reviews unacceptably. To say that a procedure is not ideal or that something else is desirable or preferable is not to say that the procedure is unfair: whether it is unfair or not depends on all the facts and circumstances of the particular case.

40. In this case an important factor in the panel chair's decision was that the applicant would be accompanied by his solicitor in the hearing room. They would no doubt be socially distanced and masked, but they would be able to see and hear each other and if necessary to ask for a private consultation during the hearing (requests for such consultations are routinely granted). Importantly the solicitor would be able to observe the applicant's demeanour and reactions throughout the hearing and would be able to express any concerns to the panel.

41. It is a fair point, made by the panel chair, that the applicant had been able to engage satisfactorily in video-link interviews with probation and the independent psychologist (the interview with probation was a three-way video interview between the applicant and the two probation officers). Whilst the panel chair's point is a fair one, it is far from a conclusive one: the experience of participating in a parole hearing is not the same as the experience of participating in an interview with one or two professionals.

42. All in all, I cannot find anything in the evidence to lead me to the conclusion that the duty member's and panel chair's decisions were in any way unreasonable or unfair. No doubt they too would have preferred there to be a fully face-to-face hearing, but I believe that a hybrid hearing was a reasonable and fair solution to the situation in which everybody found themselves.

43. Stage 2: I have searched in vain for any evidence that there were any problems in the actual hearing which would have made it necessary or appropriate to discontinue the hearing and to adjourn or defer for a fully face-to-face hearing. Whilst the solicitor's representations contain the general assertion that a fully face-to-face hearing would have enabled the Applicant to see the panel and the witnesses face-to-face (and them to see him face-to-face) and to have allowed all parties to participate fully, there is no suggestion of any particular problem having occurred at this hearing or being brought to the attention of the panel. On the contrary, it is clear from the panel's decision letter that the applicant was able to participate fully and to make his points clearly to the panel.

The failure to adjourn the case after the panel had reached certain conclusions.

44. This ground raises the point discussed in paragraph 21 above: was the panel under a duty to adjourn the case in order to obtain any (and if so what) further evidence.

45. The panel's task was to assess the applicant's risk of serious harm to the public and then to assess the manageability of that risk on licence in the community.

46. Their conclusions about the applicant's risk were as follows:

"The panel … considered [the Applicant's] risk of violent reoffending to be medium and [the Applicant's] risk of sexual reoffending to be high. [The Applicant] demonstrated by [the Applicant's] behaviour on licence that some of [the Applicant's] risk factors remained live in the community, including a degree of sexual preoccupation; alcohol misuse; [the Applicant's] lack of openness and honesty with professionals tasked with managing [the Applicant's] risk; poor

problem-solving skills and poor consequential thinking skills. Since [the Applicant's] return to custody, you have demonstrated limited insight into [the Applicant's] behaviour in the community and have demonstrated poor emotional management at times and a continued lack of trust in females."

47. Having made that assessment, the panel considered the manageability of the applicant's risk on licence in the community. They set out the details of the risk management plan proposed by probation, and went on to state:

    "The panel considered the risk management plan to be robust but did not consider external controls to be sufficient to manage [the Applicant's] risk alone and did not consider [the Applicant] to have the internal controls to be able to comply, given [the Applicant's] behaviour when last on licence and [the Applicant's] lack of insight into the reasons for recall."

48. They therefore decided that the Applicant did not meet the test for re-release on licence.

49. The solicitor submits that:

    "… Whilst a risk management plan must be thoroughly reviewed when considering release, it should not prevent a prisoner's release, particularly when their level of risk no longer warrants confinement. If the sole reason as to why a prisoner cannot be released is a non-workable risk management plan, the case should be adjourned, not concluded with a negative decision. In current times, the direction of an adjournment would provide the opportunity for progression to be made in terms of the easing of restrictions in the community, and would allow the [community] offender manager to propose a future, detailed risk management plan, that is more representative of the services available."

50. There are two misunderstandings in this submission.

51. First, it is not correct to suggest that the applicant's level of risk no longer warranted confinement. On the contrary, on the panel's assessment (which was fully justified by the evidence) his risk was high and would therefore require his continued confinement in prison unless he could show that it would be manageable on licence in the community. In order to show that that was the case, he would need to show not only that there were sufficient external controls in the risk management plan proposed by probation but also that he possessed sufficient internal controls to reduce his risk of re-offending to an acceptable level. However robust an offender's external controls may be, they will not in themselves prevent re-offending. That was the point correctly made by the panel.

52. Second, it is not correct to suggest that the sole reason why the panel decided that the Applicant could not be released was "a non-workable risk management plan". On the contrary, the panel's conclusion was that the risk management plan was a robust one which would have been effective if the applicant had also been able to demonstrate sufficient internal controls.

53. It is difficult to see how any further evidence obtained following an adjournment could have made any difference to the panel's decision. Even if (which is doubtful) it had been possible to make probation's proposed risk management plan any more robust than it already was, that would not have altered the fact that on the panel's finding the applicant lacks sufficient internal controls to enable his risk to be managed safely in the community, and without those controls he does not meet the test for re-release on licence.

54. What is needed before the applicant will meet that test is not a tightening up of the risk management plan but for him to develop and be able to demonstrate the necessary internal controls. The purpose of the recommendation made by three of the four professional witnesses is to help him to do that.

55. In the circumstances I cannot see that there was any reason for the panel to adjourn the hearing for further information to be obtained, or indeed that an adjournment would have been of any benefit to the Applicant.

Decision

56. For the reasons set out above I am afraid I am unable to agree with either of the grounds advanced by the solicitor in support of this application. I must therefore refuse the application for reconsideration and the panel's decision must stand.

Jeremy Roberts
27 May 2021