[2021] PBRA 79

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Application for Reconsideration by Khan

Application

1. This is an application by Khan (the Applicant) for reconsideration of a decision of a Panel of the Parole Board dated 6 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, nor was there a recommendation that he was suitable to 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 1,192 pages (that includes the decision letter) and the application for reconsideration.

Background

5. The Applicant was sentenced to life imprisonment on 25 November 2005 for an offence of murder. The minimum tariff was set at 14 years (with allowance for time on remand) and expired on 14 June 2018. The Applicant was 24 years old at the time of the index offence and is now aged 45.

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

Request for Reconsideration

7. The application for reconsideration is dated 27 May 2021.

8. The grounds for seeking a reconsideration were not set out specifically but appear in a narrative form in a document entitled 'Appeal Representations'. These start with a heading 'introduction and directions sought' and, at the end of that heading, state that they would wish to 'highlight the following points'.

9. There is then a summary of the law (domestic and under the European Convention of Human Rights). I take the grounds to be those matters raised at paras 28-38.

10. Although there are various issues raised, the main grounds relate to the fact that the Applicant did not attend the hearing, which proceeded in his absence.

11. It is said that the Applicant was *'too ill'* to attend, and therefore proceeding without him was procedurally unfair. The Applicant sets out the factual background to this at paras 31-35. I shall take these globally as Ground 1.

12. The other matters raised are that the decision letter was said to contain *'several material mistakes of fact, considered irrelevant factors and failed to take into account relevant ones',* although none of these are enumerated (Ground 2).

13. Further, the decision letter has *'stated that [the Applicant] has said things, without him giving evidence … it is unclear how the panel have been able to give evidence on [the Applicant's] behalf'* (Ground 3).

14. It is said that there is *'no evidence … that [the Applicant's] risk is imminent and that he is likely to commit similar offences as the index offence'*. I shall take this as Ground 4.

15. Lastly, it is said that the Panel erred in placing an *'over-reliance on the serious of the index offence, rather than the progression'* that the Applicant has made. This, I shall call Ground 5.

Current parole review

16. The Applicant's case was referred to the Parole Board as long ago as October 2017. An oral hearing was directed in February 2018.

17. The oral hearing was conducted remotely on 27 April 2021. The Panel heard evidence from the prison probation officer and the community probation officer.

18. In light of the issues raised on this application, it is necessary to set out the procedural history of the case :

22 February 2018	Oral hearing directed, to be listed on 8 May 2018.
17 March 2018	Application made by the Applicant to defer the listed hearing (on unspecified grounds) was refused.
24 April 2018	Application to defer was renewed. This was mainly on the basis that the Applicant wished to obtain legal representation. This application was granted, with the Applicant being warned to make all reasonable efforts to secure representation. Oral hearing relisted for 4 September 2018.

4 September 2018	Oral hearing deferred on the day due to a lack of legal representation and a request from the Applicant to add more material to the dossier.
9 January 2019	The oral hearing listed that month was deferred at the Applicant's request as he had sacked his solicitors. It was noted (and this was not disputed) that this was the third occasion that the Applicant has dispensed with his lawyers. Hearing relisted for 17 July 2019.
17 July 2019	Oral hearing deferred at the Applicant's request as his new legal team had only recently been instructed, and he now wished to obtain an independent psychological risk assessment. Hearing relisted for 20 November 2019.
18 November 2019	Hearing deferred at the Applicant's request in order to obtain a psychiatric report. Hearing relisted for 25 March 2020.
25 March 2020	The hearing was just before the Covid-19 lockdown. The Applicant's then lawyer could not attend in person as he had to self-isolate. It was agreed that he could attend by telephone, but the Applicant stated that he would not engage in a hearing without his lawyer in person. However, by the day of the hearing the country had entered the lockdown and all hearings were deferred. Hearing relisted for 16 July 2020.
16 July 2020	The Applicant had dispensed with a further set of lawyers and had indicated an unwillingness to proceed without his new lawyer physically present. There appear to have been various technical difficulties at the hearing, and one (of the three) panellists had to withdraw. The remaining Panel offered to proceed, but the case was adjourned at the Applicant's request for a variety of reasons.

	Hearing relisted for 27 April 2021. In the interim there were a number of different applications made.
26 April 2021	Applicant requested a number of accommodations to make allowance for medical conditions and to pray (as the hearing was listed during Ramadan). These were all agreed to. The Applicant then requested an adjournment because of Ramadan. This was refused.

19. On the day of the hearing, the Panel were told that the Applicant had declined to attend an arranged medical examination, and he did not attend the hearing.

20. The Applicant's lawyer spoke to the Applicant and applied for an adjournment on the basis that the Applicant had not refused to attend healthcare, but rather than he was too ill. His lawyer relayed the Applicant's statement that he had been doubly incontinent.

21. At the request of the Panel, a prison officer went to speak to the Applicant. He reported back that he had made several attempts to persuade the Applicant to attend healthcare and relayed the message from the Panel that they were likely to proceed in the Applicant's absence.

22. The Prison Officer did state that the Applicant looked unwell, although he was not familiar with the Applicant's usual presentation. The Officer stated that he did not see faeces or urine as previously described.

23. The Prison Officer's evidence was challenged by the Applicant's lawyer. The Panel concluded, on the balance of probabilities, that they accepted the Prison Officer's evidence.

24. The Panel noted that there was a history of the Applicant allegedly feigning illness and exaggerating his physical capacity, albeit that this was some time ago.

25. Having taken representations from the Applicant's lawyer, the Panel decided to proceed in his absence in accordance with Rule 23 of the Parole Board Rules 2019.

26. The Applicant's lawyer decided to withdraw at that point, although it appeared that he asked if he could return if he received further instructions. He was told that he could do so without notice.

The Relevant Law – Reconsideration

27. 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

28. 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)).

29. 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

30. 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."

31. 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.

32. 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

33. 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.

34. 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.

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

36. 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 applicant (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.

37. In **Oyston [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 Relevant Law – Proceeding in absence

38. The relevant Rule is Rule 23:

Notification by prisoner

(1) A prisoner must notify the Board and the Secretary of State if—

(a) the prisoner does not want a panel at an oral hearing to consider the case; or
(b) the prisoner does not want to attend an oral hearing which has been listed.

(2) An oral hearing may take place in the absence of a prisoner where—

(a) a prisoner has notified the Board in accordance with paragraph (1);
(b) a represented prisoner has not notified the Board in accordance with paragraph (1) but the prisoner's representative is in attendance;
(c) a represented prisoner has not notified the Board in accordance with paragraph (1) and neither the prisoner nor the prisoner's representative are present at the hearing.

39. It can be seen that the structure of the Rules is that it gives a Panel a discretionary power to proceed in the absence of a prisoner.

40. I am not aware of any reconsideration cases, or cases from the Administrative Court, concerning the application of Rule 23.

41. Clearly, where a prisoner has given a notification under Rule 23(1), it is likely that the Panel will conclude that it is fair to proceed.

42. In situations where there has been no notification, although there appears to be an absolute discretion under Rule 23, it is clear that the Panel must act in a rational and fair way.

43. It is perhaps useful to consider the approach taken by the criminal courts where a defendant fails to appear for a trial.

44. The case of **Jones [2002] UKHL 5** is still the leading authority, and states that the following matters should be taken into account:

(a) The nature and circumstances of the person's behaviour in absenting himself, in particular, whether the absence was voluntary and there was a clear waiver of his rights under Article 6 [of the European Convention of Human Rights]*;*

(b) Whether an adjournment would resolve the matter;

(c) How long an adjournment would be;

(d) Whether the person wished to be represented, or had waived that right;

(e) Whether the person's representative could receive instructions from their client;

(f) The extent of the disadvantage to the person;

(g) The risk of the tribunal of fact reaching an improper conclusion about the absence of the defendant;

(h) The general public interest that trials should take place in a reasonable time;

(i) The effect of delay on the memories of witnesses; and

(j) Where there is more than one defendant, the undesirability of having separate trials.

45. It is clear that (j) has no application. In reality, (g) and (i) are unlikely to be a significant factor.

46. The remaining factors are relevant.

47. There are, of course, differences between criminal trials and Parole Board hearings. One significant point being that it is not the case that the whereabouts of the prisoner is unknown, as it might be if he was on bail.

48. This does mean that the Panel will likely be faced with a situation where the issue is whether the prisoner has voluntarily absented himself (most likely from an intention of frustrating the proceedings).

49. Another difference is that a criminal trial is the state bringing a prosecution against a defendant who, at that point, is presumed to be innocent. It is an adversarial proceeding with a clear burden and standard of proof, and strict rules of evidence.

50. There is useful guidance as to the application of **Jones** in Criminal Practice Division 2015:

25B.2 The court has a discretion as to whether a trial should take place or continue in the defendant's absence and must exercise its discretion with due regard for the interests of justice. The overriding concern must be to ensure that such a trial is as fair as circumstances permit and leads to a just outcome. If the defendant's absence is due to involuntary illness or incapacity it would very rarely be right to exercise the discretion in favour of commencing or continuing the trial.

25B.3 Proceeding in the absence of a defendant is a step which ought normally to be taken only if it is unavoidable. The court must exercise its discretion as to whether a trial should take place or continue in the defendant's absence with the utmost care and caution. Due regard should be had to the judgment of Lord Bingham in ***R v Jones (Anthony William) [2002] UKHL 5, [2003] 1 A.C. 1, [2002] 2 Cr. App. R. 9****. Circumstances to be taken into account before proceeding include:*
i) the conduct of the defendant,
ii) the disadvantage to the defendant,
iii) the public interest, taking account of the inconvenience and hardship to witnesses, and especially to any complainant, of a delay; if the witnesses have attended court and are ready to give evidence, that will weigh in favour of continuing with the trial,
iv) the effect of any delay,
v) whether the attendance of the defendant could be secured at a later hearing, and
vii) the likely outcome if the defendant is found guilty.
Even if the defendant is voluntarily absent, it is still generally desirable that he or she is represented.

51. A Parole Board hearing is much more inquisitorial in nature, and the rules of evidence are much less strict. Another consequence of that is that the Panel will likely have a lot more information about the prisoner's case from the various reports that are in the dossier.

52. If the prisoner's absence is involuntary (for example, if they are ill or have been transferred prisons) then it would be extremely unlikely that a Panel could conclude that hearing could fairly proceed in his absence.

53. There may be cases where, for example, there is a recalled prisoner who is so close to their sentence end date that there is no realistic prospect of having a rescheduled hearing, and so a Panel decides that proceeding in absence is the fairest option.

54. If the Panel conclude that the absence is voluntary, it will often be prudent to confirm that the prisoner is aware that his hearing is today and that, if he does not attend, the case may proceed in his absence.

55. The listing practice of the Parole Board means that it will not be practical to put the matter back to the next day, and often even to the afternoon if it is a morning case.

56. However, such enquiries would normally have been made by the prison officer in the morning in any event and, if not, can be made quickly.

57. Even though there may be voluntary absence, that does not mean that the hearing should proceed. There will be cases where the Panel decides that it is appropriate to adjourn or defer.

58. At that point, the Panel should consider all the circumstances including, in particular, points (a), (b), (c), (d), (f) and (h) of **Jones** and (i)-(vii) of the Practice Direction (suitable amended to the difference in Parole Board proceedings) and make a decision as to the fairness in proceeding without the prisoner being there.

59. When a Panel decides to proceed in the absence of the prisoner, it is desirable for him to be represented. However, it will be a matter for the representative to decide if they can continue, consistent with their professional obligations.

60. The Panel can ask the representative to stay and put forward their client's case, but it will be a matter for them as to whether they do (at least if they are a regulated legal professional).

61. This will often not become clear until after the decision is made. It would be open to the Panel to revisit the decision to proceed, but it is unlikely that this would lead the Panel to adjourn.

The reply on behalf of the Secretary of State

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

Discussion

63. I shall start by considering Grounds 2-5 briefly.

Ground (2) – Alleged mistakes of fact

64. It is said that there are a number of mistakes of fact, but it is not said what these are.

65. A bare assertion to that effect can carry no weight. In those circumstances, this ground is not made out.

Ground (3) – The evidence of the Applicant

66. It is not clear to me what this ground relates to.

67. The decision letter refers to statements which the Applicant has made previously. The Panel were perfectly entitled to record this (in fact, in circumstances where the Applicant did not attend, it may be that they were obliged to) but this cannot be said to be the Panel giving evidence on his behalf.

68. In the absence of any examples in the grounds, I do not consider that there is anything in this point.

Ground (4) – Imminence of risk

69. The Panel is obliged to make an assessment of risk, which is what the Panel did on this occasion.

70. There clearly was evidence from which the Panel were entitled to conclude that the Applicant presented a risk of serious harm to the public, which is the test that they are obliged to apply

71. In those circumstances, this ground is not made out.

Ground (5) – Overreliance on the index offence

72. It is said that the Panel placed too much reliance on the index offence.

73. It is unsurprising that the Panel would start with the index offence, as this is the reason for his ongoing detention. However, the Panel took this as a starting point, but went on to consider the developments since then.

74. In those circumstances, this ground is not made out.

Ground (1) – Proceeding in absence

75. I therefore turn to the most significant ground, that relating to the absence of the Applicant from the hearing.

76. The Applicant does not dispute the lawfulness of Rule 23, and there is no submission that it is not compatible with Article 6.

77. The question then is whether the decision to proceed was one that was open to the Panel.

78. A decision to proceed in the absence of a prisoner is not one to be taken lightly, therefore it is one that should be subject to anxious scrutiny.

79. As can be seen from the chronology above, this case was an unusual one in that some three and a half years after the referral, the proceedings were still ongoing.

80. The decision letter carefully sets out the history of the matter. There have been a large number of adjournments, at least five of which had been requested by the Applicant.

81. Had the Panel adjourned again, this would appear to have been the eighth time that the case would have been adjourned or deferred.

82. The grounds take issue with the Panel's finding that the Applicant had defecated and urinated on himself. However, this is simply a disagreement with the factual finding, which was reasoned and open to the Panel.

83. The grounds for reconsideration state that the evidence of the prison officer was that the Applicant *'did not look well'*. From this it is *said 'this confirming that [the Applicant] was not fit enough to proceed to the oral hearing'*. One does not follow from the other.

84. Against the backdrop summarised above, the Panel's finding of fact that the Applicant was not being honest about his having been *'covered in urine and faeces'* and the fact that there was no medical evidence (mainly because the Applicant had refused to attend healthcare), it is not surprising that the Panel concluded that the Applicant was attempting to frustrate the proceedings.

85. That conclusion was not only open to them but was, I consider, realistically the only conclusion that could be drawn on the evidence.

86. I note that even now there has not been any medical evidence served to support the contention that the Applicant was unwell on the day.

87. Given the Panel's assessment of the position, it cannot be said that the decision to proceed without the Applicant was an unreasonable one.

88. In this case, the Applicant's representative withdrew. That was a matter for him, although the reasons are not clear. It does not seem to me that this could have made a difference in the assessment of the Panel

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

Conclusion

90. This case was a very unusual one with an extremely lengthy history. There was clear evidence that the Applicant had sought to delay the proceedings on a number of occasions.

91. The Panel concluded that that is what the Applicant was doing on the day of the hearing. That is clearly a decision that was open to them on the evidence, as was the decision to proceed in absence.

92. I do not consider that anything in the grounds, or that occurred during the course of the hearing, throws doubt on that decision. To proceed in absence is an exceptional decision, but this was clearly an exceptional case.

93. None of the other grounds raise any issues of substance.

Decision

94. 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
21 June 2021