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[2022] PBRA 118

Application for Reconsideration by Cooper

Application

1. This is an application by Cooper (the Applicant) for reconsideration of a decision of an oral hearing dated the 15 July 2022 and outcome of decision not to direct release. There is an error in the application which submits that the panel decided to *'direct the Claimant's progression to Open Conditions…'.* As an aside, no Parole Board panel can 'direct' progression to open conditions, they can *recommend* or *advise* the Secretary of State as to suitability for open conditions. The error in the application is because in fact the panel did not so advise or recommend progression to open conditions.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.

3. I have considered the application on the papers. These are the 861-page dossier which also contains the decision letter, and the application for reconsideration. I considered whether I should seek clarification from the Applicant's legal representatives of the above error as well as some other rather oddly worded parts of the application but decided that the application was sufficiently clear for me to be able to proceed, and the decision not to recommend transfer to open conditions is not within the remit of the reconsideration process in any event.

Background

4. The Applicant is serving a sentence of imprisonment for public protection (IPP). He was sentenced in 2007 for the offence of sexual activity with a person with a mental disorder, involving penetration. He was given a tariff of 4 years 6 months, less time spent on remand and this tariff expired in December 2010. He has previous offending of a similar nature having been convicted of a historic offence of rape, and another conviction for threatening and violent behaviour towards a former partner. He has been released and recalled on three occasions on this sentence. The relevant oral hearing was considering his most recent recall. The Applicant was 41 years old at the time of conviction. He is now 56 years old.

Request for Reconsideration

5. The application for reconsideration is dated 4 August 2022.

6. The application was not made on the published form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints and reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made. As explained above, the application did contain errors and some unclear phrases however I decided that the meaning of all parts of the application was clear and proceeded without seeking further clarification.

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

(a) Irrationality

i. The Applicant states the panel's conclusion was based on the report by a Forensic Psychologist in Training who placed a significant weight on likelihood of his sexual reoffending in the community. The Applicant had not committed any offences whilst on licence.

ii. The Applicant states that in addition to the above, it is clear that the panel's decision that the Applicant's risk was not manageable in the community due to mental health is completely irrational, as it went contrary to the evidence of the Professional witnesses (the independent psychologist, Community Offender Manager(COM) and Prison Offender Manager (POM)) who attended the Hearing.

(b) Procedurally unfair

i. The Applicant states that the panel overstepped its remit *"in alleging the commission of further offences without any further tangible evidence".*

(c) Illegality

i. The applicant states that the panel misapplied the public protection test.

Current parole review

8. The case was first referred to the Parole Board by the Secretary of State in July 2021. The MCA directions directing an oral hearing was in August 2021. These directions directed a face-to-face hearing, however because of the COVID 19 pandemic this proved very difficult. Following submissions from the Applicant's legal representatives, the panel chair directed that a remote (video) hearing was suitable. By then a number of reports had been added to the dossier and the hearing time estimate was increased to 4 hours. The Applicant has had a number of reviews by the Parole Board in the past. This review was subsequent to his most recent recall.

9. The date of the oral hearing was 6 July 2022, and the panel consisted of two psychiatrists and an independent member. The panel considered a dossier of 833 pages and received written concluding submissions from the Applicant's legal representative following the hearing. Reports considered by the panel included but were not limited

to a number of psychiatric and psychological reports as well as reports from the Applicant's POM and COM. Evidence was taken from a prison psychologist, as well as a psychologist instructed by the Applicant's legal representatives (the independent psychologist), the POM and COM, and a representative from the mental health in-reach service at the prison. Evidence was also taken from the Applicant.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 15 July 2022 the test for release (which is automatically set out in the oral hearing template) and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

11. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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**.

Illegality

13. An administrative decision is unlawful under the broad heading of illegality if the panel:

(a) misinterprets a legal instrument relevant to the function being performed;
(b) has no legal authority to make the decision;
(c) fails to fulfil a legal duty;
(d) exercises discretionary power for an extraneous purpose;
(e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
(f) improperly delegates decision-making power.

14. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Irrationality

15. 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."*

16. 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.

17. 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

18. 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.

19. 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.

Other

20. 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.

21. 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 reply on behalf of the Secretary of State.

22. On 11 August 2022 the Secretary of State indicated that he had no comment on the application.

Discussion

23. I will take each ground and sub-issue in turn. Inevitably there will be some repetition as many parts of the Application are linked.

(a) Irrationality:

i) The Applicant states the panel's conclusion was based on the report by a Forensic Psychologist in Training who placed a significant weight on likelihood of his sexual reoffending in the community. The Applicant had not committed any offences whilst on licence.

24. The decision letter itself indicates that the panel placed significant weight on what it considered to be a very thorough report by the prison psychologist. Had there been evidence that the panel had not considered the evidence and report of the independently commissioned psychologist (independent psychologist) I would be concerned that the panel had not fully weighed up the evidence of both witnesses. That is not the case here. I can see that under the 'evidence of change' section the panel carefully reports what both witnesses stated. From the letter, I cannot see that there is a huge difference in view of the two experts other than their conclusion, one (the independent psychologist) tentatively supporting release with a very strict risk management plan, and the other recommending further work in a custodial setting.

25. Having explored the evidence of both experts, the panel is entitled to come to a view, indeed where there are differences in view that go to risk, it is the duty of a panel to decide whether they prefer one opinion over another, or whether they reject both, or parts of both.

26. I then considered whether the panel had properly explained why they preferred the evidence or recommendation of the prison psychologist. The decision letter specifically states that there are unknown concerns that have not been properly explored, such as targeting vulnerable women and the Applicant's sexual behaviour. This is further explored in earlier sections of the letter as well.

27. I also noticed that both experts used different assessment tools to assess the risk of sexual offending. All the tools were valid for the assessments they were designed to undertake. The independent psychologist used the RM2000 (Risk Matrix 2000) which as they state in their report is a static measurement of risk of sexual offending. They assessed, using this tool, that the risk of sexual offending was high, but quite rightly pointed out that the tool cannot measure change as it is static and therefore uses historic information. The prison psychologist used RSVP (Risk of Sexual Violence Protocol). This tool certainly looks at the past, but also the present and the psychologist using this tool could helpfully assess any evidence (or not) of change over a certain period of time. Where the independent expert report provides their assessment under RM2000 in two paragraphs, the prison psychologist's report, when discussing the results of using the RSVP, goes into a significantly greater amount of detail, for around 29 paragraphs. Both experts used other tools to assess the Applicant as well, and I note that the independent psychologist used a battery of tools to assess the Applicant's mental health. The panel took evidence from both forensic psychologist witnesses and their evidence is detailed in the decision letter.

28. The panel's duty is to assess risk, in this case the risk of future sexual violence, and I cannot see any irrationality in the attention they paid to the prison psychologist's report under the circumstances.

ii) The Applicant states that in addition to the above, it is clear that the panel's decision that the Applicant's risk was not manageable in the community due to mental health is completely irrational, as it went contrary to the evidence of the Professional witnesses (the independent psychologist, COM and POM) who attended the Hearing.

29. There is no doubt that the Applicant's case is a complex one, as the Applicant suffers from a range of mental health problems, and he has spent time in a hospital for treatment of his mental health on this sentence. Indeed, his first release on licence was from a medium secure hospital.

30. Having read and assessed the conclusion of the letter, I cannot agree with the Applicant's submission that the panel's decision not to release was because the Applicant's mental health was not manageable or *'due to mental health'*. I think there might be a misunderstanding of the panel's conclusions in this respect. The panel's conclusion states that there has been a "*consistent focus on mental health issues rather than the psychological effects of risk*". This statement as I read it explains the panel's concern that insufficient focus has been given to risk (as opposed to mental health) while the Applicant was in custody. The decision letter goes on to state that the Applicant's mental health is generally well controlled. My reading of the conclusion is that, while inevitably taking mental health into account, the concern of the panel is that there had been insufficient focus on risk and "*the lack of progress in identifying risk".* Accordingly, I dismiss this part of the Application.

(b) Unfairness:

i) The Applicant complains that the panel overstepped its remit *"in alleging the commission of further offences without any further tangible evidence".*

31. 'Further offences' is usually meant to refer to offences committed (or alleged to have been committed in this particular case) after the index offence which is why the word 'further' is used. I should state at the outset that in my view this part of the application is misconstrued. Firstly, the panel does not 'allege' anything, indeed it has no power to do so as the application itself states. It **could** make comments or even findings with respect to allegations made by a third party as long as it did so lawfully. I can see no such evidence or allegations before the panel. In the report of the prison psychologist, as quoted in the application there is reference to concerns about the Applicant targeting vulnerable women. I am not sure if this is the *'allegation of commission of further offences'.* The decision letter refers to the fact that while in the community on licence there were allegations of sexually inappropriate behaviour. The panel is reporting what is stated in the dossier and makes no findings on any 'allegations' (if indeed the inappropriate behaviour is what the application is referring to, it is not clear). The decision letter indicates that the panel has a concern that the Applicant does not have insight into why female sex workers (whom he admitted to meeting socially while on licence although denied having sex with) might be vulnerable. The decision letter then goes on to say in its conclusion that *'apparent targeting of vulnerable women and his sexual behaviour are not well understood and have not been addressed*'. None of this indicates that the panel is making findings on any allegations.

32. Possibly arguing in the alternative, the application states in its conclusion: *'The allusion of further offences being committed prior to the index, without any substantial proof or evidence is incredibly harmful to the Applicant and is ultra vires, as the Parole Board is not there to determine innocence or guilt.'* I take from this that perhaps the 'allegations' referred to in the body of the application are some historic allegations and not *'further'* offences. Again, I can find nothing in the decision letter that refers to un-convicted allegations or any findings in relation to the same. Neither allegations nor findings can be found in the decision letter and therefore I dismiss this part of the Application.

(c) Illegality

i) The Applicant states that the panel misapplied the public protection test.

33. The application states that the panel did not correctly apply the public protection test and therefore the decision is irrational, I think this part of the Application falls more neatly under the ground of illegality as per paragraph 13 above. Several points are made in this part of the application, and they fall under the following broad areas:

a) Failure to consider the evidence of the independent psychologist who favoured release and putting too much weight on the assessment of the prison psychologist;

ii) I have already dealt with this issue under 'irrationality' above and have nothing more to add, other than to repeat that I do not find any unlawfulness in the approach of the panel.

b) Failure to take into account professionals' views that risk had (sufficiently) reduced since the Applicant came into custody;

iii) There is some confusion in the application about the assessment of risk. The application quotes the 'OGRS' score as low, and then goes on to say that the panel summarised this as high risk. I cannot find any evidence of this in the decision letter. As background, OGRS stands for Offender Group Reconviction Scale. It is a risk assessment tool used to assess the likelihood of re-offending. It is a static tool using factors such as age, gender and criminal history. It is generally thought not to be very useful for predicting the likelihood of future sexual offending. The decision letter simply quotes *all* the relevant scores and assessments from the tools or expert opinions of the witnesses. In the same assessment that provided the OGRS score there was also a fairly new assessment for likelihood of further contact sexual offending (OSP/C), and this was high, as quoted correctly by the panel, maybe this is what the application is referring to. Even their own expert the independent psychologist agreed that the Applicant posed a high risk of sexual reoffending using the RM2000 risk assessment tool. There are also separate assessments for risk of serious harm. The risk of serious harm (as opposed to re-offending) was assessed by the COM as high to the public and to known adults. The prison psychologist and the independent psychologist are both stated within the decision as agreeing that the risk of serious harm was high. As far as 'sufficiently reduced' being considered despite the high scores for both harm and re-offending, the panel was clear that its finding was that the Applicant lacked insight into his offending. I cannot see therefore there is any merit in this part of the application.

c) That the panel appears to be putting weight on evidence that was not before them about lack of openness and honesty by the Applicant – and the explanation of this part of the application appears to be the panel's consideration of the evidence of personality traits;

iv) I could find no evidence about concerns about the Applicant's lack of openness and honesty in the conclusion of the decision letter. I therefore explored the rest of the letter in detail to establish what the application might mean with respect to this part of the complaint and any link to personality traits. On a detailed examination of the decision letter, I can find nothing to substantiate this part of the complaint at all.

d) That in relation to openness and honesty, the panel does not explain why they come to the conclusion about the Applicant's lack of the same;

v) I make no further answer to this other than what I have said under c) above. I can find no conclusion that the panel came to about the Applicant's openness and honesty, or otherwise.

e) That the panel incorrectly came to the conclusion that the Applicant needed to do more work to reduce his risk:

vi) The decision letter states, in its conclusion and in the body of the letter, its concerns that the Applicant lacks insight into his risks; that some of the risks regarding targeting vulnerable women and sexual behaviour are not fully understood; that there is, in their opinion, insufficient material difference in the risk management plan, from the plan that he was released on previously (and was recalled). The conclusion does not state that the Applicant needed to do more work to reduce risk, however I do accept that in stating that there are still poorly understood and untreated risk factors there is a suggestion that more work will need to be done. The panel is entitled to come to such a position having taken evidence from the professionals, and the evidence is presented fully in the decision letter. I consider that the issue here continues to be the preference of the recommendation of the prison psychologist over that of the independent psychologist and I have dealt with this elsewhere. I find no illegality in this part of the application.

f) That, as per the case of **Sternum**, the panel should have assessed risk of committing similar violent offences as that of the index offence, and there was no evidence before the panel of such a risk or that the risk was imminent.

vii) I disagree there was no evidence before the panel of risk of similar offences as that of the index offence. The Applicant's own independent psychologist, using the RM2000 risk assessment, stated that the RM2000 *"predicts the likelihood of reconviction for a sexual or violent offence"* and then goes on to state that the Applicant scored as high risk using this assessment. The prison psychologist, using the RSVP, stated that there was a high risk of serious harm particularly to adult females who are considered vulnerable. The OASyS OSP/C risk which is a new risk tool used by the probation service to assess the likelihood of future sexual offending placed the Applicant as a high risk of further contact sexual offending. The panel does not find that the risk was imminent, and does not need to do so to decide that the test for release is not met. I can find no merit in this part of the application.

g) The decision is irrational because the panel should not have assessed the seriousness of the Applicant's index offence but should have provided an assessment of current risk and whether it could be managed in the community;

viii) I refer to my answers to all the points above. As well as that, a panel is, in my opinion, duty bound to consider the seriousness of any index offence as well as any past offending, along with any evidence of change, reduction in offending, current risk factors, protective factors and concerns about future risk. In my view the panel did not err in its approach in making its decision taking into account all the evidence before it.

h) The panel did not give good reason for deviating from the recommendations of the professionals.

ix) This is an important point, and where a panel does deviate from recommendations it must state why and say whose evidence they prefer (or provide their own analysis). The COM in their written report, while agreeing with the concerns raised by the prison psychologist, recommended release. However, in the decision letter it is stated that when giving oral evidence, this professional agreed with the prison psychologist that further work needed to be carried out before release, and the letter details many concerns that the COM has about the Applicant's management in the community. The POMs recommendation is not noted in the decision letter, however in their evidence they too had a number of concerns about the Applicant's manageability in the community. The only clear position relating to release was that of the independent psychologist, who recommended release with a highly structured and supportive risk management plan. Elsewhere in this decision I have already dealt with my consideration relating to preferring one professional's opinion over another and explained my reasons as to how the decision letter was clear in its explanation as to why the panel did prefer the prison psychologist's evidence and recommendation. The panel's decision letter clearly indicates its own concerns about risks not clearly understood and therefore not treated, and the lack of insight they assessed in the Applicant about his risks. I consider that sufficient reason was given for the panel's decision and its preference for one professional's opinion over another's.

Decision

34. For the reasons I have given, I do not consider that the decision was illegal, irrational or procedurally unfair and accordingly the application for reconsideration is refused.

Chitra Karve
07 September 2022