

[2022] PBRA 20

Application for Reconsideration by Curtis

Application

1. This is an application by Curtis (the Applicant) for reconsideration of a decision of an oral hearing panel of the Board dated the 6 January 2022. The panel did not direct 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 of the oral hearing panel; the dossier consisting of 615 pages; the application for reconsideration filed by the Applicant's solicitors and dated 2 February 2022.

Background

4. The Applicant pleaded guilty to an offence of Wounding with intent to cause grievous bodily harm contrary to section 18 of the Offences against the Person Act 1861. The Applicant attacked the victim, who was a family member, causing serious injury. The Applicant was aged 21 at the date of sentence. He was sentenced on 23 May 2014.
5. He was 29 years old at the time of the oral hearing decision. The Applicant is serving an extended sentence of imprisonment. The judge imposed a sentence of nine years and four months imprisonment with an extension period of five years. The Applicant was eligible for parole on 12 August 2020. His conditional release date is in September 2023. His sentence expiry date is in September 2028.

Request for Reconsideration

6. The grounds for seeking a reconsideration are as follows:
 - a. That the panel failed to give sufficient reasons for its decision not to direct the release of the Applicant, in the light of the fact that three professional witnesses supported release.
 - b. The panel failed to adjourn to obtain further evidence as to progress in a treatment unit.

Current parole review

7. The oral hearing was conducted before a three panel member of the Parole Board consisting of an independent member as chair, a psychologist member, and a psychiatrist member.
8. Evidence was received from the Applicant's Prison Offender Manager, his Community Offender Manager, and a prison forensic psychologist. The Applicant was legally represented at the hearing.

The Relevant Law

9. The panel correctly sets out in its decision letter the test for release.
10. Pursuant to 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)).

Irrationality

11. 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."

12. 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.
13. 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

14. 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.
15. 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.

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

17. Justice must not only be done but be seen to be done and so procedural unfairness includes not only an unfairness of process, but also the perception of unfairness (for example, failure to deal with the arguments or evidence advanced in an appropriate manner or not at all).

18. It is for me to decide whether I consider the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties.

19. 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 draftsman ship.*"

20. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

Failure to give sufficient reasons

21. It is well established now, by decisions of the courts, that a failure by a panel to give adequate reasons for its decision is a basis on which its decision may be quashed, and reconsideration directed. Complaints of inadequate reasons have sometimes been made under the heading of irrationality and sometimes under the heading of procedural unfairness: whatever the label, the principle is the same.

22. The reason for requiring adequate reasons had been explained in a number of decisions including:

R v Secretary of State for the Home Department ex parte Doody (1994) 1 WLR 242;

R (Wells) v Parole Board (2009) EWHC 2710 (Admin);

R (PL) v Parole Board and Secretary of State for Justice (2019) EWHC 306;

R (Stokes) v Parole Board and Secretary of State for Justice (2020) EWHC 1885 (Admin).

23. The principal reason for the duty to give reasons is said to be the need to reveal any error which would entitle the court to intervene: without knowing the panel's reasons the court would be unable to identify any such error and the prisoner's right to challenge the decision by Reconsideration or judicial review would not be an effective one. In **Wells** Mr Justice Saini pointed out that the duty to give reasons is heightened when a panel of the Board is rejecting expert evidence.

The reply on behalf of the Secretary of State

24. The Secretary of State made no comment.

Discussion

25. It is convenient first to set out below the conclusion of the oral hearing panel and their reasons.

"The panel carefully considered the information it read in the dossier, the evidence it heard and the written submissions from the legal representative on his [the Applicant's] behalf. He committed a serious offence of violence whilst on licence for other serious offences of violence and demonstrated by this that he is capable of causing serious harm and capable of reoffending despite restrictions placed on him. Whilst the panel accepts that his mental health problems, in the form of problematic personality traits, are likely to have played a role in the index offence and that he has engaged in work to better understand these traits, it also considered other factors such as grievance thinking, feelings of revenge, his behaviour in relationships and his willingness to use violence to have played a role.

The professionals who worked closely with him on the Unit did not consider him to have addressed his use of violence or his behaviour in relationships and recommended that these areas of outstanding treatment need were addressed in prison by him undertaking a training course addressing the use of violence and sex offending. In contrast, the [Applicant] said that he had engaged in work on the Unit to address these risk factors but was unable to recall his learning in evidence and the professional witnesses were unable to assist the panel in understanding what work he had completed, if any. Taking all of this into account, the panel concluded that there was insufficient evidence that the [Applicant] has addressed these areas of risk, fully understands them or knows how to manage them. It therefore concluded that he has outstanding treatment needs which need to be addressed in custody. It is not for the panel to identify the appropriate treatment pathway.

All of the witnesses recommended his early release, although the Community Offender Manager considered him to have outstanding core risk reduction work.

The Parole Board shall not direct release unless it is satisfied that it is no longer necessary for the protection of the public that he should be confined. At this stage the panel was not so satisfied and concluded that his risk cannot be managed in the community."

26. As noted above the position at the date of the oral hearing was that the prison psychologist and both the Community Offender Manager (COM) and the Prison Offender Manager (POM) were recommending that the Applicant be released.
27. The history of the case was that prior to sentencing the Applicant had been examined by a psychiatrist who had considered the Applicant to have antisocial and paranoid personality traits. He was also considered to have limited insight into the nature of his antisocial personality traits and a limited understanding of the relationship between those traits and violence.
28. At the time of committing the index offence the Applicant had been on licence having been released following a conviction for wounding with intent and unlawful wounding. He had been sentenced to a period of three years imprisonment in relation to that prior offence. In his sentencing remarks the judge referred to the Applicant as a "*dangerous young man.*"
29. During the course of his sentence the Applicant had completed a training course addressing decision-making and better ways of thinking. He had also completed an intervention related to substance misuse. He had spent a brief period on a prison programme aimed at addressing and managing emotions and mental health difficulties. The Applicant deselected himself from this programme after two months and during the assessment period.
30. In June 2016 the Applicant was transferred to a unit of a mental health hospital and remained in hospital for a period of 12 months. The purpose of this transfer appeared to have been to assess and treat mental health difficulties. He was reported to have engaged in therapy to understand his personality traits. He was transferred back from hospital to prison.
31. No formal report was provided to the oral hearing panel from the hospital, however a mental health discharge summary was provided. In essence the discharge summary indicated that it was the view of the hospital that the Applicant's mental health difficulties had been diagnosed and treated and that he no longer required treatment in hospital. The recommendation by the hospital consultant was that the Applicant should undertake a training course addressing violent offending. The clear implication was that the Applicant had not undertaken any or sufficient intervention work in relation to violence. It was also noted by the hospital unit that there had been instances of aggressive behaviour by the Applicant directed towards staff and patients.
32. In preparation for a forthcoming oral hearing the Applicant's COM, in January 2020, reported that he took the view that the Applicant should complete a program related to violence and sexual offending or complete an alternative intervention programme. The COM noted that the Applicant had not completed any accredited offending behaviour work to address the index offence.
33. In January 2020 the POM provided a report indicating that there were difficulties in securing a place for the Applicant on a programme addressing violence and sexual offending and suggesting that an alternative treatment pathway was investigated.

34.A psychological risk assessment was conducted by a prison psychologist in November 2020. The comment by the psychologist in relation to further intervention treatment was as follows:

"The [Applicant] is an individual whose experiences from childhood have had a lasting impact on his ability to trust and interact with others. His use of substances has compounded these issues and contributed to the deterioration of his mental health. This has led to his serious actions within his index offence. The [Applicant] has engaged in both medical treatment and therapy during his time in hospital and, since his return to custody, there has been a significant change in his behaviour. Whilst he has not engaged in any formal intervention to address his violent offending since his return to custody from hospital, it is my assessment that he does not currently demonstrate any outstanding treatment needs that would require engagement in further interventions in custody."

35.This initial psychological assessment appeared to assume that the Applicant had engaged in therapy in hospital. However, the psychologist conceded that no formal intervention had taken place in relation to violence or sexual behaviour in prison. The psychologist did not refer to the fact that the hospital had specifically indicated that the Applicant should undertake a specific programme in relation to sexual behaviour and violence. The implication therefore was that none or insufficient intervention work had taken place in hospital.

36.A second psychological risk assessment was conducted by the same prison psychologist who reported further on the Applicant on 30 July 2021. This was described as an addendum report. This report arose because it had become apparent that the psychologist had not had information relating to any intervention work taking place in hospital. In the second report the report writer indicated that the evidence that was not available on the first occasion had been "reviewed". The recommendations of the psychologist was that it was not appropriate to conduct a further assessment of the risk of violence and that the assessments made on the first occasion remained valid. The psychologist recommended release. The psychologist had relied upon the Applicant's self-report in relation to his ability to manage violence in the future.

37.The reporting psychologist did not appear to address the fundamental issue of the absence of intervention work in relation to violence or sexual behaviour. In particular the psychologist did not address the fact that having spent a year in a specialist hospital and having left the hospital with a recommendation that an intensive programme in relation to violence and sexual behaviour should be undertaken, the recommendation was now that no further work was required.

38.In its decision as set out above, the oral hearing panel noted that the hospital unit did not appear to have undertaken intervention work in relation to the Applicant's aggressive use of violence or his behaviour in relationships. The panel also addressed the fact that the recommendation to undertake intervention work had not been implemented.

39.The panel were clearly concerned about the absence of accredited intervention work, in the light of the recommendation of the hospital, the index offence and the Applicant's history.

40. The complaint by the Applicant is that the panel have failed to explain the reasons for rejecting the recommendation of both the prison psychologist and the COM. As set out above in the conclusion paragraphs the panel referred to the fact that "*all the witnesses recommended his early release*". However the panel, in my view, failed to engage with the evidence of those witnesses.
41. So far as the community offender manager was concerned, the panel did not explain why they rejected the COM's recommendation. The COM appeared to have come to the conclusion that good behaviour, since returning from hospital, was a basis for recommending release and for rejecting the proposal that the Applicant should undertake an intensive behavioural programme. The panel would have been perfectly entitled to conclude that a period of good behaviour was insufficient to demonstrate reduction of the risk of violence in the community. The panel would also be entitled to conclude that the COM had failed to explain why the original recommendation for undertaking programme work had changed. The panel would also have been entitled to conclude that spending a period of time in a specialist probation hostel, although supportive for the Applicant, would be unlikely to equate to a period of intensive violence reduction behavioural work.
42. Equally so far as the reporting psychologist was concerned. The panel would have been entitled to conclude that the reporting psychologist made no reference to the fact that a specialist hospital had recommended the intensive behavioural work. The psychologist was also heavily dependent upon the self report of the Applicant in concluding that his risk could be safely managed in the community.
43. I am therefore satisfied that the conclusion that was reached by the panel was entirely reasonable and supported by the evidence.
44. However, I am not satisfied that the panel gave a sufficient explanation to the Applicant as to the reason for their decision. It is incumbent on an oral hearing panel to engage with the evidence, particularly in circumstances where professionals are making recommendations contrary to the decision of the panel. In this case the panel failed to engage individually with the evidence of the witnesses supporting release and failed to explain in detail and individually why they rejected the evidence of the prison psychologist and the COM. As I have indicated, there were a number of valid reasons for the panel reaching its conclusion, however the reasons were not recorded clearly and in a way that the Applicant could understand. The Applicant had a right to know and understand the reason for his application for release being rejected. For that reason, I conclude that this is a case where insufficient reasons were recorded by the panel in its conclusions.
45. As set out in **DSD**, panels of the Parole Board are not obliged to adopt the opinions or recommendations of professionals. 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 minds on the totality of the evidence that they hear, including the evidence from the prisoner, they would be failing in their duty to protect the public from serious harm (whilst also protecting the prisoner from unnecessary incarceration) if they failed to do just that. However as indicated above it is important that the panel should clearly explain its reasons for doing so and those stated reasons should be sufficient to justify its conclusions.



46. Although it is entirely a matter for an oral hearing panel to adopt its own style of addressing issues. In cases where there is a decision in direct conflict with the recommendation of a particular witness, prisoners and their representatives would be assisted if the decision clearly addresses, in paragraph form, a brief summary of the recommendations of a particular witness and, importantly, a clear summary of the reasons why that particular witness's recommendations have been rejected. This would ensure that the prisoner and his legal advisers have a clear understanding of the basis of the decision and the reasons for rejecting the views of any particular professional or other witness.

Procedural irregularity

47. The Applicant also argues that the panel should have adjourned the hearing and secured further evidence from the hospital unit relating to any intervention work completed in hospital. I reject this ground of the application. The fact that the hospital unit had clearly recommended that the Applicant should complete an intensive course relating to violence reduction was a clear indication that the Applicant had not completed sufficient intervention work. The hospital had also provided a lengthy summary of the Applicant's progress which in my view was sufficient for the panel to reach a conclusion. The panel were perfectly entitled to reject the Applicant's evidence that in his view he had completed sufficient intervention work in hospital.

Decision

48. Accordingly, applying the test as defined in the decisions set out above, I determine the decision to be procedurally unfair because of a lack of a clear explanation as to the basis of the conclusions of the oral hearing panel. I do so solely for the reasons set out above.

49. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

HH S Dawson
9 February 2022