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[2022] PBRA 22

Application for Reconsideration by Hickey

Application

1. This is an application by Hickey (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 31 December 2021 not to direct his release.

2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.

3. I have considered the application on the papers. These are the decision letter, the dossier and the application for reconsideration.

Background

4. The Applicant is serving an extended sentence with a custodial term of six years with an extension period of five years imposed on 2 October 2013 following conviction for robbery. He was also convicted on the same day of a second robbery, attempted robbery, possession of an offensive weapon in a public place (a hunting knife) and wounding with intent to do grievous bodily harm. He pleaded guilty to all offences.

5. He was released on licence on 31 January 2020 (his conditional release date). His licence was revoked on 4 October 2020, around ten months later, and he was returned to custody the following day. This is his first recall on this sentence and his first parole review since recall. His sentence expiry date is reported to be 25 June 2025.

6. The Applicant was aged 17 at the time of sentencing. He is now 25 years old.

Request for Reconsideration

7. The application for reconsideration is dated 24 January 2022 and has been submitted by solicitors acting on behalf of the Applicant.

8. It submits that the panel's decision was irrational for a number of reasons. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No matters of procedural unfairness were explicitly raised in the application.

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9. The Applicant's case was referred to the Parole Board by the Secretary of State to consider whether to direct his release.

10. The case proceeded to an oral hearing on 3 August 2021 before a single-member panel. It was adjourned at the request of the Applicant's legal representative as the risk management plan was not developed sufficiently for a realistic case for release to be put forward. In adjourning, the panel chair also directed a psychological risk assessment (PRA).

11. The reconvened hearing took place on 9 December 2021. It was held by video conference. Oral evidence was taken from the Applicant, his Prison Offender Manager (POM), his Community Offender Manager (COM), and the psychologist instructed by HMPPS to complete the PRA. The Applicant was legally represented throughout. He sought a direction for release.

12. Closing legal submissions were made in writing.

13. The Applicant's POM and COM supported his release; the psychologist could not make a recommendation. The panel did not direct the Applicant's release.

The Relevant Law

14. The panel correctly sets out the test for release in its decision letter dated 31 December 2021.

Parole Board Rules 2019

15. 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)).

16. 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

17. 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."*

18. 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.

19. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

The reply on behalf of the Secretary of State

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

Discussion

21. Many of the arguments in the application for reconsideration rely upon an autism screening assessment dated 20 January 2022. This concluded that a full Autism Spectrum Disorder (ASD) assessment would be beneficial to understand whether the Applicant had particular neurodevelopmental needs. It is argued that various aspects of the panel's analysis of risk (or indeed the recommendations or evidence of the psychologist) may have been different, given that the Applicant may have ASD.

22. This evidence was not before the panel at the time of the hearing. While a failure to consider evidence could potentially give rise to a successful application for reconsideration (on the basis of procedural unfairness), this principle cannot apply retrospectively. A decision cannot be irrational if it failed to consider evidence which did not exist at the time the decision was made.

23. Failing to put information before a panel is not a ground for procedural unfairness: **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 by which 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 it.

24. It follows that any arguments that the panel was irrational in its analysis because the Applicant may, in fact, have ASD must fail. To suggest otherwise invites me to reconsider the panel's risk assessment itself, not the way in which it was made, which is clearly outside the scope of rule 28.

25. As an aside, while this new evidence cannot form the basis for an application for reconsideration, there is nothing to prevent the Secretary of State from re-referring the case to the Parole Board in the light of the new evidence if he sees fit to do so.

26. Some submissions remain open for consideration. In short, these argue that the panel's decision was irrational because it:

    a) did not give sufficient weight to the Applicant's recent stability in custody;
    b) gave too much weight to the Applicant's non-participation in the PRA; and

c) gave too much weight to the lack of a move-on plan after a period in designated accommodation.

27. Irrationality, in the context of an application for reconsideration, applies to the overall decision not to direct release and not the decisions made along the way (unless, of course, any such decisions taint the overall rationality of a panel's conclusion). A decision is only irrational if no other rational panel could come to the same conclusion.

28. The decision clearly sets out why it disagrees with the recommendations of the POM and COM. First, it notes its concern that although the Applicant would be housed in designated accommodation for eight weeks following a release direction, there was no clarity about where the Applicant would have been housed thereafter, or the community support that would have been available to him. Second, it expresses concerns about the Applicant's motivation and ability to work with his COM in supervision. In weighing all the evidence, the panel decided that the risk management plan was not robust beyond the very short term. Balancing this against the significant period (in excess of three years) left on the Applicant's sentence, it decided that the test for release was not met.

29. The weight which a panel places on each piece of evidence before it is a matter for the panel. Disagreeing with a decision based on a differing view of how the evidence should have been weighed (which is the essence of the surviving parts of the application) does not automatically make it irrational. The application contends that no other rational panel could have reached the same conclusion: I disagree. On the evidence before it, the panel's decision is not irrational. The risk management plan was only defined until the end of the Applicant's time in designated accommodation, and it was not unreasonable for the panel to decline to gamble on a robust move-on plan being put in place during the Applicant's eight weeks in that accommodation.

30. It is also argued that the panel should have adjourned for the risk management plan to be better defined, referring to the Parole Board's published **Adjournments and Deferrals Guidance** (July 2020). This is not argued in terms of procedural unfairness (as it should have been); that said, if the decision not to adjourn was irrational then I accept that could make the decision not to release irrational.

31. The Applicant's legal representative knew (and acknowledged in their closing written submissions) that the move-on plan was not resolved. It was certainly open to them to request a further adjournment (as indeed they did at the August 2021 hearing when the risk management plan was not well-developed).

32. The fact that the Applicant's legal representative did not request an adjournment does not relieve the panel from making an adjournment decision. However, any adjournment decision must be balanced against the Parole Board's duty under Article 5(4) of the European Convention on Human Rights to provide a speedy review of a prisoner's detention. Reviews must be delayed as little as possible and cannot be allowed to 'drift'.

33. It is not clear how long it would have taken for move-on plans to be fully determined. Moreover, it is clear from the decision that the absence of move-on accommodation was not the only factor that led the panel to its decision. In all the circumstances, I

do not find the panel's decision not to adjourn to be material to the rationality of the overall decision (neither, for completeness, do I find it to be procedurally unfair).

34. Finally, in closing, the application states that the panel has given no justification as to why it departed from the recommendations of the POM and COM. This is not specifically pleaded as a matter of procedural unfairness, but I shall nonetheless deal with it.

35. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board [2019] EWHC 2710**.

36. As I have already set out above (at para. 28) the panel's reasons are clear and support its decision sufficiently well to discharge its common law duty to give reasons. I find no procedural unfairness here.

Decision

37. For the reasons I have given, I do not consider that the decision not to direct the Applicant's release was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

Stefan Fafinski
16 February 2022