

[2022] PBRA 84

Application for Reconsideration by Gardiner

Application

1. This is an application by Gardiner (the Applicant) for reconsideration of a decision by a Parole Board Panel, dated 7 June 2022, following an oral hearing on 19 May 2022, refusing to direct his release.
2. I have considered this application on the papers. These comprise of the dossier, currently consisting of 1347 pages, the decision of the Panel dated 7 June 2022 and the application for reconsideration, dated 28 June 2022.

Background

3. On 19 January 1994, having been charged with murder, the Applicant was convicted, on the basis of diminished responsibility, of manslaughter and robbery. A Hospital Order was made under the terms of the Mental Health Act and an order made for the forfeiture of a firearm used by him. The offence, which occurred whilst at large following a prison abscond, involved his buying a gun and after drinking heavily, broke into a house and held his victim and wife hostage before shooting him a number of times.
4. On 10 June 2005, following a guilty plea to a charge of s. 18 causing grievous bodily harm with intent, the Applicant was sentenced to Life Imprisonment with a minimum tariff term of 4 years and one day, the Tariff Expiry Date being 10 June 2009. Whilst a patient in secure hospital. He carried out a planned attack on another patient by pouring boiling water over him.

Request for Reconsideration

5. The Application for Reconsideration comprises a 16-page document prepared by the Applicant's Legal Representative who had taken over the case after the Applicant had represented himself at the hearing.
6. It is not necessary to reproduce the application in full, but all sections have been considered and the aspects relevant to the issues of irrationality or procedural unfairness are dealt with below.
7. The Applicant seeks reconsideration only on the grounds of procedural unfairness.



8. The function of the RAP is limited to the reconsideration of the statutory limbs of challenge.

(a) *Procedurally unfair:*

The Application speaks of 3 Grounds of Appeal:

- a) Failure to make findings of fact in relation to the 1995 Index Offence. The Panel, in the absence of Judge's Sentencing Remarks and "*the conflict of accounts*" the Panel relied on "*uncorroborated newspaper clippings*" supplied as part of Victims' Personal Statements.
- b) Admission of uncorroborated material. That newspaper cuttings were a procedurally improper source in relation to the Applicant's offending history and "*in the same way a Jury would be falling into error by consulting newspapers on return from court, the Parole Board ought not to consult such uncorroborated, untested and unfounded material as media reporting.*"
- c) Improper victim interference. A comment by the daughter of the victim of the 1994 index offence as to how prisoners should be treated was "*indirectly in breach of the proforma victim personal statement whereby the victim should not make comment on whether or not the offender should be released.*" She not only extended her statement to the submission of extraneous material in the form of newspaper clippings but was "*allowed to submit material which advocated against release but*" for example included comments suggesting the Applicant could not be rehabilitated."

Response from the Secretary of State

9. The Secretary of State (the Respondent), by e-mail dated 4 July 2022, indicated that no representations were made in response to the application.

Current parole review

10. The Panel considered a dossier of 1314 pages. It took oral evidence from the Applicant, his POM, his COM and from a Prison Psychologist. It recorded a significant criminal record which included violence and dwelling house burglaries. None of a considerable number of previous Parole Reviews and psychiatric and psychology reports had led to a progressive move either by release or a recommendation for open conditions as a result of which the Applicant had remained in custody continuously for over 33 years, at least. Medical evidence indicated a psychopathic disorder and a variety of personality disorders which continued to evidence themselves in self-harm, bizarre behaviour (including before the Panel) and significant psychotic episodes and auditory hallucinations.

11. Whilst giving the Applicant credit for his not having used violence for many years and for regaining enhanced status, the Panel noted the Applicant had done little, if any work to address his risk factors. Report writers and experts had actively sought to find a means of addressing his risk other than in closed conditions and his mental health problems led to ACCT procedures and to admitted use of drugs in prison. It was clear that he remained hostile towards the Probation Service and maintained a general mistrust of professionals but he indicated that he would benefit from a move to open conditions and would be willing to work with professionals although he *"sometimes won't accept what is being said."*

12. In dealing with the specific issues of the index offences it noted that, in relation to the killing, the Applicant told the Panel "I took his life out of anger."

13. In relation to the newspaper cuttings, the Panel had formally referred to the submission of victim personal statements accompanied by the press cuttings, commenting only that the Panel had given *"due weight to the comments of (the author) and evidence of continuing distress despite the passage of time"* In the body of the decision, it said that the killing had been *"graphically recorded"* and, without specific reference to the newspaper reports, that there was a report of one assault at Broadmoor which involved (the Applicant) burning another patient with a flame from an aerosol.

14. In its conclusion, the Panel emphasised that, in the lengthy run-up to the hearing itself, the Panel had spent much time seeking to explore the options in the case but the Applicant's personality traits were deeply entrenched were *"not incapable of being addressed"* in order to bring about a reduction in risk. For this to happen, however, he would have to address his own fears and lack of confidence as the Panel *"believes he is not without hope."* In the immediate term, however, it concluded, as advised by the experts and consideration of *"an important assessment"* from a specialist unit at the prison that the statutory test was not met and that progression was not appropriate.

The Relevant Law

15 Rule 28(1) of the Parole Board Rules provides that applications for reconsideration may be made in eligible cases either on the basis that the decision was (a) irrational or that it is (b) procedurally unfair. This is an eligible case.

16. A decision not to recommend a move to open conditions is not eligible for reconsideration.

17. In **R (on the application of 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 uses the same word as is used in judicial review demonstrates that the same test should be applied. This test for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.

19. Procedural unfairness under the Parole Board Rules relates to the making of the decision by the Parole Board and an assessment is required as to whether the procedure followed by the Panel was unfair.

20. The common law duty to act fairly, as applied in this context, is influenced by the requirements of article 5(4) as interpreted by the European Court of Human Rights. Compliance with the common law duty should result also in compliance with the requirements of article 5(4) in relation to procedural fairness. Article 6 is relevant to criminal trials but does not impinge on this duty.

Discussion

21. The Panel, in this case made two decisions – a decision not to direct release and a decision not to recommend a move to open conditions.

22. As indicated above, the decision not to recommend a move to open conditions is not eligible for reconsideration.

23. The representations on behalf of the Applicant do not seek to suggest that the decision not to direct release was irrational or seek to challenge that decision.

Procedural Unfairness

24. The issue of procedural unfairness, although 3 separate grounds of appeal are put forward, in essence encapsulate one major complaint relating to reference to the index offence through newspaper cuttings produced as part of the Victim Personal Statement.

25. Findings of fact and admissions of uncorroborated material. It is the duty of the Panel to deal with a review in light of all material in the dossier and, itself, to decide the weight to place on each aspect. The index offence of which complaint is made occurred in 1991 over 30 years ago since when the case has been the subject of several reviews in which the factual basis of the offence were considered, On this occasion, the Panel acknowledged that, over the years, accounts had varied, but nonetheless, even at this stage, the Applicant spoke of committing the offence "out of anger." The Panel is not subject to the strict evidential rules applicable to Jury trials and may consider all evidence before it giving relevant passages a fair assessment. In this case it made only passing reference to the press cuttings, placed them into context as part of the Victim Personal Statements and, in the light of the weight of the evidence all suggesting that risk levels remained high, the RAP considers the reference specifically to press reports to be of little significance. It is also noted that the reference to the alleged burning of another patient in prison is also to be found in the most recent OASys report.

26. Improper victim interference. The RAP considers this objection to be without merit. The Panel placed the context of the press cuttings within the ambit of the Victim Impact Statement and dealt with them on that basis.

Decision

27. For the reasons I have given, I do not consider that the Panel's decision was procedurally unfair and accordingly the application for reconsideration is refused.

Edward Slinger
7 July 2022.