[2022] PBRA 87

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Application for Reconsideration by O'Reilly

Application

1. This is an application by O'Reilly (the Applicant) for reconsideration of a decision for reconsideration of a decision of an oral hearing panel, which on 18 May 2022, after a hearing on 18 May 2022, decided not to direct his release on licence or recommend his transfer to open conditions

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 452-page dossier provided by the Secretary of State which included the Panel's written decision, 3-page closing written submissions dated 18 May 2022, the application for reconsideration submitted by the Solicitor representing the Applicant and an email from PPCS on behalf of the Secretary of State dated 21 June 2022. I have also listened to the audio recording of the oral hearing.

Background

4. The Applicant was sentenced in July 2009 to Imprisonment for Public Protection with a minimum period to serve of three years less time spent in custody on remand before he was eligible to apply for parole, for an offence of Causing Grievous Bodily Harm with Intent. The Applicant was 27 at the time of sentencing and he is now 40 years of age.

5. The minimum period expired on 30 September 2011. The Applicant was released in July 2018 and recalled in August 2019. The recall was triggered due to breaching the non-contact licence condition and an escalating pattern of violent and abusive behaviour towards his ex-partner. A previous panel of the Parole Board reviewed his recall at an oral hearing on 29 May 2020, the panel found the recall decision to be appropriate. This is his second review since recall.

Request for Reconsideration

6. The application for reconsideration is dated 9 June 2022.

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

Ground 1: The Process was Procedurally Unfair: The panel made their decision based on an incomplete risk management plan, rather than adjourning a decision to allow for the risk management plan to be confirmed and considered.

Ground 2: The decision was irrational as it included evidential errors and misrepresented the evidence in the written decision reasons.

Current parole review

8. On 26 April 2021, the case was referred to the Parole Board by the Secretary of State to consider whether or not it would be appropriate to direct the Applicant's release or if that was not appropriate to recommend a transfer to open conditions.

9. The case was directed to an oral hearing after consideration by a Parole Board Member as part of the member case assessment process on 27 September 2021. An oral hearing was due to take place on 7 April 2022 but was adjourned as the prison offender manager was unwell and there was no witness available from the prison to take her place.

10. The oral hearing took place before a two member panel of the Parole Board on 18 May 2022 with all parties attending by way of video link; in addition to hearing from the Applicant, who applied for release, the panel heard from the Prison Offender Manager, the Community Offender Manager and a Prison Psychologist. The panel also considered the contents of the dossier which ran to 430 pages. The Applicant was legally represented throughout the hearing. The Secretary of State was not formally represented. It was agreed closing submissions from the solicitor for the Applicant would be submitted in writing after the hearing.

The Relevant Law

11. The reconsideration mechanism is not a process where I am required to indicate whether, or not, I might have reached the same or a different conclusion from that reached by the Panel.

12. The panel correctly sets out in its decision letter dated 18 May 2022 the test for release 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

13. 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)).

Irrationality

14. 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."

15. 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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

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

17. 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.

18. 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."

Procedural unfairness

19. Procedural unfairness has a similar meaning as procedural irregularity does in Judicial Review. 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.

20. Procedural unfairness means a procedural impropriety or unfairness which resulted in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result.

21. 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; and/or

(b)The Applicant was not given a fair hearing; and/or

(c)The Applicant was not properly informed of the case against him/her; and/ or

(d)The Applicant was prevented from putting his/her case properly; and/or

(e)the panel was not impartial.

22. 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).

23. 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.

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

The reply on behalf of the Secretary of State

25. The Secretary of State confirmed by way of email dated 21 June 2022 from PPCS on his behalf that he did not wish to make any representations in response to the application.

Discussion

Ground 1:

26. Here the Applicant submits that the process was Procedurally Unfair, as the Panel made their decision based on an incomplete risk management plan, rather than adjourning a decision to allow for the risk management plan to be confirmed and considered. The Offender Personality Disorder (OPD)- pathway support should have been confirmed as part of the risk management plan as requested in the closing submissions of the hearing; that elements of the Risk Management Plan (RMP) need to be confirmed prior to a final decision being issued.

27. The written decision reflects evidence that efforts by the Probation Service to

secure a bed space at Approved Premises were made, however this had not been confirmed and the OPD Pathway provision would depend upon where the Applicant lives in the community.

28. The written decision states that:

"The risk management plan has the potential to be robust, however there are gaps and unknowns about the living and supervisory arrangements and the specific OPD pathway service provision. Furthermore, the panel did not have confidence that [the Applicant] *was motivated to engage with the OPD pathway. He told the panel that he would "give it a go", but was unable to identify why it might be beneficial for him to do so; this was in contrast to the views of each of the professionals who considered his engagement "essential" to risk reduction and risk management. Specifically the panel was concerned that there was a lack of certainty about where* [the Applicant] *would be released to, and he told the panel that he had no particular preference in relation to his resettlement area; the fact that there was no clarity about what OPD pathway services would be provided or what he would be prepared to engage with; the fact that his relationship with his community offender manager was "difficult" and that it was likely that he would be temporarily supervised in another probation area whilst at an AP as there is no available AP in Kent where his COM is situated. This would be at a time when the essential OPD pathway engagement should take place to ensure a smooth transition from the AP to a resettlement area which, as yet, has not been identified."*

29. The panel's Decision Letter concludes:

"The panel was concerned by [the Applicant's] *lack of insight into his risks, his minimisation of responsibility for his recall, his lack of well thought out and realistic strategies to manage or have healthy relationships in the future (other than total avoidance) and his failure to recognise the clear need for support with understanding his problematic personality traits. The panel agreed with the professional witnesses that it is most likely that his personality traits have proved a barrier to him implementing learning from the various programmes that he has completed and was firmly of the view that intervention to assist him develop insight and self-management strategies was essential. The panel also shared Dr X view that detailed consolidation work covering previous interventions and learning was required. These concerns coupled with the uncertainties in relation to the risk management plan set out above led the panel to conclude that* [the Applicant] *does not meet the test for release. It remains necessary for the protection of the public that he is confined."*

30. I have carefully considered the written closing submissions of the Applicant's legal representative which states:

"The risk management plan that has been proposed is robust and contains all elements to ensure that [the Applicant] risk can be managed in the community; although there are elements that need to be confirmed."

31. I have carefully considered the written closing submissions of the Applicant's legal representative which states:

~~32. Further, it is stated:~~

"It is submitted that with the proposed licence conditions and RMP in place, the option to release directly to an AP and access the OPD Pathway, would meet the test for protecting the public. Evidence heard at the hearing from [the Applicant] in relation to his offending, risk factors and plans to the future, show he clearly has an understanding of his offending and how to remain a pro social member of the community on release. We submit that [the Applicant] meets the strict test for release.

That any risk that [the Applicant] poses to the public could be safely managed under the proposed risk management plan and licence conditions.

Therefore, it is no longer necessary for him to be detained in custody and would invite the panel to direct his release at the earliest opportunity to the appropriate approve premise hostel."

32. Whilst the written closing submissions indicated that there were elements of the risk management plan that need to be confirmed, the submissions expressly invite the panel to direct the Applicant's release at the earliest opportunity and do not request an adjournment or request that the OPD pathway support be confirmed as part of the risk management plan prior to a final decision being issued as indicated in the reasons for requesting reconsideration.

33. The panel were under a duty to give the prisoner a 'swift' review and any possible adjournment engages **Article 5.4 of the European Convention on Human Rights** which imposes on the court or other body exercising judicial functions the duty:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

34. An application for an adjournment in any jurisdiction has to consider the potential delay it would cause and its likely consequences.

35. However, in the present case, the submission is without merit because no application for an adjournment had been made.

36. I consider that the risk management plan was not fully formed at the time of the oral hearing or at the time of the Panel's decision. Specifically, that a proposed Approved Premises had not been identified and as such the area for proposed release was unknown and therefore the extent of what OPD Pathway service provision would be available to the Applicant was unknown to both the professional witnesses and the Applicant at the time of the hearing and at the time of issuing of the written decision.

37. Witness evidence was that OPD pathway support was considered as *'essential'* in managing risk in the community.

38. The panel commented in the written decision that it did not have confidence that the Applicant was motivated to engage with the OPD pathway. It did so after hearing all evidence of professional witnesses and from the Applicant and was the panel's assessment.

39. I consider that as the Applicant was unaware of what OPD Pathway service provision would be available to him in the community, it would follow that he could not be expected to fully appreciate why it might be beneficial for him to engage, or to express a fully informed view as to what he would, and would not, be prepared to engage with, in the community. This may have impacted upon his ability to put his case forward for the panel to assess his motivation to comply with the risk management plan.

40. The panel were under a duty to give the prisoner a 'swift' review, in accordance with Article 5(4). They did so on the basis of the information put in front of them. The Applicant, who was legally represented and had equality of arms, did not ask for an adjournment o request the opportunity for further information/steps to be taken prior to a decision being issued by the panel.

41. I am not aware of any proposition that there is a general duty on panels to wait and allow either party to perfect their case, especially in situations where there has already been plenty of time to do so, and no further time was asked for by the Applicant. I do not consider that the panel erred in determining the case and made a swift decision on the basis of information in front of them.

42. I therefore do not consider that the process adopted by the panel was procedurally unfair to either party. Consequently, this ground fails.

Ground 2:

43. It is submitted by the Applicant that the decision was irrational as it included evidential errors and misrepresented the evidence in the written decision reasons. This includes:

a) The prison number on the decision letter is incorrect.

b) Paragraph 2.4 makes reference to "*vile*" messages being sent repeatedly; no messages have ever been seen or produced in a dossier.

c) Paragraph 2.16: The Applicant made it clear throughout the hearing he was willing to engage in the OPD pathway but, he had some concerns about the process. He clearly stated to the panel he was willing to fully engage. It is referenced at Paragraph 3.11 he would "*Give it a go*" this has been taken negatively instead of the context of the Applicant stating that is all he can do is "*give it a go and engage.*"

d) Paragraph 2.23: states that the panel found the discrepancy between the professionals accounts of his motivation to engage in the OPD pathway difficult to

reconcile but, came to the conclusion given his presentation and lack of insight into his problems, could not rely on his statements that he would engage in a meaningful way – those professionals that gave evidence to state he was willing to fully engage are those that work closely with the Applicant and have an understanding of him; therefore believe in his willingness to engage and benefit from the process.

e) Paragraph 4.4: The panel considered insight into problematic personality traits and self-management was what might be termed "*core risk reduction work*" and should be completed in closed conditions. All professional witnesses stated there is no core risk reduction work to be undertaken and the only work is consolidation work and engagement with the OPD pathway.

44. The Applicant submits that evidential mistakes were made and the panel misinterpreted evidence. 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. 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.

45. I do not consider the mistake of an incorrect prison number on the written decision to be fundamental. All other details correctly relate to the Applicant.

46. The reference at paragraph 2.4. in the Panel's decision to *'vile'* messages is contained within the dossier at page 76 of the dossier. The dossier contains information that a Community Offender Manager has seen the messages which used derogatory language and that the Applicant had admitted sending the messages during a previous parole board hearing (page 70). Messages are referred to by the prison psychologist and "derogatory and unpleasant letters" to the Applicants partner are taken into account within the Spousal Assault Risk Assessment at page 305.

47. I consider that the risk management plan was not fully formed at the time of the oral hearing or at the time of the Panel's decision. Specifically, that a proposed Approved Premises had not been identified and as such the area for proposed release was unknown and therefore the extent of what OPD Pathway service provision would be available to the Applicant was unknown to both the professional witnesses and the Applicant at the time of the hearing and at the time of issuing of the written decision.

48. Witness evidence was that OPD pathway support was considered as *'essential'* in managing risk in the community.

49. The panel commented in the written decision that it did not have confidence that the Applicant was motivated to engage with the OPD pathway. It did so after reading all written evidence and hearing all evidence of professional witnesses and from the

Applicant, who stated that he was prepared to engage with the PD Pathway but was clear that he was not prepared to engage with a Psychologically Informed Planned Environment (PIPE). The panel commented upon his presentation and lack of insight into his problems and determined that it could not rely upon the Applicant's statements.

50. The comments within the Panel's decision at paragraph 3.11 that the Applicant would *"Give it a go"* are contained within the Applicant's written closing submissions.

51. I consider that as the Applicant was unaware of what OPD Pathway service provision would be available to him in the community, it would follow that he could not be expected to fully appreciate why it might be beneficial for him to engage, or to express a fully informed view as to what he would, and would not, be prepared to engage with, in the community. This may have impacted upon his ability to articulate to the panel regarding the level of his motivation to comply and engage, which in turn, may have impacted upon the panel's assessment as to his motivation to engage, and likely compliance, with the risk management plan.

52. However, I do not consider that this leads to an irrational decision taking into consideration the number of expressed concerns in the conclusion of the panel's written decision.

53. On the basis of the evidence before them at the time, the panel considered that the Applicant had not made sufficient progress in addressing his problematic personality traits which the panel considered were strongly linked to his violence and inability to self-manage as well as his ability to implement learning. The panel considered engagement with work to develop insight into his problematic personality traits and self-management was what might be termed "core risk reduction work". I am not persuaded that the conclusion of the panel, that further work was required, could be considered to be irrational in the light of the history of this particular Applicant.

54. I have considered the specific submissions of the Applicant. I am satisfied that this decision was not 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. I do not consider any of the points raised under Ground 2 have succeeded. Consequently, this ground fails.

55. The application for Reconsideration is refused.

Katy Barrow
15 July 2022