[2020] PBRA 51

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Application for reconsideration by Ryan

Application

1. This is an application by Ryan (the Applicant) for reconsideration of a decision of an oral hearing panel dated 24 March 2020 not to direct his release or to recommend 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 provisional decision letter, the dossier, a letter from the prison psychiatrist to the mental health team within the prison (5 March 2020) and the application for reconsideration.

Background

4. The Applicant was sentenced on 28 February 1985 to be detained at Her Majesty's pleasure following conviction for murder. A minimum term of ten years was imposed. He was 16 years old when first remanded and 17 years old at the time of sentence. His tariff expired on 30 March 1994.

5. He was most recently released on licence on 29 March 2017. His licence was revoked on 23 June 2017, some three months later, and he was returned to custody the following day. This is his third recall on this sentence and his third review since this recall.

Request for Reconsideration

6. The application for reconsideration is dated 27 March 2020 and has been submitted by solicitors acting for the Applicant.

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

    i. The panel could not form a view of the factors that would make the Applicant less likely to reoffend and refused to countenance positive factors, thereby demonstrating an unwillingness to acknowledge anything pointing towards suitability for release;

ii. The panel did not mention or consider a statement given in evidence by a mental health worker that the Applicant's mental health was stable;

iii. The panel did not mention or consider a statement given in evidence by the prison psychiatrist that the Applicant's condition was capable of being treated in the community if he agreed to treatment (and that closing submissions on this point were not addressed);

iv. The panel did not mention or consider statements by the Applicant's Offender Manager (OM) and prison psychologist that the Applicant's risk was manageable in the community;

v. The panel misdirected itself as to the test for release; and

vi. The panel ignored two of the four parts of the statutory test for determining suitability for open conditions.

8. The grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below. 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 application was unfocussed as to whether reconsideration on each ground was being sought under irrationality, procedural unfairness (or both). I will deal therefore with each on what I consider to be the more appropriate basis.

Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State in August 2017 to consider whether or not it would be appropriate to direct his re-release and, if release was not directed, to advise the Secretary of State on whether he was ready to be moved to open prison conditions.

10. There have been various professional witnesses involved throughout this review: a prison psychologist (PP1), a prison psychiatrist (PP2), an independent psychologist (IP1) and an independent psychiatrist (IP2).

11. PP1 had prepared a report (19 April 2018) which noted that the Applicant had been referred to a hospital for further assessment as he had been reported as presenting with symptoms of a severe long-term mental health condition. It recommended that the Applicant should be supported in custody to stabilise and address his mental health concerns before further consideration was taken for progression. It said that a mental health assessment 'should be considered essential prior to any further risk management decisions'.

12. The Applicant's case was due to be heard on 25 February 2019. It was deferred on 16 January 2019: first, to allocate both psychologist and psychiatrist specialist members to the panel, and second, to accommodate an independent psychological assessment. The deferral period was also used to enable a psychiatric report to be

completed, followed by a psychological assessment, taking into account its findings.

13. IP1's report (22 January 2019) concluded that open conditions did not appear to offer any tangible benefit to the Applicant and recommended that he be released on licence subject to the proposed risk management plan.

14. IP2's report (28 January 2019) noted that the Applicant was not currently suffering from a mental disorder or a personality disorder. It concluded that either release or a move to open conditions would be safe and appropriate.

15. PP1's second report (26 June 2019) noted the content of both IP1's and IP2's earlier reports. It noted that the Applicant had disclosed certain symptoms relevant to his mental health during an interview which he had not expressed to other professionals. Nevertheless, it concluded there was no benefit in open conditions and recommended release.

16. The Applicant's OM (24 July 2019) recommended release. It noted the various specialist reports completed but concluded the Applicant's outstanding treatment needs could be safely managed in a community setting.

17. A report had also been directed from PP2, but this would not be available by the time of the oral hearing. The panel decided to proceed without it as it had the benefit of both IP2's report and their attendance as a witness.

18. The case proceeded to an oral hearing on 23 October 2019. A three-member panel of the Parole Board (including both psychologist and psychiatrist members) heard the case. It took oral evidence from the Applicant's stand-in Offender Supervisor (OS), a member of the prison mental health team (MH), PP1, IP1 and IP2.

19. Before the hearing, the panel gave IP2 the opportunity to read PP1's report. When IP2 gave evidence, they said they were surprised by the content of IP1's report (and their oral evidence) as the Applicant had not disclosed certain symptoms relevant to his mental health during his interview with IP2. This led IP2 to form the view that the Applicant may have a mental health disorder which meant that he no longer considered his assessment to be complete and that the Applicant's mental health needed to be reassessed. The Applicant's legal representatives requested an adjournment for a mental health assessment. This was granted in the interests of fairness.

20. Updated reports were directed (or invited, in the case of the independent professionals). The adjournment period would also allow time for PP2's report to be provided.

21. PP2's report (21 October 2019) concluded that, on the balance of probabilities, the Applicant's symptoms were best understood in terms of a primary diagnosis of a mental disorder with features of suggestive personality disorder. He recommended that the Applicant required 'a period of assessment and sustained treatment in a

secure hospital setting prior to any coherent package to manage his risks in the community'.

22. PP1's third report (10 January 2020) provides an update in the light of PP2's report. It notes that the Applicant continues to present with symptoms consistent with a mental disorder. It concludes that it is 'imperative that any mental health concerns are addressed' and that the Applicant should be referred for a hospital assessment 'as soon as possible'. It also notes that there would not be any further benefit for the Applicant to remain in custody if his mental health condition could also be treated in the community.

23. IP1's second report (17 January 2020) also provides an update in the light of PP2's report. It concurs with the findings of PP2 that the Applicant has a mental disorder but is less convinced of the presence of features suggestive of personality disorder. It concludes that the Applicant does not warrant hospital treatment. It reaffirms that open conditions would offer no tangible benefit and recommends release.

24. Reports from the prison mental health team offered no view on risk or manageability but note that the Applicant had expressed concern regarding hospital admission as he does not accept that he has a mental disorder. It further notes the Applicant's view that he is less preoccupied or distressed by his symptoms than he has been in the past.

25. An updated report from the OM (7 February 2020) changed the recommendation to not supporting release. It noted that at the time of their last report, PP2's report was not available. It further noted that earlier recommendations for release were made on the basis of the Applicant's self-report that he was suffering no symptoms of poor mental health. It supported the views of PP1 and PP2 in favour of hospital assessment.

26. Likewise, the Applicant's Offender Supervisor (OS) also supported release in July 2019, but changed recommendation in January 2020 for the same reasons as the OM.

27. The panel reconvened on 19 March 2020. This was during the coronavirus pandemic. The original psychiatrist member was unable to attend following official government advice, and the hearing proceeded as a two-member panel with the agreement of the Applicant's legal representative.

28. At the reconvened hearing, the panel took evidence from: OS, OM, MH, PP1, IP1 and PP2.

The Relevant Law

29. The panel correctly sets out the test for release applicable to a prisoner serving a life sentence in its decision letter dated 17 February 2020. This is provided by s28(6)(b) Crime (Sentences) Act 1997: the Parole Board shall not direct release

unless 'the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined'

30. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin), R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release and the two decisions must be approached separately and the correct test applied in each case.

Parole Board Rules 2019

31. 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)).

32. 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

33. In **R (DSD and others) v 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."*

34. 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.

35. 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

36. 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.

37. 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 an applicant's case was dealt with justly.

Other

38. In **R (Oyston) v Parole Board [2000] PLR 45**, Lord Bingham said at para. 47:

> *"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

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

Discussion

Ground i: Inability to form a view on protective factors and refusal to countenance positive factors

40. It is submitted that the panel's inability to reach a view on the factors that would make the Applicant less likely to reoffend without a further mental health assessment and engagement in treatment is irrational. It is further submitted that the panel refused to countenance positive factors in this case (which I will treat as an allegation of procedural unfairness).

41. While the various professionals involved in this case have identified what they consider to be certain relevant factors, it does not follow that the panel has to accept them, either in full or in part. The panel forms its own view on risk, which will include, amongst many other things, an assessment of these factors. If the panel, as an independent risk assessor, felt that it needed the findings of a further

mental health assessment in order to establish a firm view, then it was perfectly and rationally entitled to do so.

42. The submission that the panel refused to countenance positive factors is also unfounded. There is no evidence of any wilful disregard of positives on the part of the panel. The panel was correctly focussed on risk throughout and, indeed, gave the Applicant credit for his positive custodial behaviour and work ethic. I find no procedural unfairness on this ground.

Grounds ii – iv: Failure to mention or consider oral evidence

43. These grounds for reconsideration are taken together as they are all based on the panel's failure to mention or consider statements taken in evidence from PP1, PP2, and the Applicant's OM.

44. The Applicant's legal representative drew reference to these points made in evidence in their written closing submissions, which the panel acknowledged considering in its decision. It cannot therefore be said that the panel did not consider them.

45. Moving on to 'failure to mention': following **Oyston,** it is clear that the purpose of the decision letter is to summarise in broad terms the considerations which have in fact led to the final decision. It follows that the decision letter is not the vehicle by which each and every statement made during the course of a hearing is recorded, considered and analysed in meticulous detail. Documenting every aspect of a panel's often very lengthy deliberation would ultimately render any decision letter unhelpful and unwieldy.

46. The panel had the advantage of seeing and hearing the witnesses whose evidence is being raised in the application for reconsideration. It also had the advantage of written submissions from the legal representative in respect of particular points favourable to the Applicant's case for release. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.

47. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of any professional witnesses. It is their responsibility to make their own risk assessments. They must make up their own minds on the totality of the evidence that they hear and read in the dossier. 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.

48. The panel set out an extensive summary of the factors which contributed to its own risk assessment and a final decision which is both reasoned and clearly articulated. The decision cannot be said to be irrational or procedurally unfair on

these grounds and I find no reasons for interfering with the panel's decision on the basis of the evidence before me.

Ground v: The panel misdirected itself as to the test for release

49. It is submitted that the panel misdirected itself as to the test for release as 'the test is whether risk is manageable in the community'.

50. It is not. The panel correctly stated the statutory test in both its introduction and conclusion and applied it correctly in its decision. It cannot be said to have misdirected itself. There is no procedural unfairness on this ground.

Ground vi: The panel ignored parts of the statutory test for open conditions.

51. Finally, it is submitted that the panel ignored two of the four parts of the statutory test for determining suitability for open conditions.

52. Firstly, it is not a statutory test, being derived from a line of case law. Secondly, decisions whether or not to recommend open conditions are not amenable to reconsideration under rule 28. No further findings are necessary on this ground.

Decision

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

Stefan Fafinski
11 April 2020