[2021] PBRA 95

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Application for Reconsideration by Gilchrist

Application

1. This is an application by Gilchrist (the Applicant) for reconsideration of a decision made by a single member panel dated 17 May 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. I have also seen a Stakeholder Response Form (SHRF) dated 9 February 20201 and an email containing legal representations on behalf of the Applicant dated 27 April 2021.

Background

4. The Applicant is serving a sentence of imprisonment for public protection imposed on 28 June 2007 following conviction for attempted rape of a female over 16 to which he pleaded not guilty. A minimum tariff of 54 months was set, and this expired on 28 December 2011. He was convicted on the same occasion for a breach of sex offender notification requirements, to which he pleaded guilty and received a one-year sentence, now spent. This is the Applicant's sixth parole review.

5. The Applicant was aged 22 at the time of sentencing. He is now 36 years old.

Request for Reconsideration

6. The application for reconsideration is dated 3 June 2021 and has been submitted by solicitors acting for the Applicant.

7. It advances two grounds for reconsideration:

   (a) It was both irrational and procedurally unfair that the oral hearing was concluded prematurely; and/or

   (b) The decision to conclude the review on the papers alone was irrational.

8. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State on 8 May 2018 to consider whether or not it would be appropriate to direct his release. If release was not directed, the Parole Board was invited to advise the Secretary of State on whether the Application should be transferred to open conditions.

10. The case was reviewed on the papers by a single-member Member Case Assessment (MCA) panel on 5 October 2018. A provisional decision not to recommend release or transfer to open conditions was made. It appears from Panel Chair Directions (PCDs, 8 January 2019) that the provisional MCA decision was substituted by a direction to oral hearing, and that this oral hearing was scheduled for 19 February 2019. The case was deferred prior to the hearing on the request of the Applicant's legal representative for an independent psychological risk assessment (PRA) to be produced and so that the Applicant could develop his working relationships with his Offender Supervisor (OS) and Offender Manager (OM). The case was relisted for oral hearing on 11 September 2019.

11. The case was again deferred on the request of the Applicant's legal representative as the independent psychologist who wrote the independent PRA was not available on 11 September 2019. The case was relisted for oral hearing on 22 January 2020, but again deferred on the request of the Applicant's legal representative as the independent psychologist was not available. The case was relisted for oral hearing on 25 March 2020.

12. The case was again deferred in line with official advice from HM Government concerning the COVID-19 pandemic since face-to-face oral hearings had been suspended two days previously. The assigned panel concluded that the case should be deferred until such time as face-to-face hearings were possible. It was listed for 7 August 2020, in the hope that restriction would have been lifted by then. It was deferred again on the request of the Applicant's legal representative as the Applicant remained of the view that his review could only be conducted at a face-to-face hearing.

13. The case was relisted for 22 February 2021. On 1 February 2021, PCDs sought representations pursuant to rule 21 (decision on the papers after a direction for an oral hearing). An issue surrounding further treatment had been resolved. The work would take some time and its effectiveness in reducing the Applicant's risks would then need to be assessed. On 9 February 2021, representations were received asking whether consideration could be given to maintaining the 22 February 2021 hearing date and directing a case management conference in advance of the full hearing, since there was a lack of clarity about the content and timetable for the further treatment.

14. A directions hearing was directed and took place on 22 February 2021 via telephone link. PCDs issued following the directions hearing note that it had been established that the Applicant would begin individual psychological work in April 2021. The work was expected to last 20 weeks, following which a report would be produced. The

precise content and schedule for the work was not clear. The PCDs note that the Applicant's legal representative anticipated that he would be seeking a paper conclusion of this review with the hope of persuading the Secretary of State to consider an earlier re-referral of his case to the Parole Board once the psychological report is complete. The PCDs set an adjournment review date of 23 April 2021 and an expectation that the case would be concluded on the papers. A report of 9 April 2021 noted the proposed content of the work and confirmed that it would start on 16 April 2021, comprise 15 sessions and conclude on 23 July 2021. Further legal representations were invited by 23 April 2021.

15. Legal representations were submitted to the Parole Board on 27 April 2021. These representations sought a further adjournment of six months (rather than concluding the review on the papers) to allow the work to be completed and for any subsequent PRAs to be undertaken. They note that this would allow a definitive assessment of risk within six months and provide the fairest and quickest route to a conclusion. They also acknowledged that the application for an adjournment was at the discretion of the Parole Board and if the panel was minded to conclude the review on the papers, then consideration be given to recommending that the Secretary of State set the next review at six months, and expediting or prioritising any relisting thereafter.

16. The panel concluded the review on the papers and did not direct the Applicant's release nor recommend a transfer to open conditions.

The Relevant Law

17. The panel correctly sets out the test for release in its decision letter dated 17 May 2021.

Parole Board Rules 2019

18. 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)).

19. 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**.

Procedural unfairness

20. 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.

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
    (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.

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

Irrationality

23. 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."*

24. 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.

25. 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

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

Discussion

27. The first ground on which reconsideration is sought is that it was both irrational and procedurally unfair for the panel to conclude the Applicant's prematurely. The second ground is that the decision to conclude the review on the papers was irrational.

28. On the face of it, neither of these decisions are subject to the reconsideration mechanism as rule 28 only applies a decision not to direct a prisoner's release. However, once the decision to conclude on the papers in this particular case was made, it followed that the decision not to direct release was essentially a *fait accompli* **(Wallace [2020] PBRA 202)** since psychological work had been identified but was incomplete.

29. The two decisions are thus (although distinct) inextricably linked. I am therefore considering both grounds raised in the application as parts of the overall decision-making process that resulted in the final decision not to release the Applicant (which falls squarely within the ambit of rule 28).

Ground 1 – concluding review "prematurely"

30. The first ground for reconsideration is that it was both irrational and procedurally unfair for the review to be concluded "*prematurely*".

31. The PCDs of 22 February 2021 noted that the Applicant's legal representative anticipated that he would be seeking a paper conclusion of this review with the hope of persuading the Secretary of State to consider an earlier re-referral of his case to the Parole Board once the psychological report is complete. On 27 April 2021, the strong primary submission was for a six-month adjournment but, in the alternative, recommending a six-month review period to the Secretary of State.

32. Both sets of legal representations acknowledged that a paper conclusion on, or shortly after, 23 April 2021 was a possibility even if it was not what the Applicant wanted. It is therefore very difficult to argue that the panel's decision to conclude when it did was irrational. Its decision to do so fell within the equally-rational contemplation of the Applicant's legal representative as a potential outcome. I therefore do not find that the panel's decision to conclude when it did was irrational. If it were irrational, then it would have fallen outside the contemplation of a sensible person who applied his mind to the question to be decided.

33. No submissions are made concerning any alleged failings in the exercise of panel's powers under rule 21 in concluding the review when it did. Even if it had, I find no breach of that rule.

34. It is, however, submitted that the panel's assessment of risk was unfair as it concluded that the psychological work being undertaken was necessary to be done in custody without the benefit of oral evidence. However, both prison and independent psychologists concurred in a joint statement that core work needed to be completed, PCDs (22 February 2021) indicate the Applicant was "*keen*" to complete the work and legal representations (27 April 2021) note the Applicant reports he was "*settling into the programme of work positively*". I find no issue with the procedure by which the panel approached its risk assessment when concluding the case on the papers.

35. Ground 1 therefore fails.

Ground 2 – Concluding review on the papers was irrational

36. The second ground for reconsideration is that the decision to conclude the review on the papers was irrational: it notes that the Applicant's review has been protracted, that some adjournments were unnecessary, that there was a known date of completion for the intervention and that a further "*short period of adjournment*" should have been directed.

37. I agree that the Applicant's review has been protracted, having started in May 2018. The various breaks in progression were either at the Applicant's request, due to the unavailability of the independent psychologist commissioned by the Applicant, or resulting from the COVID-19 pandemic restrictions. A further six-month adjournment would not be short in the ordinary course of proceedings (although perhaps short when set against the three years since the Applicant's review began).

38. The decision notes that six months might not have been enough. If it is assumed that the Applicant's psychological intervention does conclude on 23 July 2021, then prevailing guidelines suggest a psychological risk assessment would take a further 20 weeks, with probation reports six weeks thereafter. Therefore, a rough best-case calculation shows a hearing would not have been realistically feasible until late January/early February 2022, well after the six months requested.

39. Cases cannot be allowed to drift forever, and while I have some sympathy for the Applicant's position, the question for me is whether the decision to conclude on the papers was irrational. It is not, and it was foreseen as a possibility by the Applicant's legal representative. Disagreeing with a decision does not make it irrational; the legal test sets a high bar, and this case does not meet it.

40. While correctly noting that the terms of the Secretary of State's referral specifically precluded the panel from commenting on (or making any recommendation about) the date of the next parole review, it did suggest that the Secretary of State should be mindful of the legal representations received on the matter of timing. It need not have done so, but, if the Secretary of State is so mindful, then a re-referral in six months would probably give a hearing in the same timeframe as an adjournment.

41. Two other points are raised under this ground.

42. It is first argued that the Applicant will be disadvantaged if the case goes before a new panel with no prior knowledge of his case. This argument undermines the ability of Parole Board panels to read, assimilate and prepare cases from the documentary evidence which is routine work for every member of the Parole Board. The Applicant will not be disadvantaged in front of a new panel.

43. Finally, it is argued that "*should the decision have been undertaken by another panel member, we are confident that this matter would have remained to be heard in front of a live panel"*. This could be read in one of two ways. The first interpretation frames the statement as a negative view of the particular decision-maker in this case and, if so, ignores the fact that Parole Board members are independent decision makers, and (provided their decisions are not irrational or procedurally unfair), their decisions must stand. Alternatively, it could be taken to mean that 'another Parole Board member may have decided differently'. That may be so, but if it was, it would not necessarily follow that the original decision was irrational. It would only be irrational if all other sensible Parole Board members would have decided differently.

Decision

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

Stefan Fafinski
8 July 2021