the Parole Board
working with others to protect the public

[2024] PBRA 71

Application for Reconsideration by Mohammed

Application

1. This is an application by Mohammed ('the Applicant') for reconsideration of a decision of a panel of the Parole Board ('the panel') who on 24 February 2024, after oral hearings on 6 November 2023 and 8 February 2024 made a decision not to direct his release on licence. For the sake of completeness, the panel also did not make a recommendation to the Secretary of State that the Applicant be transferred to open conditions.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair. This is an eligible case, and the application was made in time.

3. I have considered the application on the papers. These are a copy of the dossier considered by the panel, the application for reconsideration made by the Applicant's legal representatives and the decision letter dated 24 February 2024.

4. I also called for and considered the recordings of both hearings.

Background

5. The Applicant is now aged 27 and is serving a life sentence he received when he was 19, for the offence of attempted murder with a minimum tariff of 6 years and 329 days, with time on remand taken into account. This tariff ended on 17 December 2022. The summary details of the index offence are that the Applicant was sentenced on the basis of joint enterprise with other co-defendants. The attack was pre-meditated and included the use of knives. This was his second review, however there is little information about his first review. This appears to be his first review since the end of his tariff.

Request for Reconsideration

6. The application for reconsideration is dated 19 March 2024.

7. The grounds for seeking a reconsideration are that the decision of the panel was procedurally unfair. The particulars of the grounds are summarised by me as follows:

a) The panel failed to take account of all the relevant evidence before it;
b) The panel failed to give the Applicant a fair hearing in that it placed undue weight on evidence that was not substantiated and failed to take into account relevant information;
c) The panel was not impartial in that their line of questioning was biased towards keeping the Applicant in closed conditions.
d) Additionally, the application states that there was no psychologist member on the panel. It is not entirely clear whether this is part of the application or simply a statement of fact, however I will treat it as if it was part of the application.

Current parole review

8. The case was referred to the Parole Board under s28 of the Crime (Sentences) Act 1997 by the Public Protection Casework Section (PPCS) on behalf of the Secretary of State for Justice (the Respondent) in June 2022. The referral was for the Parole Board to consider whether it would be appropriate to direct release, or failing that, to advise the Respondent whether the Applicant should be transferred to open conditions. The Board is also required to give full reasons for any decision and to include any areas of continuing risk that need to be addressed in their decision.

9. A single member of the Parole Board considered the case initially and made a direction for an oral hearing in August 2022. That member directed additional reports for the hearing, and one of these reports was a forensic psychological risk assessment (PRA) to, in summary, assess risk and protective factors, assess any outstanding areas of risk and make proposals for the management of those risks in custody and the community. The author was also directed to give an analysis of what further work (if any) was outstanding. That member did not consider it necessary for a psychologist member to be on the panel, but directed that the case be heard by 3 members.

10. The panel that considered the Applicant's case consisted of three independent members. It first took some evidence on 6 November 2023, and adjourned for additional information as well as to ensure that the Prison Offender Manager (POM) and Community Offender Manager (COM) became more familiar with the Applicant's case. By the time of the second hearing on 8 February 2024, the dossier ran to 423 pages.

11. The panel took evidence from the POM, the COM and the author of the PRA. The Applicant was represented throughout by the same legal representative.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 24 February 2024 the test for release and the issues to be addressed in making a recommendation to the Respondent for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

13. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable

for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

14. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

15. 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

16. 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.

17. 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.

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

Other

19. 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.

20. 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.*"

The reply on behalf of the Respondent

21. On 26 March 2024 PPCS on behalf of the Respondent offered no representations in response to the Applicant's reconsideration application.

Discussion

22. I will take each particular of the application or subsection as necessary in turn. It will be necessary to provide some details with respect to the Applicant's case in order to assist with this decision.

23. I first deal with the issue of there being no psychologist on the panel. There is no rule or guidance that indicates that there must be a psychologist on any panel. The decision that a psychologist was not required was made initially by the MCA member and the panel chair evidently agreed with this decision as they made no further directions about panel membership. In most cases, a psychologist is not needed. They might be needed where there are complex psychological needs to be taken into account, or where there are more than one psychological report that provide very different assessments and recommendations. The Applicant's case has neither of these elements. Without particular complexity, panel members who are not psychologists are trained and provided guidance in order to be able to understand the assessments carried out by a forensic psychologist and to explore this evidence at a hearing. There was no procedural unfairness.

24. *The panel failed to take into account relevant evidence* and also *that the panel failed to give the Applicant a fair hearing in that it placed undue weight on evidence that was not substantiated and failed to take into account relevant information*. These were separately noted in the application but it is appropriate to consider them together. There were no specific examples given in the application, and in fact I note that with regard to unsubstantiated evidence or unclear evidence in security reports, the panel specifically stated that it gave no weight to this evidence. For example, where material was sent to the Applicant (I assume from outside the prison) that tested positive for cocaine, the panel did not take this intelligence into account, making no finding against the Applicant, entirely fairly in my opinion. Another example was of a report suggesting that the Applicant was one of many involved in drugs being thrown over a fence. After exploring this the panel, again entirely fairly, discounted that there was any evidence that the Applicant had been involved. I cannot see what other *'irrelevant'* information the panel may have relied on.

25. With respect to consideration of *relevant* evidence, I note that in the conclusion of the decision letter the panel states that it struggled to "*identify any protective*

factors that would currently serve to significantly reduce [the Applicant's] risk, or to indicate that risk is manageable were [the Applicant] to be in the community on licence or located in an open prison…". This might have concerned me, because there is evidence of protective factors in relation to the Applicant's case. However, I note that in the initial section of the decision letter, the panel does identify protective factors and these include willingness to undertake offence focused work, support from his family and his current custodial conduct. This reassures me that the panel did take relevant factors into account in their decision. In the quoted section above, the panel is specific in saying that it does not identify protective factors that would satisfy it that risk had been reduced or that risk was manageable. In other words, the panel is not saying there are no protective factors, but that these do not provide the information the panel considers necessary for its assessment.

26. Having considered the application, the decision letter and listened to the recording of much of the hearings, particularly the second hearing, I have concluded that the Applicant's strongest concern relates to the decision of the panel not to accept the recommendation of the prison psychologist. This specialist recommended that the Applicant be released on licence. I explore this below.

27. It would seem obvious but is helpful to state, that while a panel must consider any reports and recommendations by witnesses, it is up to the panel to come to its own decision, taking all the evidence before it into account. In other words, the panel is not bound by the recommendation of any witness. The issue is whether, in coming to its conclusion, the panel properly took into account all the evidence before it, including the evidence from witnesses and explained their conclusion, especially where their conclusion differs from any witness.

28. I consider the panel explored the psychologist's reasons for her recommendation fully. They even put her reasoning and conclusion to the COM while exploring the COM's own recommendation, which did not agree with that of the psychologist. The questions put to the psychologist were in my view appropriate. The leading panel member was honest as to what the panel's concerns were, and I think it worth providing a summary of these concerns here. The Applicant, albeit as a very young man, engaged with others in a planned and very violent attack on someone. The Applicant's offending history prior to the index offence consisted of several offences of violence and use of weapons. Any panel of the Parole Board would be remiss in not taking into account the fact of so much violence at such a very young age. The particular issue for this panel was that despite a prior recommendation that the Applicant complete core high intensity work on violence through a programme called Kaizen, this had not been done. I should explain here that 'core' work is usually meant to mean risk reduction work that must be done in custody, before any release and usually before transfer to open conditions. Kaizen is a core risk reduction programme that can only be undertaken in closed conditions in custody.

29. There was agreement amongst all the witnesses that no accredited or high intensity work on violence had been undertaken at all up to the point of the hearing. It would have been a surprise had the panel not explored this in some detail with all the witnesses, and they did. The prison psychologist's opinion was that while this programme, or the need to do this type of core work, was needed some years ago, there was no evidence of violent behaviour from the applicant for at least 4 years,

and this provided good evidence, in their opinion, of risk reduction. This was a large factor in the psychologist's conclusion which was that this core work on violence was no longer necessary.

30. It would be fair to say that the evidence of the POM was not clear on this issue, despite efforts made by the panel. However the POM did indicate that in their opinion work on violence was needed. The COM was clearer on this point, and gave evidence that work on violence had not been done, and that this was core work. The COM then got into some difficulties with their recommendation, which earlier had been that the Applicant should be transferred to open conditions. The panel correctly explored the confusion with her to some degree and further questioning made it possible for the COM to be more clear and indicate that the core work would need to be done in closed conditions.

31. There was also a discussion at the second hearing about the Applicant no longer being considered eligible for the Kaizen programme. Clearly at an earlier point he was considered to be suitable, but since then, largely because of no evidence of current violence, his risk scores had changed and the witnesses indicated that he would not be considered eligible.

32. The Parole Board has no duty, power or role in recommending particular types of work that any prisoner should undertake. The terms of the referral from the Secretary of State provides: "*…the Board …is not being asked to comment or make any recommendation about; …any specific treatment needs or offending behaviour work required…*".

33. It is not possible therefore for any panel to suggest that, for example in this case, any person completes the Kaizen programme. However, it is the role of the panel to identify continuing areas of risk, and in so doing a panel might well indicate that they consider that violence is a continuing area of risk and note that the high intensity work earlier recommended has not been undertaken.

34. The application states that at the hearing the COM provided evidence that the Applicant would no longer be eligible (as explained by me above) for the Kaizen programme. This is accurate. However the application goes on to state that when the COM made this statement, the Chair "*told the COM that if the Panel believe [the Applicant] needs to do a certain programme they can arrange for it to be done*".

35. If the Chair did say this, it would be a mistake. I would have been very surprised to have heard any Chair of a panel to state this, and I listened carefully to the Chair's comments or questions to the COM. I did not hear any such statement. Even had the Chair mistakenly said this at the hearing, I would not have found any procedural unfairness (or in fact irrationality as that would probably have been the appropriate ground) as it bore no relevance to the decision of the panel. The panel was careful in its conclusion not to mention any specific treatment or work, however it stated clearly that risk reduction work was needed before progression.

36. I can see no evidence of an unfair approach to the evidence. The panel's job was to explore current and future risk. They reached a conclusion that did not agree with the psychologist's opinion however that does not mean that they disregarded it. They carefully examined it at the hearing.

37. *The panel was biased*: As to whether the panel was biased (had already formed its decision prior to the hearing), it was clear from the recording of the hearing that the panel was concerned that the earlier recommended high intensity work on violence had not been undertaken. In my view, given the offending history of the Applicant the panel was correct in its exploration of whether this work continued to be needed. As I have stated above, the panel was honest about its concerns and expressed those clearly during the hearing. It is the job of the panel to be concerned about risk and whether there was sufficient evidence of reduction in risk. The panel explored this, and took into account the work that had been undertaken by the Applicant. They did not consider this work sufficient. The evidence before the panel was that the work undertaken by the Applicant did not specifically address violence. The accredited work completed was the Thinking Skills Programme. The panel noted (and explored at the hearing) the poor post programme review following the Applicant's engagement with the programme, indicating more work needed to be undertaken. The panel further noted that just after completing the programme the Applicant assaulted a prison officer. The panel also had concerns about gang affiliated violence (also a risk factor) and it became clear during the hearing that the Applicant had not engaged with any work with respect to this risk either.

38. I cannot find that the panel's approach to their questions was biased or unfair. They did disagree with the psychologist, and have explained why in their decision letter. For example, when discussing the psychologist's evidence at the second hearing, the decision letter states: "*The panel asked [the psychologist] to help the panel to understand where the need for high intensity work has gone*". The panel then recorded the psychologist's answer, which was that there had been no violent incidents since the assault on the prison officer (some years ago), the Applicant had completed some one to one work since then and there were no current treatment needs.

39. Having explored this with the psychologist, and considered the fact that the Applicant had completed the Thinking Skills Programme (not a high intensity programme meant to tackle violence) with a poor report on engagement, that the Applicant had following that programme assaulted a prison officer, and that although other work had been completed, none of it could be said to be core violence reduction work, the panel stated in its conclusion that "*Risk reduction work … is required before [the Applicant] leaves the closed prison estate*."

40. The application quotes the Parole Board Guidance on Effective Questioning. I read this carefully and can find no evidence of the panel disregarding its duty of fairness and impartiality in putting its questions to the witnesses and to the Applicant. Some questions were repeated, but on listening to the recording, I consider the panel was ensuring clarity, as some of the evidence presented by the witnesses during the hearing by the witnesses was unclear and sometimes contradictory. There is no doubt this was a difficult case for the witnesses to come to conclusions and recommendations, and it is the panel's job to ensure that they have fully understood the opinions of any witness.

41. The application does not further particularise the problems with the approach of the panel during the hearing, and I can find no examples of inappropriate questioning by any of the panel.

42. I finally turn to comments made in the application about the risk management plan. The application states that the risk management plan was not sufficiently formed. The panel is entitled to consider the evidence before it, and I see no evidence that it did not properly explore the plan. The panel makes it clear however in the section assessing the risk management plan that "*There is outstanding work to be completed*…" and then the panel provides a long list of risk factors that need further addressing. Given the panel's findings (which I consider to be reasonable) in this respect, whether or not the risk management plan was complete or needed more work becomes moot.

Decision

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

Chitra Karve
09 April 2024