[2020] PBRA 164

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Application for Reconsideration by Bonnick

Application

1. This is an application by Bonnick (the Applicant) for reconsideration of a decision of an oral hearing panel of the Parole Board (the panel) which, by decision letter dated 2 September 2020 declined to either release the Applicant or to recommend that he be transferred to open conditions. The Application was made on behalf of him by his legal representatives.

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 include the dossier considered by the panel, the decision letter of 2 September 2020, the Application for reconsideration (the Application) and an emailed response from the Applicant's legal representatives to an invitation by me to clarify a particular ground for reconsideration.

Background

4. The Applicant is serving a life sentence imposed in August 2000 for the offence of Wounding with intent to do Grievous Bodily Harm. The minimum term was two years, and this expired in August 2002. He was 31 years old at the time of sentence. A panel of the Parole Board in December 2014 decided to release him on licence, and he was duly released in February 2015 (wrongly stated to be December 2015 in the decision letter) and remained in the community until his licence was revoked in May 2019. The hearing in question was the first consideration of his recall.

Request for Reconsideration

5. The application for reconsideration is dated 23 September 2020.

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

(a) Irrationality

(i) That the decision to refuse release without providing the Applicant with an opportunity of an acceptable risk management plan was irrational;

(ii) That the panel heavily relied on the Applicant's evidence to assess his level of insight into his risk factors even though he clearly struggled to verbalise his insight; and

(iii) That the hearing was conducted via video link given the Applicant's difficulties and the need for reasonable adjustments to be made.

(b) Procedurally unfair

(i) That the Applicant has a low IQ and struggles verbally to express himself. The remote hearing made it difficult for the Applicant to answer questions and explain his version of events;

(ii) That the Offender Supervisor (OS) had commented in the hearing that the Applicant was struggling to follow the hearing;

(iii) That it was incorrect of the panel to have disregarded that the Applicant had already been interviewed regarding the alleged incident and that the allegations had been investigated and the matter dropped;

(iv) That the panel should have adjourned the hearing to hear evidence from the alleged victim for the interests of fairness;

(v) That the panel did not make their finding of fact clear until the decision was issued; and

(vi) That the panel should have adjourned the hearing until an acceptable risk management plan was presented.

7. I asked for further particulars of the Applicant's grounds in relation to the complaint of the hearing being held over a video link. Some further grounds have been supplied by the Applicant's representatives; however, I do not consider these strengthen the original grounds. These grounds, including the further information, will be considered fully below.

Current parole review

8. The Secretary of State's referral directed the Parole Board to consider whether the Applicant should be released on licence. Failing that, the referral was to consider whether the Parole Board recommended transfer to open conditions. The Applicant was 52 years old at the time of the oral hearing. The hearing was initially due to be held on 18 May 2020, however because previously directed reports had not been disclosed, the hearing was adjourned with further directions. I note that the decision letter indicates that at the time of the adjournment the Applicant's legal representatives submitted that the case should proceed without this information but this was not agreed to by the panel. The hearing was re-listed on 1 September 2020.

9. It is relevant to the Application that the information that had been previously directed but not received by the May 2020 hearing date was a police report regarding allegations of violence towards a former partner, and reasons as to why no further action had been taken.

10. The hearing in May 2020 was, as indicated in the Application, heard over a telephone link. It is not clear why it was considered suitable to hold that hearing by telephone, given that the Parole Board Member directing the case to an oral hearing in August 2019 had made clear that the Applicant was assessed as having a low IQ,

and therefore a face to face hearing was needed to "*ensure his understanding and to enhance communication*". By May 2020 time face to face hearings had been stopped because of the COVID-19 pandemic, and panel chairs were tasked to assess whether hearings could proceed remotely. I consider it reasonable to assume that the panel chair would have decided at the time of the May hearing or shortly after, that the next hearing should be via a video link, and that the time for the hearing should be extended by one hour. This is evident from the Adjournment letter dated 19 May 2020.

11. No submissions were received from either party about the hearing being held remotely, either by telephone or, later, by video. The Applicant was represented by the same legal representatives on both occasions.

12. On 1 September 2020 the panel consisting of two independent members and a psychologist member convened to hear the case over a video link. A substantial dossier was taken into consideration, this included mandatory documents, recall and recall review reports, psychological risk assessments and police reports containing information relevant to the allegations that were dropped before the Applicant was returned to custody. Also in the dossier were written legal representations.

The Relevant Law

13. The panel correctly sets out in its decision letter 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

14. 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)).

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**.

Irrationality

16. 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."

17. 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.

18. 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

19. 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.

20. 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 the Applicant's case was dealt with justly.

Other

21. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

The reply on behalf of the Secretary of State

22. The Secretary of State did not make any formal representations in response to the Application.

Discussion

23. I will first consider the ground of irrationality, and take each issue in turn.

Ground 6(a)(i):

24. It is the case that the panel found the risk management plan not acceptable. There is however no evidence that the panel relied on the failure of this plan for its decision. In its concluding section, the panel makes clear its reasons for refusing release. The risk management plan is but one part of the many reasons given, and the panel is clear that it was of the opinion that the Applicant had not undertaken sufficient work to manage their own risks in the community. In other words, it decided that there was outstanding work to be completed before re-release.

25. Even if only the risk management plan had been the reason for refusing release, I would have found it difficult to find that the panel had been irrational in its decision, taking into account the case of **Williams** as indicated above. A panel is justified in making its decision on the evidence before it at the time.

Ground 6(a)(ii):

26. Turning to the complaint that the panel relied heavily on the Applicant's evidence despite his struggle to 'verbalise' insight, I note that there is evidence in the dossier that the Applicant struggles from low IQ, and I also accept that the decision letter states that the panel found that the Applicant had a very low level of insight. However, I also note that the panel had other evidence before it relating to the Applicant's level of insight. This includes the evidence of the Forensic Psychologist witness, who assessed repeated risky behaviour while on licence, a lack of learning after having engaged with substantial amount of offence focused work including one to one work, and limited understanding in managing emotions. Other witnesses also provided similar evidence with respect to lack of insight.

27. In relation to the Applicant's own evidence, the Application does not indicate that what the Applicant said was somehow either untrue or inappropriately asked of him or that he misunderstood the question. The decision letter records that he answered a question about insight by saying that he did not consider himself to be a risk of violence to a future partner. It is not being contested that he did say that. Whether or not lack of insight comes from difficulties that the Applicant has in processing, learning and remembering information is not in itself a matter for the Parole Board. What is a matter is whether or not insight exists, and whether, if it does not exist or is limited, that goes to the panel's assessment of risk.
28. In making their assessment of insight, or lack of it, the panel took evidence from all witnesses, including the Applicant. Their assessment of risk took the issue of insight into account. I can find no evidence of irrationality here.

Ground 6(a)(iii):

29. That the hearing took place via a video link without reasonable adjustments being made.

30. As indicated above, there is evidence that the Applicant has a low IQ. It is noted that the Applicant was represented throughout the review process. The panel, following guidelines relating to hearings being run during the COVID-19 pandemic, decided to proceed via a video hearing. It is the case that had the panel decided that a face to face hearing was the only way to hold a hearing for the Applicant, there would have been a significant delay for a face to face hearing. None were being arranged at that time.

31. Had there been any concerns about a remote hearing, the Applicant's legal representatives could have made an application at any time for a face to face hearing, and to object to the hearing being held remotely. There is evidence in the dossier of the legal representatives being involved in the case for some time, responding to requests for directions or variations of the same from the Secretary of State.

32. It was also open to the legal representatives to suggest particular reasonable adjustments. It is not stated in the Application what these adjustments might have been. In fact the panel notes that at the initial hearing in May 2020, when the panel was considering adjourning for further information, the Applicant's legal representatives asked for the matter to proceed even though at that point the hearing would have proceeded by way of telephone link. It could be reasonably assumed that a telephone link would have been even more challenging than a video hearing for communication.

33. There is also no evidence that the Applicant by himself or through his legal representatives during the hearing itself asked for an adjournment so that the case could resume face to face. Where a prisoner has the assistance of legal representation, it is reasonable for a panel to expect that the representative would ensure that their client was able to engage in any process before or at any time during the process. I can find no irrationality in the decision to hold a video hearing.

Grounds 6(b)(i) and 6(b)(ii):

34. I now turn to the ground of procedural unfairness. It is appropriate to address the complaint of having a video hearing, that the OS indicated that the Applicant was struggling to follow the events and that the Applicant found it difficult to give his version of events together, as they all focus on the question of whether the Applicant had a fair hearing and whether he was prevented from putting his case fairly.

35. I first make more general remarks in relation to remote hearings. I accept that remote hearings can be more challenging than face to face hearings for some prisoners. Not only are there technological issues that can lead to delay (which is stressful for any prisoner), but the lack of face to face interaction can provide a barrier for communication for some prisoners.

36. I also accept that prisoners with learning disabilities can struggle to communicate and answer questions put to them by a panel, this is true for both remote and face to face hearings.

37. Many prisoners, whether of low IQ nor not, struggle to give evidence. Parole hearings, by their nature, can be stressful for prisoners. Parole Board members are trained and accredited to ensure that prisoners are able to participate in a hearing.

38. I take into account that there is no indication in the adjournment letter – that indicated that the hearing should now proceed by way of video, rather than telephone link - as to the reason for change for panel logistics. These changes included an increase of time for the hearing of one hour, and that the hearing could proceed by way of video link. It would have been useful had a reason been given.

39. At the time of the adjournment in May 2020, there was no likelihood of a face to face hearing, and no time estimate as to when these could re-commence. This is because of the 'lockdown' due to the COVID-19 pandemic. It is reasonable to assume that the panel took into consideration the impact on the Applicant of having to face a very long delay for their hearing had they directed that the case could not proceed remotely.

40. It is also reasonable to assume that the reason that they changed the original telephone hearing to a video hearing is because it would afford the Applicant and the panel the ability to have some 'face to face' interaction. This would have been prevented if a telephone hearing would have been considered to be suitable.

41. In this particular case, I think that it is reasonable to assume that the panel, in making a decision that the hearing should proceed via video link and not telephone link, and that it should be for one hour longer, took into consideration the complexity of the case in general, including the need to ensure that the Applicant's needs were met.

42. I also note the following: that the panel was fully aware of the assessments with respect to the Applicant's cognitive functioning; that there had been no challenge to the decision to hold the hearing remotely from the Applicant's legal representatives at any point; that the Applicant was represented both prior to and during the hearing and also that the panel was able to take evidence from him. This evidence is indicated in the decision letter and is not challenged in itself by the Applicant's legal representative, in other words, they are not saying that the Applicant, through confusion or misunderstanding, gave evidence that was unsafe. The panel is in my view entitled to rely on the fact that a legal representative has made no objection at any point about the hearing being held remotely. As indicated above, there is no indication that the Applicant's legal representative made any objection to the hearing being held remotely either before or during the hearing. I find no unfairness in relation to this particular.

43. I turn now to the issue of whether there is any procedural unfairness in relation to the panel's finding with respect to the allegations made against the Applicant that were later dropped. The Applicant's legal representative indicate that that the panel should not have "*disregarded*" the Applicant's interview with the police, and that before making any decision on the allegation they should have directed the alleged victim to attend the hearing to answer questions. They also suggest that the panel should have directed the Applicant's current partner to attend the hearing as she had provided a statement.

44. I do not find that the panel disregarded the evidence of the police interview. The decision letter is clear that the panel considered it. It also considered information provided in the police report, including statements, copies of photographs taken at the time of the allegation of the alleged victim and body worn camera information from police. They considered the fact that the investigation had been dropped and the alleged victim was no longer supporting the police investigation. They found that the alleged victim's injuries, were consistent with the account that she had given to the police at the time of the incident and not the Applicant's. I cannot find what use the attendance of the Applicant's partner would have been in this regard, as her statement was in the dossier and considered by the panel and in any event she was not a witness in the matter. In my view the panel was entitled, with the evidence before them, to make a finding on the balance of probabilities.

Ground 6(b)(v):

45. I reject the complaint that the panel should have made its findings (with respect to the allegations) clear before the decision was made. There is no process for a two-stage hearing where a panel first makes findings in relation to the evidence, states what they are and then takes further evidence before coming to a final decision. This is a process that is sometimes taken in regulatory hearings but not in parole hearings. There is no procedural unfairness here. The panel was entitled to make findings based on the evidence, it did so and explained its reasoning.

Ground 6(b)(vi):

46. Finally, the Application indicates that the panel should have adjourned until an "*acceptable*" risk management plan was available. I have dealt with this issue already under the earlier ground, however I will approach it on the grounds of procedural unfairness.

47. The Application states that, if the panel had adjourned for an "*acceptable*" risk management plan, then "*it is clear that if this was in place the applicants (sic) risk can be managed in the community*". Having carefully read the decision of the panel, I cannot see where they indicate that their decision depended upon the acceptability or otherwise of the risk management plan. They do indeed find that the plan is inadequate to manage the Applicant's risk, it is obvious that every Parole Board panel that is required to consider release must make an assessment of the risk management plan. However in my opinion, the panel is clear that its decision not to release or progress the Applicant has been taken by considering the evidence as a whole. A full explanation for the decision is given and this includes lack of insight, consideration of past offending and current risk factors, (lack of) skills to manage risks and outstanding needs for further offence focused work. I can find no evidence that any further development of the risk management plan would have changed the decision of the panel.

Decision

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

Chitra Karve

1 November 2020

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