[2020] PBRA 186

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Application for Reconsideration by Williams

Application

1. This is an application by Williams (the Applicant) for reconsideration of a decision of an oral hearing panel (single member) dated 5 November 2020. The decision of the panel was not to recommend release of the Applicant.

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 a dossier consisting of 338 pages, a letter from the Applicant's solicitor dated 24 November 2020 and setting out the grounds for the application for reconsideration, and the panel member's decision letter dated 5 November 2020.

Background

4. The Applicant is serving two sentences of imprisonment for public protection (IPP). The index offences which relate to this application are offences of attempted murder and possession of a firearm with intent to endanger life. He was sentenced in relation to these offences on the 5 of September 2006.

5. The Applicant is also subject to a concurrent IPP which was sentenced in January 2007. The offences in relation to this IPP matter were committed before the index offence (although sentenced after the sentencing of the index offence). These offences were robbery, attempted robbery and possessing an imitation firearm when committing an offence.

6. The minimum term in relation to the index offences expired in 2015. The Applicant was released on licence on 20 September 2016 and recalled on 25 October 2019. This was the Applicant's first review since recall.

7. The Applicant was 21 years old in 2006 when the index offence was committed. The Applicant was, at the date of this decision, aged 36.

Request for Reconsideration

8. The application for reconsideration is dated 24 November 2020. The application was not made on the published form CPD2, 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 form explains how to look for evidence to sustain the complaints and, reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, the application was validly made.

9. The grounds for seeking a reconsideration are that the hearing was procedurally unfair for the following reasons:

    a. That the solicitors for the Applicant were unable to conduct a meaningful conference regarding a police report as it was only disclosed three days prior to the hearing and the Applicant had the document only one day prior to the hearing. Accordingly, solicitors were unable to give proper advice and the hearing should have been deferred;
    b. The hearing was by way of telephone link which did not give the Applicant an opportunity to stop the hearing and give instructions to his legal representative;
    c. The hearing should have been conducted by a three person panel;
    d. That a psychological risk assessment should have been ordered by the panel at MCA stage or later;
    e. That both the Prison Offender Manager and the Prison Offender Supervisor recommended release; and
    f. That the panel failed to set out the extra work which is it was suggested the Applicant should undertake to reduce risk.

Current parole review

10. This case was originally referred to Member Case Assessment (MCA) hearing on 20 December 2019. That panel member deferred the assessment to await the outcome of subsequent charges which had been laid against the Applicant, while he was on licence, and which were in relation to serious allegations involving kidnapping.

11. The matter eventually came before a single (oral hearing) panel member on the date set out above. There had been considerable difficulty in securing information about the subsequent charges. In essence the Applicant had been committed to the Crown court for trial on the charges, but eventually a decision had been made to offer no evidence. The single panel member required information from the police and/or the Crown Prosecution Service relating to the details of the allegations and any information concerning the reasons behind the decision not to pursue them. As indicated above, the information was eventually served by way of a police report. The CPS did not indicate the reasons for a decision not to pursue the case and they were not therefore recorded in the dossier.

12. As indicated above, the hearing was conducted by a single panel member which was a correctly constituted Parole Board panel. The hearing took place by way of telephone link in the light of the current pandemic and the prohibition against face-to-face hearings in prisons. The Applicant was represented at the hearing. Evidence was received from the Applicant himself, the Prison Offender Manager (POM) and the Community Offender Manager (COM).

13. The Parole Board decision letter does not reveal any application by the Applicant himself or his solicitors for either a short adjournment to take instructions or for a longer adjournment to consider further the (late) served police evidence in this case.

14. It is also noted that the Applicant's solicitor does not indicate that such an application was made at the hearing.

The Relevant Law

15. 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

16. 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)).

17. 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

18. 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."

19. 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.

20. The Applicant in this case did not argue that the decision was irrational.

Procedural unfairness

21. 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.

22. 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.

23. 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.*"

24. 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

25. The Secretary of State offered no representations in response to this application.

Discussion

26. I will be dealing initially with grounds 9 a, b, c and d above.

27. Where an irregularity is said to have occurred in the course of a hearing and a party to the Parole Board hearing has been represented by lawyer, that party is highly unlikely to generate a successful appeal, if there had been no challenge made to

the alleged irregularity by the Applicant or his lawyer at the hearing itself. This is clearly subject to exceptions - for example, a failure by another party to disclose relevant material.

28. In paragraph 9a above, it is noted that the Applicant's solicitor indicates that the police report, which was a highly relevant and important part of the risk assessment, had only been received a few days before the hearing by the solicitors themselves and in even less time by the Applicant. Accordingly, the complaint is that the limited time that the Applicant and the solicitor had to discuss the report was insufficient to take the required instructions.

29. There is no reference in the application for reconsideration to any indication by the Applicant or his solicitors either before or at the hearing, requesting an adjournment because insufficient time had been available to take instructions. It is clearly incumbent upon those appearing before a panel of the Parole Board to make such an application if it is thought to be appropriate. It is a reasonable assumption by any Parole Board panel that a represented Applicant will ask for adjournment, if appropriate.

30. It cannot be a procedural irregularity for a panel to fail to adjourn the matter where no application has been made and when no indication is given, that further time is required. It is also the case that, in this instance, the Applicant will not have been entirely taken by surprise by the material that was served by the police. The Applicant had been charged with offences which were based upon the evidence disclosed by the police. It is highly likely that the Applicant will have been served with advance information and possibly a full trial bundle before the matter was withdrawn in the Crown court. Accordingly, I determine that there was no procedural irregularity so far as this complaint is concerned.

31. For similar reasons, I reject the complaint in 9b above, namely that the Applicant was not able to stop the proceedings and give instructions because they were over the telephone. The use of video and telephone contact to conduct proceedings is by no means ideal and has been adopted in the light of the current pandemic. However, normal communication can continue, and parties are well aware of fact that applications to adjourn, to take or give instructions, or to take (for example) comfort breaks are routine and acceptable. Again, there is no indication by the Applicant or indeed in the decision letter that any application was made for time to have further discussions, or importantly that any such application was made and refused. It is again incumbent upon the parties to present their concerns at the hearing itself and to allow the issue to be considered by the panel. Again, in the absence of any application or comment within the hearing itself, I reject the complaint that the Applicant was not able to take advice or give instructions to his legal adviser.

32. Representation 9c above is a complaint that the hearing should have been conducted by a 3 member panel of the Parole Board rather than a single member panel.

33. The Parole Board Rules 2019 set out the requirements for a properly constituted panel of the Parole Board. The panel was correctly constituted. An Applicant or his legal advisers or indeed the Secretary of State are at liberty to make representations (preferably well before the hearing of the review), if there is a view that a differently

constituted panel would be fairer or more effective. Clearly, reasonable grounds for such an application would need to be set out by the Applicant. A bare assertion that a differently constituted panel should have been arranged for this hearing is insufficient to persuade me that there was a procedural irregularity. Again, such an application could have been made at the hearing itself. There is no indication from either the panel decision letter or from the Applicant's solicitors that any application was made. Accordingly, I reject this complaint as a procedural irregularity.

34. Representation 9d complains that a psychological risk assessment should have been commissioned by the panel.

35. Although it is often the case that a Parole Board panel will (usually at MCA stage) commission psychological and other reports to assist in their risk assessment, such a report is not a requirement of a hearing. It is for the individual panel to reach a conclusion as to whether it is satisfied that there is sufficient material upon which it can make a fair decision. Again, it is open to the Applicant or his solicitors to either commission an independent report themselves if thought appropriate, or alternatively to make representations to the oral hearing panel to adjourn the matter and commission such a report. There is no evidence of such an application, having been made by or on behalf of the Applicant in this case. Equally, if the decision arises at short notice an application can be made at the hearing itself for adjournment. Again, no application appears to have been made at the hearing itself. Accordingly, I reject this complaint is being procedurally unfair.

36. Representation 9e identifies the fact that the panel members conclusion was in conflict with that of the POM and COM.

37. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. 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.

38. However, if the panel makes a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should clearly explain its reasons for doing so and that it stated reasons should be sufficient to justify its conclusions per **R (Wells) v Parole Board 2019 EWHC 2710**.

39. In this case the crucial evidence which related to concerns about risk was the allegation that the Applicant had been involved in a violent kidnapping incident with a group of other men. It was this allegation which led to the Applicant's recall and which also led to charges being laid of kidnapping and robbery.

40. It was the differing approach of the COM and POM and the Panel Member to the evidence supporting these allegations of wider offending which led to contrasting views of the Applicant's risk.

The Law – wider Offending

41. In **DSD** (cited above), the court said as follows (at p155):

> *155. '……whereas we agree ….. that it is not the role of the Parole Board to determine whether a prisoner had committed other offences, we cannot accept the extension of that submission,……. that it is precluded from considering evidence of wider offending when determining the issue of risk. The distinction between these formulations is important, not least because it was occasionally obscured during the course of Ms Kaufmann's argument. It was, however, very clearly drawn at the beginning of her submissions in reply. As for Mr Collins's submission that the distinction between taking account of evidence of wider offending and refraining from making determinations about it is artificial, we cannot agree: it is important. At the risk of repetition, in the circumstances of the present case, this evidence or material could have been used as a means of probing and testing the honesty and veracity of Mr Radford's account.*

42. It was made clear in that case that Parole Board panels not only have a right, but indeed a duty, to consider the potential of '*wider offending'* if it impacts on risk. It was also made clear that the offending may not (as in **DSD**) have necessarily been concluded by a conviction. The appropriateness of a decision on risk being supported by unconvicted material was established.

43. However, a Parole Board panel relying upon evidence of behaviour outside the parameters of conviction must exercise care and there must be an evidence base upon which any conclusion is reached. See the Parole Board published guidance as to the approach in such cases.

44. Once established, the panel must scrutinise the available evidence, taking careful account of denials or alternative explanations. The panel may then be in a position to reach a definitive conclusion as to the quality and reliability of the evidence base and whether it is safe and fair to rely upon it in assessing risk. In **DSD** the court indicated that:

> '*In our judgment, this material would have provided a sound platform for testing and probing Mr Radford's account, either at a pre-hearing interview by a member of the panel or at the hearing itself.'*

45. In **DSD** the issue was whether the panel had gathered sufficient appropriate material upon which to reach a decision on risk. However, the principal of the appropriateness of a decision on risk being supported by unconvicted material was established.

46. In this case the panel member clearly applied the principles set out in **DSD** and the Parole Board Guidance as enunciated above. The panel member appropriately

required details of the evidence base upon which the original allegations had been made. The evidence was made available to all parties through the dossier. The evidence was analysed in the course of the hearing and clearly tested in questioning.

47. The panel member pointed out that two pieces of evidence were particularly compelling in associating the Applicant with the offending, namely the fact that a car belonging to the Applicant's partner had been at the scene of the kidnapping and that a mobile telephone associated with the Applicant had also been detected at the scene of the kidnapping. That evidence combined with the detailed cell site, CCTV and number plate recognition material, together with the complaint by the kidnapped individual himself was sufficient to satisfy the oral hearing panel member that the Applicant's account of having had a car and mobile phone stolen and used in the kidnapping lacked credibility. The panel Chair therefore concluded on the balance of probability that the Applicant was involved in the abduction.

48. This decision was fundamental to the evidence at the hearing. It explained the basis upon which the views of the POM, and COM were not followed. Both professionals based their assessment of risk on the assumption that the Applicant had not been formally convicted of the kidnapping offences and therefore no account was taken of that incident when assessing risk. Indeed, the COM indicated in evidence that if the Applicant had been convicted of the offending, then the view of his risk would have been entirely different.

49. Whilst respecting the positions taken by the POM and the COM, which adhered rigidly to the question of whether the evidence was sufficient to meet the test of a criminal trial. I determine that the panel member appropriately and correctly applied the assessment of risk required of Parole Board members and set out in detail in **DSD**.

50. Although it might have assisted if the single panel member had set out, in more (and separate) detail, the reasons and basis for his rejection of the position taken by the POM and the COM. Taken as a whole, I am satisfied that the decision letter sets out the basis upon which the panel member reached a different conclusion to that of the two professionals; namely that the assessment of risk by the Panel Chair was based upon a finding that the Applicant had been involved in the kidnapping and thus his risk had not been comprehensively assessed by the COM and POM.

51. Accordingly, I reject the complaint that the panel member's findings on this aspect of his decision are procedurally unfair.

52. In heading 9f above, the Applicant's solicitor indicates that the panel member failed to set out the work which would be expected to be completed by the Applicant in order to address the concerns about risk.

53. The Parole Board are a decision-making tribunal. Considerations as to any programs or interventions which might be appropriate for a particular individual are clearly matters for the prison, psychologists, and community and prison supervising officers to discuss and agree with the individual prisoner. The role of the Board is to consider whether any such interventions (once undertaken) have been sufficient to assist in reaching a conclusion upon the statutory test. It would therefore not be appropriate for a panel to make definitive suggestions about future intervention

work to be undertaken, although the decision letter sets out, in broad terms, the information which may assist a panel in the future.

54. I do not therefore find that an absence of suggested interventions by the single panel member amounts to a procedural irregularity in this case.

Decision

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

HH S Dawson
5 December 2020