[2021] PBRA 101

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Application for Reconsideration by Patterson

Application

1. This is an application by Patterson (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 2 June 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 dossier consisting of 337 pages (as it was before the Panel), the Decision Letter, the reconsideration representations submitted by the Applicant and those submitted on his behalf by his legal representative. No representations have been received from the Secretary of State.

4. Whilst I have been assisted to some extent by the Applicant's own hand-written representations, they are focussed more on his sense of disappointment at the outcome of the hearing than on the legal test which I must apply.

5. In the circumstances, I have given greater attention to the legal representations; they assist me rather more in addressing the legal questions which I must resolve.

Background

6. On 11 September 2015, the Applicant, then aged 25, was sentenced to an extended sentence of imprisonment consisting of a custodial period of eight years and an extension period of four years for an offence of wounding with intent to do grievous bodily harm. The offence was committed against a fellow prisoner while the Applicant was on remand, awaiting sentence for serious offences for which he received a substantial sentence. His parole eligibility date was 19 November 2020 and his conditional release date is 21 July 2023

Request for Reconsideration

7. The application for reconsideration is dated 21 June 2021.

8. The grounds for seeking a reconsideration are that the decision not to direct release was procedurally unfair and irrational on the following bases:

(a) The Panel should have adjourned the hearing to obtain a psychological report;
(b) The Panel should have adjourned the hearing so that the risk management plan could be "confirmed" (as described in the legal representations) or alternative options could be considered;
(c) The Panel should have adjourned the hearing to allow the Applicant a further opportunity to demonstrate improved behaviour;
(d) The Panel should have followed the recommendations of the professional witnesses that the Applicant's risk could be managed in the community; and
(e) The Panel gave insufficient weight to the work done with and by the Applicant and to his improved behaviour.

Current parole review

9. The Applicant's case was referred to the Parole Board by the Secretary of State on 8 November 2019 to consider whether or not it would be appropriate to direct his release.

10. The Panel considered the contents of a dossier of 337 pages, heard evidence from the probation officers responsible for the supervision of the Applicant in prison and in the community and received submissions from his legal representative.

The Relevant Law

11. The Panel correctly sets out in its decision letter dated 2 June 2021 the test for release.

Parole Board Rules 2019

12. 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)).

Irrationality

13. 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."

14. 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.

15. 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

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. In the cases of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

20. 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.

21. 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.*"

22. 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.

Discussion

23. Three of the complaints concern what are asserted to be failures on the part of the Panel to adjourn the hearing. In those circumstances, it is important to set out some general observations about adjournments.

24. First, decisions as to whether to adjourn hearings are a matter for the discretion of the Panel. Such decisions will usually be the result of identifying relevant factors in favour of or against the granting of an adjournment. The weight to be given to these factors is a matter for the Panel. It would, generally, be only if the Panel had failed to take account of a relevant factor or had taken into account an irrelevant factor and had as a result of doing so reached a flawed decision that a reviewing body would set aside the decision on the basis of procedural unfairness or irrationality.

25. Secondly, adjournments are best avoided if at all possible. Prisoners, who will usually have been waiting for some time for their hearing, are entitled to a decision on the due date. Setting an adjourned date involves duplication of cost and, importantly, means that a hearing date which would otherwise have been given over to another case now cannot be so allocated; another prisoner is thus compelled to wait for even longer for his case to be heard.

26. Thirdly, Parole Board hearings should, wherever possible, conclude with a final decision. They are not to be regarded as mere staging posts during an ongoing and continuous process, going from one hearing (intended to be a final hearing) to another and even another.

27. Fourthly, a reviewing body is entitled to give some weight to the fact that a complaint is made only at the reconsideration stage about a failure to adjourn when no submission was made at the hearing itself that there should be an adjournment. If no suggestion was made at the hearing that the Panel would not be able to reach a rational or procedurally fair decision without an adjournment, the later complaint is always likely to carry less weight. That said, this Panel was required to reach a fair decision, in the sense I have just described, and would not be relieved of that duty by the mere fact that an adjournment was not applied for. The failure to apply for an adjournment is relevant not to the question of the duty of the Panel but to the question of whether an adjournment would have served a useful purpose; if it would have, why was no application made?

28. Against that contextual background, I turn to the individual complaints.

29. The complaint as to the absence of a psychological report is framed thus:

> "…..*in the body of the Decision reference is made by the Panel to the fact that there is no psychological report and in their conclusion mention how a Panel in the future would benefit from one*"

30. The argument is further developed:

> "*…the Panel were wrong not to adjourn the case for the preparation of the psychological report should this have been something that was within their mind, which it clearly was, bearing in mind reference was made to it in the Decision*."

31. This argument has some attraction. But it needs to be seen in the overall context of the decision as a whole. As the Decision Letter makes plain (also emphasised in the representations submitted by and on behalf of the Applicant) at the heart of the decision not to direct release was a concern that, although there had been improvement in the Applicant's custodial behaviour in the recent past, there was a lengthy history of poor behaviour as well as some quite recent examples of it. The Panel was also concerned as to whether, Covid restrictions were eased leading to greater movement around the prison and contact with other prisoners, the Applicant's improved behaviour could be sustained.

32. It follows that, so far as the present Panel was concerned, a crucial matter for the next Panel to consider was whether the improved behaviour, so much relied on by and on behalf of the Applicant, had been sustained in different circumstances. The suggestion that the next Panel might be helped by a psychological report was phrased with this in mind:

> "*The panel concluded that for the next review [the Applicant] would benefit from a psychological risk assessment to explore the triggers to [his] violent behaviour and whether the counselling [he has] received and the learning from [a training course addressing the tendency to use violence] has reduced the risk of further such offending*."

33. The suggestion that a future panel, considering the Applicant's case in the context of the hoped-for improved custodial behaviour, might be helped by a psychological report offering some explanation for his past behaviour and some insight into

whether his changed behaviour, in the context of the counselling and learning he had received in custody, might translate into less dangerous behaviour in the community does not mean that the present Panel's decision was rendered irrational or procedurally unfair.

34. In these circumstances, I am unpersuaded that the Panel should, on its own motion, have adjourned the hearing to obtain a psychological report. I note that no suggestion was made on behalf of the Applicant at any stage of the proceedings that a report should be commissioned, whether before or during the hearing. His legal representatives are experienced and highly competent. If they did not think a report was necessary, then why should the Panel have come to a different conclusion? I can find no sustainable basis for the assertion that a failure to direct an adjournment was in itself procedurally unfair and/or led to an irrational decision on the part of the Panel.

35. As to the risk management plan, the Panel set out in some detail what was proposed. It included a relatively short stay in designated accommodation, regarded by the probation officer supervising the Applicant in the community as not being ideal; efforts would be made to secure an extension.

36. No move-on plan had been developed prior to release. The Applicant was in a medium security establishment, in restricted circumstances arising from the nature of the establishment as well as from Covid restrictions. He had no move-on plan and would have had a short period of time in designated accommodation to make himself ready for resettlement into the community after more than seven years in prison.

37. It was in that context that the Panel gave, as an additional reason for declining to direct release, that this had the potential to set the Applicant up to fail.

38. The legal representations before me do not seem to suggest that this in itself was an irrational or procedurally unfair decision. The complaint is that the Panel should have adjourned the hearing so that more could be done to remedy the defects in the risk management plan.

39. Whilst the complaint is clearly stated in the representations, there is little, if anything, to explain what would have been achieved by an adjournment.

40. The central problem in relation to this aspect of the release plan was the brief period of time in designated accommodation. It was agreed that the eight week period on offer was insufficient. Experience of current conditions is clear. There is considerable pressure on designated accommodation as a direct result of the pandemic with the result that the length of time for which released prisoners might be accommodated there is shorter than in the past. Extensions appear to be granted in cases where it is applied for on a needs basis and in response to unexpected vacancies arising, for example when a resident is recalled to prison. These extensions are unlikely to be granted prior to release and are likely to arise only in the event of a vacancy presenting itself on an ad hoc basis post release.

41. In short, no indication is given in the representations as to what might have been achieved by an adjournment; experience suggests that nothing would have been achievable.

42. In addition and without repetition, the other broader reasons why adjournments are undesirable together with the inference, as above, to be drawn from the decision by the legal representative to make no application for one at the hearing all point to this complaint lacking any real substance.

43. I am unable to find that the asserted failure by the Panel to adjourn for this purpose amounted in any way to procedural unfairness nor made the decision irrational.

44. The complaint that the Panel should have adjourned to allow the Applicant a further opportunity to demonstrate good behaviour is easily answered. He had ample opportunity to do this prior to the hearing. The direction from the Secretary of State was made in November 2019. The hearing, delayed by a deferral in November 2020, took place May 2021. Accordingly, the Applicant had been in his "parole window" for 18 months prior to the hearing.

45. In those circumstances, any application made on his behalf for an adjournment to afford him further opportunity to display good behaviour would undoubtedly have failed. It is unsurprising that one was not made, and it is fanciful to suggest that the Panel should have taken a decision of its own motion to consider and to grant such a hopeless application.

46. There is no substance to this complaint, and I reject it.

47. The fourth complaint, that the Panel should not have gone behind the recommendations of the professional witnesses, finds its answer in the legal representations submitted on his behalf:

> *"We of course appreciate the Parole Board ultimately are independent and of course have to make their own independent assessment of risk, however when you have two professionals who know the individual well and have had the time to assess his risk and indeed plan for the future, it seems somewhat unfair when a negative decision is issued on the basis that the Panel felt that our client was being set up to fail."*

48. First, I can only allow this application, so far as this ground is concerned, on the basis of irrationality so that a finding that the decision was "somewhat unfair" would fall well short of meeting the correct test.

49. Secondly, as acknowledged in the representations, it is always open to a Panel to reach a decision which is not in accordance with the recommendations of the professionals, provided that it does so in a manner which is not irrational and makes it clear where it disagrees with them and why.

50. The Panel found, on a proper evidential basis, that the Applicant lacked appropriate skills to help him to avoid violence. The Panel accepted that there had been positive changes in his insight and in his behaviour but nonetheless were unable on the

evidence as they understood it to find that his improved behaviour could be sustained in the community.

51. These were findings which were to some extent at odds with the views of the professionals. They were, however, findings to which the Panel was entitled to come on a basis which was fair and rational.

52. I cannot accept that the decision of the Panel in this regard was "somewhat unfair". In any event and on any view, it was not a decision which could conceivably be characterised as irrational.

53. In these circumstances and for these reasons, I reject this complaint.

54. Finally, it is asserted that the Applicant's good behaviour and the counselling work completed by him were not taken into consideration "properly" (the word used in the representations).

55. I have understood this complaint to be that these matters were not given the weight which they merited, not that they were not taken into account at all.

56. A fair reading of the Decision Letter shows that the Panel expressly recognised that counselling work had been beneficial to the Applicant and had led to positive results, for example that he had developed strategies to remove himself from stressful situations and to seek help and support when necessary. There is further reference to him having developed some insight after completing a particular intervention and to his improved custodial behaviour.

57. The Panel went on to balance these positive aspects against other aspects of his case, noting that he had continued to receive adjudications and negative reports and had quite recently threatened a prison officer. The Panel found that although there had indeed been some improvement in his recent custodial behaviour this had to be seen in the context of his behaviour during the whole of the sentence (which had been problematic). Further, the Panel were mindful of the restricted regime under which the Applicant had been living because of Covid and had reservations as to whether this improved behaviour could be sustained when restrictions were removed.

58. The Panel was fully entitled to approach the matter in this way. They took account of relevant matters, did not take into account irrelevant matters and reached a balanced decision based on their assessment of the evidence as a whole.

59. This is precisely the way in which a Panel should approach its task. I find it impossible in the circumstances of this case to characterise this approach as irrational or procedurally unfair; it is the exact opposite.

60. This ground of complaint is unsustainable, and I reject it.

61. Having rejected each complaint, I have gone on to consider whether the matters complained of when considered together amount to a sustainable argument that the decision as a whole was irrational or procedurally unfair.

62. I can find no basis for such a finding.

Decision

63. 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.

Alistair McCreath
7 July 2021