the Parole Board
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[2021] PBRA 146

Application for Reconsideration by Wylie

The Application

1. This is an application by Wylie ('the Applicant') for reconsideration of the decision of a panel of the Parole Board ('the panel') which on 3 September 2021, after an oral hearing on 1 September 2021, decided not to direct his release on licence and not to recommend to the Secretary of State that he should be moved to an open prison.

2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.

Background

3. The Applicant is now aged 47 and is serving a sentence of life imprisonment for murder. He received that sentence on 8 July 1999. His tariff was originally set at 18 years but was later reduced to 15 years less time served in custody on remand. The tariff expired on 17 January 2014. The Applicant has remained in closed conditions throughout his sentence.

4. The victim of the murder was his cellmate, where the Applicant was serving a 10-year sentence for the attempted murder of a woman in the female toilets of a public house. The victim of the murder was a vulnerable young man whose mental age was 7 and who was awaiting trial for petty theft.

5. The murder occurred on the day on which the Applicant had learned that his appeal against conviction and sentence for the attempted murder had been unsuccessful. It was described by the then Lord Chief Justice, when reviewing the trial judge's recommendation for the tariff, as an exceptionally serious crime for which there were no mitigating factors. The murder and attempted murder were the culmination of a pattern of serious offending.

6. It is evident that the Applicant has had mental health difficulties. [Redacted]. Earlier in his sentence his behaviour was problematic but in recent years it has been stable.

7. The current review of the Applicant's case is his fifth. It commenced when the Secretary of State referred the case to the Board on 13 November 2020 to decide whether to direct the Applicant's release on licence and, if not, to advise the Secretary of State about his suitability for a move to an open prison.

8. Member Case Assessment (MCA) directions issued on 24 April 2021 directed that the case should proceed to an oral hearing. The directions stated that the case was suitable for a video link (but not, by implication, a telephone link) between the panel and the prisoner, but also stated that it was suitable for a witness to provide evidence by video or telephone link. In the light of these conclusions, it was directed that the hearing should be conducted by video link.

9. Despite this direction the parties were notified by the listings department of the Board on 11 June 2021 that the hearing was to be conducted by telephone link. The likely reason for that will be discussed below.

10. On 2 August 2021, Panel Chair Directions issued by the panel chair stated that there was no change to the panel logistics previously directed, which of course included the direction that the hearing should be conducted by video link.

11. Nevertheless, the hearing remained listed to be conducted by telephone link, and duly took place by that means on 1 September 2021. There is no indication that the panel chair noticed that this was a breach of the directions made on two occasions or that she took any steps to correct the position. Nor is there any indication that the Applicant's solicitors raised any complaint about the erroneous listing or made any application for the hearing to be conducted by video link. The implications of all this will be discussed below.

12. At the hearing the Applicant sought a recommendation for a transfer to an open prison but not a direction for release on licence. All three professional witnesses (including a psychologist) supported a transfer to an open prison, but the panel disagreed.

13. An undated handwritten application for reconsideration was submitted by or on behalf of the Applicant. It is unclear who was the author of the application, though it is evident that the Applicant had dispensed with the services of his previous solicitors and now had two new legal advisors. Though undated, the application was received within the time limit laid down by the Rules.

The Relevant Law

The test for re-release on licence

14. The test for re-release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the panel in the introductory section of its decision. A direction for release is binding on the Secretary of State.

Recommendation for a move to an open prison

15. The Board's advice about suitability for open conditions is not binding on the Secretary of State, who is free to accept or reject it as he sees fit. The Board's advice must be based on a balanced assessment of risks and benefits, with an emphasis on risk reduction and the need for the prisoner to have made significant progress in changing his attitudes and tackling his behaviour problems in closed conditions.

Without evidence of such progress, the Secretary of State will not normally consider a move to open conditions. Matters which the Board has to consider in making its assessment include the risk of the prisoner absconding and the likelihood of his complying with the conditions of any temporary release on licence.

16. It is perhaps a little unfortunate that, in the "*Conclusion and decision*" section of its decision letter, the panel - having just stated that it declined to release the Applicant and that it did not make a recommendation for a move to open conditions - stated that "*This decision is binding on the Secretary of State*" without making it clear that it was only the decision not to release the Applicant which would be binding on the Secretary of State.

The rules relating to reconsideration of decisions

17. Under Rule 28(1) of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.

18. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by:
(a) a paper panel (Rule 19(1)(a)) or
(b) an oral hearing panel after an oral hearing as in this case (Rule 25(1)) or
(c) an oral hearing panel which makes the decision on the papers (Rule 21(7)).

19. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both of two grounds: (a) that the decision is irrational or (b) that it is procedurally unfair.

20. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration.

21. The panel's decision not to recommend a move to open conditions is not eligible for reconsideration. It is again perhaps a little unfortunate that at the end of the decision letter (in a section automatically included in the template for an oral hearing) it was stated that "*This decision is provisional for 21 days from the date it is issued to the parties. Within this time, either party may apply for the decision to be reconsidered on the basis that it is either 'irrational' or 'procedurally unfair', or both"* without making it clear that it was only the decision not to direct release which was eligible for reconsideration. That may account for the fact that, as will be explained below, most of the arguments deployed in support of this application are directed against the decision not to recommend a move to open conditions rather than the decision not to direct re-release on licence.

The test for irrationality

22. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin) (the "Worboys case")**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It stated 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."*

23. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.

24. 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.

25. The Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see **Preston [2019] PBRA 1** and other cases.

The test for procedural unfairness

26. 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 from the issue of irrationality which focusses on the actual decision.

27. It has been established that the things which might amount to procedural unfairness include:
    (a) A failure to follow established procedures;
    (b) A failure to conduct the hearing fairly;
    (c) A failure to allow one party to put its case properly;
    (d) A failure properly to inform the prisoner of the case against him or her; and/or
    (e) Lack of impartiality.

28. This is not an exhaustive list. The fundamental question on any complaint of procedural unfairness is whether, viewed objectively, the case was dealt with fairly.

The Application for Reconsideration in this case

29. Though hand-written, the representations are set out clearly and concisely and with admirable restraint. There are seven separate complaints which will be considered below.

Documents considered

30. The following documents were originally provided for my consideration:
    (a) The dossier provided by the Secretary of State, which contains 570 numbered pages and includes the panel's decision letter;
    (b) The representations submitted in support of the application for reconsideration; and

(c) An email from PPCS dated 1 October 2021 stating that the Secretary of State offers no representations in respect of the application.

31. I was provided (at my request) with the MCA directions directing an oral hearing and a number of e-mails relating to the process which resulted in the hearing being conducted over the telephone.

Discussion of the issues raised by the Applicant

32. Of the seven complaints made in the representations six were directed against the decision not to recommend a transfer to an open prison. Five of them were put on the basis of procedural unfairness and one on the basis of irrationality, but I believe that if any of them had been grounds for reconsideration it would have been on basis of irrationality.

33. These six complaints are as follows:

Ground 1: The panel attached weight to its assertion that the '*normal move-on time'* for a prisoner reduced from Cat A to Cat B is 3 years.

Ground 2: The panel decided against the advice of the professionals who had worked closely with the Applicant.

Ground 3: No real recommendations were made by the panel as to what exactly the Applicant could do to satisfy the panel.

Ground 5: It was inaccurate to comment that the Applicant had been a '*Cat A prisoner until 12 months previously':* he had actually been a Cat B prisoner for 2 years (though he had only been moved to a Cat B prison 12 months previously.)

Ground 6: The 6 or 7 month period of stability recommended by the panel was far shorter than the many years of stability in his mental health which the Applicant had already demonstrated.

Ground 7: The Applicant was described by the panel at one point as '*still needing to address risk*' when in fact he had completed all risk-focussed offending behaviour programmes and had no further work to complete.

34. The difficulty with these grounds is that, even if substantiated, they would not be grounds for reconsideration of the decision not to direct release (which is the only decision eligible for reconsideration). It is not therefore necessary (and would probably be inappropriate) for me to express any view about the merits or otherwise of any of them.

35. The remaining ground (Ground 4) falls into a different category. It is clearly based on a complaint of procedural unfairness. The complaint is that it was procedurally unfair for this hearing to be conducted over the telephone.

36. The starting point in considering this ground is the judicial direction by the MCA member that the case was not suitable for a telephone hearing and should be listed for a video link hearing (a direction that was subsequently repeated in the Panel Chair Directions). There were good grounds for the view that the case was not suitable for a telephone hearing. Telephone hearings are normally considered to be unsuitable in cases where the prisoner has serious mental health difficulties, which the Applicant certainly has. The details of those difficulties are set out in the dossier and I need not repeat them in this decision.

37. The Applicant's mental health difficulties have been successfully managed for some years now, so that his mental state has been stable, but it would be idle to suppose that the difficulties are not still there and liable to recur in stressful situations.

38. I have tried to establish how it came about that the direction for a video link hearing was not complied with. There does not appear to have been any judicial decision reversing it. What seems to have occurred is an administrative error. The most likely explanation for that error is as follows.

39. On 10 May 2021 the Board's case manager sent an e-mail to the witnesses, PPCS and the Applicant's solicitors attaching a copy of the MCA directions. In that e-mail it was confirmed (in accordance with the MCA directions) that the witnesses could apply to attend the hearing by telephone link. It seems that all witnesses made that request, and it was mistakenly assumed by the secretariat that that meant the whole hearing should be conducted over the telephone. That of course overlooked the fact that it had been directed that there should be a video link, and not a telephone link, between the panel and the Applicant.

40. So it was that on 11 June 2021 an e-mail was sent to the witnesses, PPCS and the Applicant's solicitors stating that the hearing would now be conducted by telephone link. An amended timetable was attached, containing the joining instructions for the hearing. It is unfortunate that nobody seems to have spotted that a mistake had been made. It is also unfortunate that the panel chair, when issuing the Panel Chair Directions on 2 August 2021, did not spot the error but simply stated that there was no change to the panel logistics directed by the MCA member. Equally the Applicant's solicitors failed to point out the error and request, as they should clearly have done, that the video hearing should be reinstated. The Applicant cannot be held responsible for the consequences of his solicitors' omission.

41. In these circumstances I am bound to conclude that there was a significant procedural irregularity in this case. Not all procedural irregularities amount to procedural unfairness but this one certainly does. There is specific evidence that the Applicant may well have been disadvantaged by the procedural error: it is recorded in the panel's decision that one of the professional witnesses (who obviously knew him quite well) *"said that sitting listening to you she felt that you had not done yourself justice in your evidence. You haven't been able to explain the challenges that you had dealt with and there was no evidence of the self-awareness and vulnerability you actually possess*." This is precisely the kind of difficulty which may occur if a prisoner with mental health difficulties is required to give evidence over the telephone.

42. The remaining question which I have to decide is whether this undoubted procedural unfairness should result in a direction for reconsideration of the panel's decision.

43. There are two possible ways of looking at that question.

44. One is to say that, since it is only the decision not to direct the Applicant's release on licence which is susceptible to reconsideration and that decision would obviously have been the same if the procedural unfairness had not occurred, I should refuse this application.

45. The other is to say that the procedural unfairness meant that the whole hearing was fatally flawed and there should be a rehearing.

46. On careful consideration I am satisfied that the second of these views is the correct one. That is because, if I were to refuse the application and allow the panel's decision to stand, an unsatisfactory and unfair situation would arise.

47. Although the decision whether to transfer the Applicant to an open prison rests solely with the Secretary of State, he is entitled to have the benefit of advice from the Board, and I believe that that advice should be based on a fair hearing and not one that is flawed by a serious procedural failure. If I were to allow the panel's decision to stand, the Secretary of State would not have the advice which he should have. That would be unfair both to the Secretary of State and to the Applicant.

Decision

48. For the reasons explained above my decision is to direct (but only on Ground 4) that this case should be reconsidered at a fresh hearing.

Jeremy Roberts
19 October 2021