[2021] PBRA 16

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Application for Reconsideration by Aldridge

Application

1. This is an application by Aldridge (the Applicant) for reconsideration of a decision of a panel on 29 December 2020 not to direct release and not to recommend a transfer to open conditions. This was a decision on the papers, explained more fully under the section below titled 'Current Parole Review'.

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, decision letter, application for reconsideration (the application). Additionally I asked for an email sent to the parties from the Parole Board Secretariat dated 28 November 2020 and titled in the subject heading 'Face to Face Oral Hearing Case Review', and also checked that certain other directions were already in the dossier, which they were.

4. Additionally, I checked the guidance sent to Parole Board members who had undertaken the face to face oral hearing case review. This guidance consisted of two documents. One was a detailed guidance and the other was a flow chart.

Background

5. The Applicant is serving a sentence of imprisonment for public protection, sometimes referred to as an indeterminate sentence for public protection (IPP). The index offence was GBH – wounding with intent. He was 33 years old at the time of sentencing and is now aged 47. His minimum term was set at one year and 3 months, this expired in 2008. He has been released on licence on three occasions, and recalled each time.

Request for Reconsideration

6. The application for reconsideration is dated 20 January 2021.

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

(a) Irrationality

- That the panel's decision to conclude on the papers was irrational and that there was not sufficient evidence to conclude on the papers; and
- That the Applicant has not had access to a full and fair assessment of risk.

(b) Procedurally unfair

- That the panel concluded this review prematurely; and
- That the panel failed to accurately and fully explore risk and the circumstances of the return to closed conditions.

Current parole review

8. There are some complexities in how this review was progressed that need careful consideration, and therefore this section has to go into some detail. There are two referrals from the Secretary of State in this case. The original referral is dated 14 May 2020 and asked the Parole Board to consider the Applicant's release on licence or, failing that, to advise the Secretary of State as to whether he continued to be suitable for open conditions. At that time the Applicant was in open conditions. The Applicant's solicitors sent in written representations indicating that if release was not considered to be possible on the papers, the Applicant asked for an oral hearing to consider release. In August 2020 a member of the Parole Board directed an oral hearing.

9. On or around 28 August and after the direction for an oral hearing, the Applicant was returned to closed conditions following an alleged adverse development. The second referral from the Secretary of State dated 12 November 2020 was an Advice Case referral. It asked the Parole Board for advice on whether the Applicant remained suitable for open conditions. Both referrals also asked for advice on any continuing areas of risk.

10. I note that on 30 November 2020, and presumably before this case was listed, a Duty Member of the Parole Board directed that the two referrals be combined. There is no indication that the Applicant's representatives were invited to state a view as to whether the Applicant agreed or objected to the combination of that review. The Duty Member directions state that the Secretary of State had invited the Parole Board to combine the review. In my view it would have been appropriate before making a final decision as to combining the two reviews to take representations on the matter.

11. As indicated in Paragraph 8 above, in August 2020, and before the return to closed conditions, a member directed an oral hearing. In the directions that member stated that, having considered the case carefully, this case should ideally be a face to face hearing. It noted that there were restrictions on face to face hearings because of the impact of COVID-19 and stated that if these restrictions continued by the time the case was listed, the panel chair would take a view on whether to proceed remotely.

12. In or around the middle of December 2020 the Parole Board introduced a new process to review cases that had been directed as face to face hearings. Because of COVID-19, face to face hearings were severely limited in numbers, and most such hearings were facing possibly very long delays. The new process asked Parole Board Members to review cases sent for face to face hearings.

13. In summary, the policy for this process required the member (or 'panel' for the purposes of making a decision) to consider whether, in light of the continued impact of COVID-19 and the likelihood of continued serious impact, whether the case really needed to be held face to face or whether it might be held remotely.

14. The process began with the email referred to above in paragraph 3, whereby the Secretariat sent an email to both parties inviting them to make representations on this matter. The email informed parties that Parole Board members would be reviewing all unlisted cases directed to a face to face hearing in order to ascertain whether they still needed to be held face to face, or if they could be held remotely or concluded on the papers.

15. A date for response was given, along with who the response should go to. It is worth stressing here that the email does make clear at this point that one consideration was whether the case could be concluded on the papers. The Applicant and his legal representatives made no response to this email.

16. The procedure for this new review process was sent to all members undertaking this work. I am familiar with the process as I was one of the members who took on a number of cases to review (obviously, not this one). This procedure indicates as follows: That panel members have 10 days to consider the case and do one of the following:

    - *Return their initial directions as part of this review (e.g. further information) where the member is considering a paper conclusion; or*
    - *Return their directions, setting out the changes to the requirement for a face to face oral hearing, making clear their reasons for the change in approach; or*
    - *Return the Duty Member or Panel Chair Directions confirming that the case still requires a face-to-face hearing and the reason(s) why.*

17. My interpretation of this is that despite the email to all parties, a section of which is quoted above, **if** a member was considering concluding on the papers **then** they should make 'initial directions' – and directions would always be sent to both parties.

18. In any event I do not consider an email sent out to parties from the Parole Board Secretariat to constitute a 'direction' for the purposes of this review. It was a helpful forerunner to the face to face review process, but a formal direction would be made by a Parole Board Member.

19. I accept that there might be some confusion about the interpretation of the guidance to this process in that after the above quoted section (paragraph 15) in the process, there is a section on concluding on the papers. I interpret this section as giving more detailed information and guidance on concluding on the papers, stating the relevant Rules of the Parole Board for example. That section also states:

> *'If the member is minded to conclude the case on the papers, representations should be sought from both parties, if they have not already been requested. This is a requirement under Rule 21. In addition,*

although neither party has the final say, it is important that any changes during the parole review are communicated to both parties and that they are given the opportunity to submit representations.'

20. I also have taken into careful consideration additional guidance that was sent to members undertaking this review, which was a 'Face to Face Hearing Review Process Map.' This is a flow chart. This chart makes it very clear that, whether or not representations have been received, if a member has a) received further information and b) is considering concluding the case on the papers **the next step** is to issue directions for any further information and/or representations.

21. The decision letter was undertaken on the papers and says specifically:

'Representations have been sought from the Secretary of State and from you and/or your legal representative and no representations have been received. Further information has now been received in relation to your return to closed conditions and the review is now being concluded on the papers in accordance with the provisions of Rule 21.'

22. The decision was made without any further directions asking for representations from the parties.

The Relevant Law

23. The panel correctly sets out in its decision letter dated 29 December 2020 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

24. 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

25. 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."

26. 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.

27. 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

28. 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.

29. 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.

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

Other

31. 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.

The Reply on behalf of the Secretary of State

32. The Secretary of State (SoS), by email dated 26 January 2021 indicated that no representations were made in response to the application.

Discussion

33. I am minded to take the ground of irrationality first in this matter. From the application, I consider here that the issue of irrationality here relates not to the final decision, but the decision to use Rule 21 in order to conclude the case on the papers.

34. The bar set for the test of irrationality is high. I find it possible, under the circumstances of the production of this new process, for there to have been some confusion in relation to what the panel was being asked to do. I think the single member panel that made the decision in this case was mistaken in their approach, however that mistake does not, in my judgement, meet the test for irrationality. There was some ambiguity in the guidance issued for the process, albeit there was none in the flow chart accompanying it.

35. I make the same finding in relation to the complaint that the panel was unable to make a full and fair assessment of risk. The letter takes fully into account the information available to it, and I cannot see how the approach taken by the panel in making its final decision can meet the test for irrationality.

36. I now turn to the ground of Procedural Unfairness. Here I consider that the test for this ground is met for the following reasons:

    (a) The process set out by the Secretariat was not followed.

    (b) Parole Board Rule 21 indicates that following receipt of further information, there is a procedure that must be carried out before a matter can be concluded on the papers, and this procedure requires directing representations from parties (and gives a timeline for seeking the same). The decision letter refers to 'further information' on the basis upon which it is able to conclude on the papers but has not followed the Rule 21 process.

    (c) The 'further information' was the return of the Applicant to closed conditions for a potential breach of the rules of the open estate. Further representations and information in relation to that breach should, in my view, have been sought prior to finalising any decision, especially if the decision was to be made on the papers.

37. The application accepts that there had been no response from the Applicant's legal representatives to the original email. There is a cautionary tale here for prisoners and their representatives which is it is important to engage with parole processes at every stage, especially in the uncertain world created by the COVID-19 pandemic. Had Rule 21 not been as clear as it is on requiring representations on further information and had the process not been sufficiently clear, in my view, to indicate that further representations should in any event be directed, this oversight might well have led to the Applicant's review being lawfully concluded on the papers.

38. Having stated that, it is also clear that there is an overall point of principle as laid out not just in the case of **Osborn et al** but also under Article 6 of the Human Rights Act 1998 (the right to a fair trial). Where the new information relied upon by the panel is essentially unexplored, and where the prisoner has not been given the opportunity to either challenge or explain the circumstances leading to any adverse development, there may be a risk of potential unfairness.

39. I should conclude this section by indicating that there are many situations were a paper conclusion of a review can be entirely justified.

Decision

40. Accordingly, whilst I do not find there to have been an irrational conclusion, I do consider, applying the test as defined in case law, that the decision to conclude this case on the papers to be procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted.

41. I considered whether it would be appropriate for this case to be reviewed again under the Face to Face Case Review process. I have come to the conclusion that this is not necessary and the case should proceed to an oral hearing. There are clear matters of risk to be explored, and the application indicates there may be a challenge or explanation to the circumstances leading to the return to closed conditions which will need exploration.

Chitra Karve
15 February 2021