[2021] PBRA 53

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Application for Reconsideration by Hill

Application

1. This is an application by Hill (the Applicant) for reconsideration of a decision of a Panel of the Parole Board dated 23 February 2021 following an oral hearing on 8 February 2021. The hearing was conducted remotely via video-link, due to current Covid-19 restrictions on face-to-face hearings.

2. The Panel made no direction for release but recommended that he was suitable to remain in open conditions where he is currently located.

3. 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.

4. I have considered the application on the papers. These are the dossier of 416 pages (that includes the decision letter) and the application for reconsideration.

5. It was necessary to direct the grounds for reconsideration to be confirmed, as well as for evidence for some of the assertions in the grounds of appeal to be provided. This prompted further representations of 7 pages.

Background

6. The Applicant was aged 42 at the time of sentence and is now aged 51 years old. He was sentenced to Imprisonment for Public Protection on 11 May 2012 for an offence of attempted murder. The tariff was set at 8 years (with allowance for time on remand) and expired on 4 May 2019.

7. The Applicant has remained in custody since being sentenced.

Request for Reconsideration

8. The application for reconsideration is dated 15 March 2021.

9. The grounds for seeking a reconsideration were not set out specifically but appear in a narrative form.

10. Following a direction to the representative, it appears that the grounds can be summarised as follows:

a) The Panel referred to the gravity of the index offence, which cannot be a ground to refuse the application for release;

b) The Panel failed to give sufficient reasons as to why they did not accept the evidence of the psychologist the Applicant's key risk factors were manageable;

c) The Panel erred in saying that there were no temporary releases, when the Applicant had given evidence that there were temporary releases to the hospital;

d) The Panel did not refer to representations that were made to the Panel after the hearing;

e) The Panel did not correctly state the test for release;

f) The Panel stated that the Applicant had convictions for failing to attend court, when this was incorrect;

g) The Panel failed to give sufficient reasons why the Applicant was assessed to present a high risk of serious harm to a known adult;

h) The Panel failed to give sufficient reasons for concluding that there was not a sufficient understanding of the relationship between the Applicant and other people in the community (including his victim);

i) If there was such an insufficient understanding, then the Panel should have adjourned in order for this to be explored;

j) The decision to refuse is a breach of the Applicant's Art 5 rights under the European Convention of Human Rights (ECHR);

k) The Panel failed to give sufficient reasons why the Applicant's risks are not manageable in the community; and

11. All but grounds (d), (i) (k) would appear to be allegations of irrationality, whereas the others are ones of procedural impropriety.

Current parole review

12. The Applicant's case was referred to the Parole Board in December 2019. An oral hearing was direct in June 2020.

13. The oral hearing was conducted remotely on 8 February 2021. The Panel heard evidence from the Applicant, as well as from the prison probation officer, the community probation officer and from a psychologist instructed by the Applicant.

The Relevant Law

14. The panel correctly sets out in its decision letter dated 23 February 2021 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for suitability to remain in open conditions.

15. I shall consider below the phrasing used.

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 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

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. 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.

24. 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.*"

The reply on behalf of the Secretary of State

25. The Secretary of State has stated that he does not wish to make any representations.

Discussion

26. I shall consider the grounds individually before considering whether the decision as a whole was flawed.

Ground (a) – Reference to the index offence

27. The legal basis of the IPP sentence being imposed is the index offence itself. As such, it will most often be the starting point of the decision.

28. Whilst it is, of course, correct that the seriousness of the index offence itself is never a reason not to direct release, it is clearly a highly relevant factor in establishing what risk the prisoner represented at the time of hearing and whether that has now changed.

29. In fact, I would consider that a failure to record and set out the details of the index offence would in most cases render the decision a flawed one.

30. Of course, whilst it is almost always the starting point, it is never the end point. In the decision letter, the Panel clearly go on to consider the progress made since then.

31. There is nothing in this ground.

Ground (b) – Reasoning in relation to the psychological report

32. The evidence of the psychologist was that the Applicant's risk was manageable in the community.

33. That psychologist had given evidence to a previous Panel in 2019. The grounds for reconsideration quote (in part) from the psychological report prepared for that hearing. However, this was considered by the previous Panel who did not direct release.

34. In its decision the Panel sets out (in paragraph 5) a summary of the psychologist's written and oral evidence. Further, it notes that alcohol is a *'core risk'* in his case.

35. The Panel were not bound to follow the psychologist's recommendation, provided that sufficient reasons were given.

36. In this case, paragraph 8 of the Decision Letter sets out a number of points, in a checklist approach, as to why the Applicant did not meet the test for release.

37. Although the Letter does not specifically address the recommendation of the psychologist, it is clear from the checklist approach why the Panel concluded that the Applicant does not meet the test for release.

38. When considered against the summary of the evidence that they received, it is clear that the Panel had in mind that evidence. There is sufficient in the Letter for the Applicant to know why it was that the Panel did not accept the evidence of the psychologist.

Ground (c) – Error in relation to the taking of temporary releases

39. The grounds assert that the Applicant stated in evidence that he had had a number of temporary releases to hospital that had passed without issue.

40. This does not appear in the dossier and, after directions were issued, the relevant exchanges were provided.

41. The Secretary of State has not disputed the accuracy of these.

42. These show that the Applicant stated that he had had two temporary releases to the hospital in the weekend before the hearing. In addition, he had had a visit to shops in the local town. During these, he was supervised by a prison officer.

43. When summarising the factors of the case, the Panel stated *'while [the Applicant had] been in the community on 2 accompanied day releases, there has been no time in the community on unaccompanied temporary release, whether on a day or overnight basis'.*

44. In paragraph 8 of the decision letter the Panel refer to the lack of *'period of temporary leave'.* It is not clear whether it would have counted the special leave to the hospital (where there would not be alcohol readily available) as falling within that category. For the sake of fairness, I shall proceed that they would and, therefore, there was an error of fact in the decision.

45. The question then is whether this could be considered to be material. The Panel further states that the *'lack of testing on extended periods of leave from the prison'* was an important factor.

46. It is clear that two periods of time away from the prison for a medical trip could not be considered to be the sort of testing that the Panel in 2019 wished to see, or that the current Panel was referring to when it said that testing was necessary.

47. In those circumstances, even if there were an error of fact, it cannot be said to have been material.

Ground (d) – Failure to refer to representations received after the hearing

48. Paragraph (2) of the decision letter includes the following "*As agreed, the panel received representations from [the Applicant's] solicitor after the hearing*".

49. There is nothing in this point.

Ground (e) – Incorrect statement of the test for release

50. In the first paragraph the Panel set out, correctly, the test for release.

51. When setting out its conclusion in paragraph 8, the Panel states that the test is *'whether [the Applicant's] risk can be safely managed in the community and that [he] no longer need to remain in prison for the protection of the public.'*

52. It would have been preferable for the Panel to have used the term 'risk of serious harm' rather than just 'risk' in this section. This was the term used in that same paragraph when considering the benefits of a move to open ('balancing the benefit to you against the risk of serious harm to others, should you be in the community on temporary release').

53. From that, and from the rest of the decision, it appears that the Panel were well aware of the test, and that the 'risk' referred to was the risk of serious harm (see its conclusion on para 6).

54. In those circumstances, I do not consider that the Panel fell into error.

Ground (f) – Factual error relation to the previous convictions

55. The Panel stated, "*[The Applicant had] breached trust by offending on bail, failing to surrender to custody and breaching court orders or requirements*".

56. Whilst there has been offending on bail and breaching court orders, it is correct to say that the PNC does not disclose any instances of failing to attend court.

57. It follows that this ground is made out. The question is then what impact this factual error would have had.

58. It appears to me that this error could not be considered to be material.

59. The sentence referred to appears in paragraph 3, when the offending history is being summarised. There is no subsequent reference to it, and no indication that the Panel placed any weight on it. In those circumstances it is hard to see how the error could have made any conceivable difference.

Ground (g) – Reasoning in relation to the risk level

60. It is correct to say that the Panel did not give specific reasons in paragraph 6 for finding that the Applicant presented a high risk of harm to *'known adults'.*

61. The Panel started from the basis that after the Applicant's sentence that was his level of risk and concluded that, until there was testing in a community setting, that assessment was reasonable.

62. Given the nature of the index offence and the sentence passed, the assessment of risk at the time of sentencing was inevitable. The Panel was perfectly entitled to conclude (especially that the risk was to intimate partners) that that assessment would remain until there had been sufficient testing in the community.

Grounds (h) and (i) – Reasoning in relation to the understanding of the Applicant's relationships, and a failure to adjourn

63. It is appropriate to take these two together.

64. The question of the family dynamics had been one of concern to the previous (2019) Panel.

65. In its decision, the current Panel also expressed concern. The letter sets out reasons why the family dynamic was of concern. These are in relatively short form, but a decision letter does not have to cover each and every point (or possible) point that is raised. What is required is that the prisoner who is unsuccessful in his application

is able to understand why the decision was made (even if he does not agree with it).

66. Here, the Panel's conclusion set out the reasons for the decision as a whole. In relation to the family situation, the Panel summarises the concerns that it had. In the context of what should be contained in a decision letter, I consider that what was given was sufficient.

67. The job of the Panel is to determine the application on what is front of them. On a fair reading of the decision letter, the Panel's concerns were that the family dynamics had not been fully explored and understood.

68. No application was made to adjourn, either at or after the hearing. It would be open to a Panel to adjourn, but this would be for a specific purpose, and not the sort of freewheeling investigations and discussions (as well as testing on temporary releases) that would be needed to explore this issue.

69. It seems to me that the Panel cannot be criticised for failing to do so.

Ground (j) – Article 5 ECHR

70. This is suggested as a ground in two ways.

71. Firstly, if there was a decision that was not lawful when considering the domestic law, then there will be a breach of Article 5. For reasons set out, I do not consider that this is such a case.

72. Secondly, it is said that to refuse release on the basis of lack of temporary releases, when that situation has been caused by the Covid-19 pandemic and is not of the Applicant's doing, is arbitrary and unfair. In those circumstances, there is a breach of Article 5.

73. Even if it were the case that refusal was based solely on the lack of temporary releases, then the step from there to a breach of Article 5 is not a straightforward one (see, for example, **Secretary of State for Justice v James [2009] UKHL 22** and **James, Wells & Lee v United Kingdom [2012] ECHR 1706**).

74. However, it is clear that the Panel did not do this. The Panel sets out a number of reasons why the Applicant's risk of serious harm was not manageable in the community.

75. Although the lack of temporary releases is part of this, it is only part of the reasoning. Further, the Panel explains why, in the circumstances of the Applicant's case, the test was not met, rather than relying simply on the lack of temporary releases.

76. In those circumstances, this ground is not made out.

Ground (k) – Failure to give reasons

77. This is somewhat of a 'catch all' ground.

78. As stated above, the decision letter need not be a lengthy document, and need not cover any single point that was, or that could be, raised about the prisoner's case.

79. What is required is that sufficient reasons are given so that the reader of the letter knows what decision was made and why. It appears that this letter discharged that obligation.

Conclusion

80. As always, it is necessary to step back and consider the above matters taken together.

81. Doing so, it does not seem to me that the decision letter was flawed. A previous Panel had concluded that the Applicant needed testing in open conditions. Given the history of offending and the length of time in custody, that was an unsurprising conclusion.

82. Since then, this has not been achievable. It is accepted that this is mainly for reasons out of the Applicant's control. However, this does not change the test that the Panel has to adopt. Against that, the decision was one that was well within the range of possible decisions.

83. The Panel has set out, in a concise and straightforward manner, the reasons for the decision. These are sufficient for the Applicant to understand why he was unsuccessful and contain no error of law.

Decision

84. 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.

Daniel Bunting
27 April 2021