[2021] PBRA 85

the Parole Board
working with others to protect the public

Application for Reconsideration by HIGGINS

Application

1. This is an application by Higgins (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 19 April 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 decision letter, the dossier and the application for reconsideration.

Background

4. The Applicant is serving an automatic life sentence imposed on 4 July 2005 following conviction for possessing a firearm on arrest for an offence. He was also convicted of possession of cocaine but received no separate penalty. The minimum tariff was set at three-and-a-half years less time spent on remand and expired on 4 July 2008.

5. The Applicant was most recently released on licence on 2 July 2019 following an oral hearing. His licence was revoked on 3 October 2019, some three months later, and he was returned to custody the following day. This was his third recall on this sentence and his first parole review since recall.

6. The Applicant was aged 36 at the time of sentencing. He is now 52 years old.

Request for Reconsideration

7. The application for reconsideration is dated 8 May 2021 and has been submitted by solicitors acting for the Applicant.

8. It submits that the panel's decision was both procedurally unfair and irrational, since the panel:

   (a) Failed to consider the Applicant's evidence and submissions and the evidence of professional witnesses properly;

   (b) Failed to follow published Parole Board guidance on allegations; and/or

(c) Failed to interpret information contained within the dossier correctly.

9. This ground is supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

10. The Applicant's case was referred to the Parole Board by the Secretary of State in November 2019 to consider whether to direct his immediate release and, if release was not directed, to advise the Secretary of State on whether the Applicant was ready to be moved to open conditions.

11. The Applicant was recalled to custody after being arrested on suspicion of several offences listed in the Recall Report (3 October 2019) as: dangerous driving, failure to stop, possession of cocaine, possession of an offensive weapon, going equipped for theft, driving over the prescribed limit, refusing to provide a sample, and possession of Class A drugs with intent to supply. The Post Recall Risk Management Report (10 October 2019) stated that he was charged with possession of an offensive weapon, failing to provide a sample to test for Class A drugs, failing to co-operate with a preliminary test and dangerous driving. He had also been released under investigation in connection with two burglaries.

12. It is reported that the Applicant was ultimately convicted of possession of an offensive weapon on 2 April 2020 and received a six-month custodial sentence (now served). The other matters were withdrawn. It was also reported that the Applicant remained (at this time) under investigation for two burglary offences and going equipped to steal.

13. Legal representations (July 2020) submitted on the Applicant's behalf noted that the Applicant disputed being the driver of the vehicle involved in the recall incident and could not remember being asked to provide a sample (by virtue of being injured when chased by police). He accepted possession of an offensive weapon (a knuckleduster) which he said he found in a borrowed jacket and meant to remove but forgot to do so. He also admitted to possession of a small amount of cocaine which he accepted he was going to use. He said he knew nothing of the tools found in the vehicle, other than the vehicle belonged to a handyman.

14. His case was directed to an oral hearing, due to be held on 11 November 2020. A deferral was sought by the Applicant's legal representative so that an independent psychological risk assessment (PRA) could be provided. This was granted. Updated reports from the Applicant's Prison Offender Manager (POM) and Community Offender Manager (COM) were also directed.

15. A COM report produced prior to disclosure of the independent PRA (22 February 2021) did not recommend release. It noted that the circumstances of recall gave cause for concern, indicating a willingness for the Applicant to engage in risk taking and reckless behaviour, failure to adhere to or take his licence conditions seriously and gravitation towards negative peer associations. It pointed out that the independent PRA may provide further insight into the Applicant's risk areas, interventions to reduce risks which may benefit the Applicant in custody. It noted

that it may be to the Applicant's advantage to revisit work from previous offending behaviour programmes he had undertaken in custody.

16. On 10 February 2021, a deadline extension for the independent PRA to 5 March 2021 was approved.

17. The independent PRA (dated 5 March 2021, but submitted by the Applicant's legal representative by email on 17 March 2021) concluded that the Applicant met the test for release, ideally to designated accommodation withing a regime designed and supported by psychologists to help people recognise and deal with their problems. It said the Applicant would not benefit from further offending behaviour work in custody.

18. A further COM report (19 March 2021) indicated that the recommendations of 22 February 2021 remained unchanged (notwithstanding the findings of the independent PRA) and concluded that the Applicant would benefit from a programme of work to refresh the skills he has previously learnt on programmes to reduce his risk of re-offending and address the risk areas linked to re-offending.

19. The case proceeded to an oral hearing on 12 April 2021. This was held remotely by telephone (due to COVID-19 restrictions) before a panel of two independent members. The panel heard oral evidence from the POM, COM, independent psychologist (author of the PRA) and the Applicant. The Applicant was legally represented throughout.

20. The POM was supportive of re-release but was unable to do so as the proposed risk management plan did not identify suitable accommodation. The COM did not support release. The independent psychologist said the Applicant met the test for release.

21. The panel did not direct the Applicant's release nor recommend open conditions.

The Relevant Law

22. The panel correctly sets out the test for release in its decision letter dated 19 April 2021.

Parole Board Rules 2019

23. 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)).

24. 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**.

Procedural unfairness

25. 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.

26. 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.

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

Irrationality

28. 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."*

29. 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.

30. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

The reply on behalf of the Secretary of State

31. The Secretary of State has submitted no representations in response to this application.

Discussion

The need for a specialist member and/or a prison PRA

32. The application for reconsideration first submits that the panel *'chose to completely disregard the evidence'* of the independent psychologist. The application concedes,

correctly, that the panel is not bound by expert evidence (or indeed the evidence of any witness). However, the application argues that, since the panel departed from the evidence of the only trained psychologist in the hearing, it should have either have had a psychologist member on the panel or directed a prison psychological report for a second opinion.

33. I do not find that the panel completely disregarded the evidence of the independent psychologist. The panel engages with his evidence at various points throughout its decision. The panel clearly disagreed with the independent psychologist's evidence, which it is perfectly entitled to do, but this is not the same as completely disregarding it.

34. As to the next point raised, while it is true that the panel members were not trained psychologists, it is not true that they lack psychological experience. All members of the Parole Board are very familiar with reading and understanding complex psychological evidence. They can ask questions of expert witnesses, do so routinely and are able to do so fairly. To suggest otherwise would mandate the presence of a psychologist specialist member at every hearing involving a psychologist witness. This would constitute an unnecessary and unsustainable state of affairs. It would also introduce an inevitable and unacceptable impediment to the Parole Board's obligation to conclude reviews expeditiously as well as undermining the capability of independent and judicial members (see **Wright [2020] PRBA 151**)

35. The MCA direction to oral hearing specifically did not add a psychologist to the panel and, at the time of making those directions, there was nothing to indicate that one was required. When the application for an independent PRA was granted, no accompanying prison PRA was directed, and neither was a psychologist specialist member added to the panel. The Applicant's legal representative would have been aware of this, but did not make representations in favour of either a prison PRA or a psychologist specialist member to be added to the panel.

36. Panel Chair Directions (PCDs) dated 12 March 2021 noted that the independent PRA had not been disclosed and made no further changes to the composition of the panel. At the time of making these directions, the panel chair would not have been aware of the content of the (by now late) independent PRA as it was not served until 17 March 2021. In the normal course of events, this would have been the last regular opportunity before the day of the hearing for the panel to make such a direction.

37. The independent PRA was submitted after PCDs and 12 days late. Nonetheless, it was served on the Parole Board and the Secretary of State more than 14 days before the date of the oral hearing (rule 18(2)) and the Applicant was therefore entitled to rely upon it. If it had been submitted at the directed time, or a further extension sought, then the panel chair would have had an opportunity to consider it and any concomitant impact on panel composition (or the need for a prison PRA) before making PCDs.

38. By the date of the oral hearing, it can be very safely assumed that the panel, the Applicant and his legal representative would have read the entire dossier, including the independent PRA and the updated report from the COM. All would have been aware of the divergent opinions on the papers. If the Applicant or his legal representative felt in any way disadvantaged by either the lack of a prison PRA or a

specialist panel member, they had an opportunity to object before the hearing began, or at any point during the hearing as questioning and oral evidence unfolded. They did not do so. In summary, by the time the hearing started, the panel had not seen a need for a prison PRA or a specialist member and the Applicant and his legal representative either tacitly agreed or chose to proceed with the hearing regardless.

39. That said, *should* the panel have directed a specialist member or a prison PRA?

40. To answer this, I first turn to the Parole Board's published guidance on the Role of Psychiatrist or Psychologist members of the Parole Board (Annex 13, Member Case Assessment Guidance, June 2018, v19.2 as amended) (the **Specialist Member Guidance**). While the Specialist Member Guidance is primarily concerned with setting directions at the MCA stage, its principles must equally apply to the management of cases insofar as panel composition it concerned. It would be peculiar if they did not.

41. The Specialist Member Guidance provides as follows:

"It is appropriate to request a psychologist for cases when:

- *There is current psychological evidence e.g. a psychological assessment, psychometric tests or psychology report which needs specialist interpretation (standard psychometric tests completed prior to or following an offending behaviour pro gramme are unlikely to routinely require interpretation);*

- *There are two or more differing psychological opinions e.g. a Prison Service psychological report and an external psychological report;*

- *In cases where there are questions with regards to an offender's response to interventions due to issues such as motivation to change, levels of psychopathy, personality disorder or learning difficulties."*

42. First, I do not find there to have been a need for specialist interpretation of the independent PRA which used a commonly-encountered set of assessment tools. Its author was there to answer questions upon it. There is nothing to suggest that any concerns were raised about the panel's ability to ask meaningful questions of the report author. If the Applicant, or his legal representative, felt that the oral evidence given by the report author was deficient or incomplete in any way, they had the opportunity to ask questions to elicit whatever further information they wished.

43. Second, as there is also no prison service PRA, there cannot be a conflict between specialists.

44. Third, I see no evidence to suggest that any of the matters exemplified in point three of the Specialist Member Guidance is engaged. Therefore, I find that the panel's decision to continue without a psychologist specialist member was not procedurally unfair.

45. Turning next to the need for a prison PRA, while the panel's reasons for not directing a prison service PRA are not clear on the evidence before me, it would not be

unreasonable for me to conclude that the panel would have considered the need for one carefully at various points within the procedural history of the case (right up to the day of the hearing and after disclosure of the independent PRA) and for whatever reason concluded one was not necessary. While it is unusual, but not unprecedented, for the only PRA before a panel to be an independent one, it is not an automatic matter of procedural unfairness if a prison service PRA is not produced in response to an independent PRA. I find no procedural unfairness in the panel's decision not to direct a prison PRA.

Duty to give reasons

46. The application for reconsideration next submits that the panel failed in its common-law duty to give reasons, relying upon **R(Wells) v Parole Board [2019] EWHC 2710** at para. 40. Here Saini J noted *"The duty to give reasons is heightened when the decision-maker is faced with expert evidence which the Panel appears, implicitly at least, to be rejecting."*

47. The application notes that the evidence of the independent PRA's author was not fully addressed in the decision, noting that the POM's evidence takes up a page in the decision, but that of the independent PRA's author is given a paragraph.

48. The panel was faced with expert evidence which it explicitly did not follow. While it is true that section 5 of the decision letter devotes three paragraphs to the POM's evidence and one paragraph to the author's evidence, this section is a recitation and summary of the oral evidence given. As statements of evidence, it cannot be said that the fact that account is longer than the other amounts to a failure to give reasons. There are no reasons for departing from the author's evidence given in section 5 of the decision, just in the same way that there is no analytical comment in relation to the POM 's evidence at this point. It would be disingenuous simply to rely on this as a failure to give reasons.

49. Reading the decision letter as a whole, the panel's reasoning is set out very clearly in section 3 and section 8. These reasons clearly explain why the panel disagreed with the author's opinion and I therefore find no failing in the panel's heightened duty to give reasons.

Panel's interpretation of evidence

50. It is next submitted that the panel erred in its assessment of various aspects of the evidence before it, which I will take as a whole. The application is not particularised as to whether procedural unfairness or irrationality is being pleaded. Indeed, other than in the introduction, the application does not cite irrationality at all. In the main, the application reasserts why it disagrees with the panel's assessment of risk or re-pleads aspects of the Applicant's case. It does not offer any submissions on why the panel acted irrationally in forming that assessment. On that basis, I could simply dismiss those parts of the application now. However, in fairness to the Applicant, I will proceed on the assumption that the application meant to plead irrationality.

51. 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.

52. If a panel does so, it must give reasons as set out in **Wells**. I have already found that the panel discharged that heightened duty in respect of the independent psychologist. I also find the panel discharged their duty to give reasons in respect of the other witnesses.

53. The panel's conclusion must be rational. The panel explained in its detailed reasons how it had weighed and balanced the competing views and facts. It was correctly focused on risk throughout. It was reasonably entitled to test the evidence robustly and reach the conclusions it did on the facts as it found them to be. The legal test of irrationality is a very strict one. This case does not meet it.

Errors of fact

54. The application also submits that the decision contained errors of fact:

    (a) The decision stated the Applicant received a three-year sentence in 2000 for aggravated burglary with further convictions on the same sentencing occasion leading to a total sentence of six years whereas the Applicant's total custodial sentence was three years and nine months.

    (b) During the aggravated burglary, the panel conclude the Applicant must have been in possession of a weapon to have been convicted. The Applicant said he used a knife to cut wires on an alarm system and this is why it was an aggravated burglary (this is also mentioned in the pre-sentence report).

55. Looking at the Applicant's list of convictions, there are nine matters which fell to be sentenced on 17 March 2000, listed as follows:

    (a) Aggravated burglary (dwelling) – 3 years concurrent
    (b) Escape from lawful custody – 6 months concurrent
    (c) Taking motor vehicle without consent – 4 months concurrent
    (d) Driving while disqualified – 4 months concurrent
    (e) Taking motor vehicle without consent – 4 months concurrent
    (f) Burglary (dwelling) with intent to steal – 3 years concurrent
    (g) Burglary and theft (dwelling) – 3 years consecutive
    (h) Taking motor vehicle without consent – 4 months concurrent
    (i) Handling stolen goods – 9 months.

56. I can see how the panel may have calculated six years rather than the three years and nine months noted in the Applicant's list of convictions.

57. The Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious

nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

58. I do not find that any error of arithmetic was egregious and, even if I did, the Applicant's 2000 conviction was one of a number of factors that contributed to the panel's conclusion, rather than the pivotal material factor.

59. Moving to the aggravated burglary itself, section 10(1)(b) of the **Theft Act 1968** provides:

> (1) A person is guilty of aggravated burglary if he commits any burglary and at the time has with him any firearm or imitation firearm, any weapon of offence, or any explosive; and for this purpose—…
>
> (b) *"weapon of offence" means any article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use…*

60. In having been convicted for aggravated burglary, the court would have been satisfied beyond reasonable doubt that the Applicant had a weapon of offence with him. Indeed, this has been admitted by the Applicant. It is not, therefore, irrational for the panel to treat the possession of a weapon of offence as such (rather than, as is submitted *'merely a tool to gain entry').* While reference to the Sentencing Guidelines would suggest no violence was used or threatened and a weapon was not produced during the commission of this particular offence, the Applicant was, nonetheless found to be in possession of a weapon of offence at the time and it was not irrational or unfair for the panel to take that into account in its overall risk assessment.

Allegations

61. Finally, it is submitted that the panel failed to follow published guidance in dealing with the allegations against the Applicant arising from the time of the recall.

62. The starting point for my analysis is the current Parole Board Guidance on Allegations (March 2019, v1) (the Allegations Guidance). This sets out guidance for panels presented with allegations that have been made against a prisoner (para. 1). For these purposes an *'allegation'* refers to conduct alleged to have occurred, but which has not been adjudicated upon by a civil or criminal court or prison adjudication (para. 2). The matters which led to the Applicant's recall are allegations which fall within the scope of the Allegations Guidance, having been discontinued and therefore not determined by the criminal courts. Panels need to consider allegations which are relevant to the parole review (para. 8). Relevant allegations explicitly include allegations of harmful behaviour (para. 8(a)). The three allegations arising from the time of recall all relate to criminal behaviour and are therefore relevant allegations as far as the Allegations Guidance is concerned.

63. Panels faced with a relevant allegation will need to disregard it, make a finding of fact, or make an assessment of it to decide whether and how to take it into account as part of the parole review (para. 9).

64. It is clear from the decision that the panel did not disregard the allegations. It carefully sets out its reasoning of what conduct might have resulted from the facts arising from those allegations which were put before it.

65. The decision does not explicitly state that it made a finding of fact, but it does explain its analysis of the allegations and how that analysis has been taken into account in forming its overall risk assessment. Its analysis stops short of saying it has made a finding of fact in relation to any of those allegations. Neither did it need to.

66. The Allegations Guidance is (as its name suggests) guidance to panels rather than a set of hard and fast procedural rules. It would, of course, be helpful for any panel to be manifestly explicit in its application of the Allegations Guidance to avoid any disingenuous suggestion that it has failed to do so. However, provided the panel's reasoning and treatment can be readily discerned from the decision and is in line with the Allegations Guidance, then it cannot be said to be procedurally unfair. Again, reading the decision as a whole, it is clear to me that the panel did not disregard the allegations or make a finding of fact, but did take the allegations into account and gave them weight as part of its overall risk assessment.

Decision

67. For the reasons I have given, I do not consider that the decision not to direct the Applicant's release was procedurally unfair and accordingly the application for reconsideration is refused.

Stefan Fafinski
1 June 2021