[2022] PBRA 131

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Application for Reconsideration by Hickinbottom

Application

1. This is an application by Hickinbottom (the Applicant) for reconsideration of a decision of an oral hearing dated 17 August 2022 not to direct release.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.

3. I have considered the application on the papers. These are:

    - The Decision Letter;
    - Reconsideration Representations compiled and submitted by the Applicant's solicitors, dated 1 September 2022;
    - The dossier, which now runs to 462 numbered pages, concluding with the Decision Letter;and
    - **R (Bailey) v The Secretary of State for Justice and the Parole Board [2022] EWHC 2125 (Admin)**, to which I am referred in the Reconsideration Representations.

Background

4. The Applicant is serving a sentence of Imprisonment for Public Protection imposed in April 2010 for attempted robbery. He was 43 years old at the time of sentence and is now 55. He passed a bank cashier a note demanding money. He had an accomplice at the door of the bank who pretended to have a gun. The cashier refused to hand over any money, and customers in the bank tackled the Applicant to the floor. He and his accomplice wore disguises. There was a getaway vehicle waiting.

5. The Applicant's Tariff Expiry Date was in April 2013. This is his fifth parole review.

6. The Applicant has a very extensive criminal record, including convictions for robbery in 2002 and 2006. Since his sentence in 2010 he has been convicted of offences committed in custody. He conspired to bring drugs into prison and was sentenced in 2015 to 5 years' imprisonment. In 2017, for a number of similar offences, he was

sentenced to 56 months' imprisonment, the sentencing judge finding that he had played a significant role in supplying drugs to other prisoners for gain.

7. In January 2021 the Applicant absconded from open conditions, and was unlawfully at large for several days.

Request for Reconsideration

8. The application for reconsideration is dated 1 September 2022.

9. The grounds for seeking reconsideration are as follows:

A. Irrationality, specified as follows
   (1) Lack of credit given to the Applicant in relation to the lack of violence which he has engaged in throughout the prison term, and the fact that he has not returned to drug use;
   (2) Although the panel may have concerns about security, there is no current evidence that such concerns are linked to offending, particularly offending which may cause serious harm to the public;
   (3) The panel disagreed "*with very limited commentary*" with the evidence of two psychologists who indicated that the risk of serious harm was medium, not high;
   (4) The panel was concerned that the Applicant had not addressed his personality traits in custody, thereby disagreeing with the independent psychologist and "*experience OM*" [*sic*] that this did not need to be done in custody;
   (5) The panel applied the wrong test for release, namely whether he would ever offend again or make poor decisions, not whether or not it is necessary for the protection of the public;
   (6) His offending in custody, and absconding, had no bearing on risk of serious harm to the public;
   (7) There is nothing at all to suggest that the Applicant continues to pose a danger to the public, even if he were to make rash decisions;
   (8) The panel failed to take fully into account the evidence of the independent psychologist who indicated a more beneficial way of addressing personality traits in the community;
   (9) It was irrational to expect the Applicant to remain in custody to address his treatment needs when there was no established way of him doing so;
   (10) It was irrational to doubt the Applicant's explanation for absconding. It was irrational to conclude that the Applicant's openness and honesty with professionals was in doubt;
   (11) There was no meaningful explanation of why the provision of recall would be insufficient to protect the public;
   (12) The panel raised a concern about the Community Offender Manager's (COM's) experience of the proposed treatment in the community. This was irrational, because the COM was fully versed in what the service had to offer.

B. Procedural unfairness

The prison psychologist failed to offer an opinion in terms of release and risk management.

10. Ground B arises as follows. On 21 July 2022 the Secretary of State for Justice (the Respondent in this application) amended the *Parole Board Rules* 2019, so that the relevant part reads "*reports relating to the prisoner should present all relevant information and a factual assessment pertaining to risk …, but the report writer must not present a view or recommendation as to the prisoner's suitability for release*." Before this amendment professional witnesses usually made such a recommendation, and oral hearing panels of the Parole Board usually asked for and investigated such recommendations.

11. The oral hearing in this case took place on 4 August 2022. The prison-based psychologist had not recommended release in her report, which was dated 16 June 2022. At that time she recommended that he transfer to a progressive regime (that is, remain in custody and complete further work).

12. The prison-based psychologist and the psychologist instructed by the Applicant's solicitors prepared a joint report setting out areas of agreement and disagreement. This joint report is dated 13 July 2022. In it the prison-based psychologist said "*Due to recent changes to Parole Board legislation [she] is unable to comment upon her previous recommendations*."

13. At the oral hearing (see Paragraph 3.9 of the Decision Letter) she declined to provide an updated recommendation for the same reason. She said she had been advised by her supervisor that this was the case even though her assessment was completed prior to the changes coming into effect.

14. The High Court is considering the lawfulness of the Respondent's rule change, but no decision has yet been reached: see **Bailey** referenced above.

15. I discuss this issue below.

Current parole review

16. The Respondent referred the Applicant's case to the Parole Board in October 2021. The hearing took place by video link on 4 August 2022.

17. The oral hearing panel consisted of a psychologist member and two independent members of the Parole Board. The witnesses who gave oral evidence were the Prison Offender Manager (POM), the COM, the prison-based psychologist, the psychologist instructed by the solicitors representing the Applicant, and the Applicant himself. The Applicant was represented throughout by his solicitor, who asked questions and made submissions. The dossier considered by the panel contained 444 pages.

18. Because the Applicant had previously absconded from open conditions the panel was not asked to consider making a recommendation for a transfer to open conditions.

The Relevant Law

19. The panel correctly sets out in its decision letter the test for release.

20. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

21. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

> *"The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."*

Parole Board Rules 2019 (as amended)

22. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A).

23. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

Irrationality

24. 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."*

25. 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.

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

27. In **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with respect to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied. … [T]his approach is simply another way of applying Lord Greene MR's famous dictum in* Wednesbury *… but it is preferable in my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion."*

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.

The reply on behalf of the Secretary of State

31. I asked that the Respondent assist me by written submissions with regard to Ground B above. By a letter dated 15 September 2022, signed by the Public Protection Caseworker Section (PPCS) Reconsideration Team on his behalf, the Respondent did so. Of course, I invited him to make any other representations he thought appropriate, but the letter shows he does not wish to do so.

32. In his written submissions the Respondent makes the following points:
    (1) The prison-based psychologist's report was dated 13 July 2022 (this, as shown above, is not quite the full picture but that does not matter), and therefore she could have given a recommendation at the hearing.
    (2) The panel considered her evidence, and her earlier report and recommendation.
    (3) The transitional arrangements following the change in the Rules provide that views or recommendations about suitability for release (or open conditions) will no longer be allowed, unless the report was submitted prior to 14 July. "*The Guidance states that witnesses are able to provide a recommendation in this situation, it does not state that witnesses must provide a recommendation*."
    (4) The Respondent goes on to assert that whether or not a report writer gives a recommendation, this cannot undermine a Parole Board decision, where the

panel has properly considered the risk evidence before it. A recommendation, or lack of a recommendation, the Respondent says, as to the statutory release test being met cannot make the decision unlawful. The Respondent does not deal with the possibility that a report writer's refusal to give a recommendation may make the hearing unfair.

Discussion

33. I will deal first with Ground A, irrationality.

34. Some of the complaints amount to a disagreement with the significance the panel attached to various aspects of the evidence. Unless the panel came to conclusions to which no reasonable panel properly considering the issues could have come, such complaints do not fulfil the test for reconsideration set out above.

35. Other complaints are in reality suggestions that the panel should have decided that work which needed to be done could be done in the community rather than in custody. This misses the point. If the panel were satisfied that the Applicant passed the test for release, it would have directed release. The question is whether its decision that the Applicant did not pass the test is justified on the evidence.

36. Some of the itemised grounds rely on the Applicant's not having been involved in violence or taken drugs himself while in custody, at least recently. Conduct in custody may, and in this case the panel considered does, have little relevance to the risk a prisoner represents in the community. The panel accurately referred to the Applicant's poor history of compliance, his breaches of bail and licence and community orders, and his serious offending while in custody. The offending in custody took place after he had completed programmes intended to help him develop skills to control his emotions and impulsivity.

37. The panel acknowledged that the Applicant's custodial conduct did not generally cause concern. However, since his most recent parole hearing he had transferred to open conditions, from which in January 2021 he absconded. His daughter took him to hospital after a few days because he was withdrawing from medication and had self-harmed. As a result he was arrested. The panel carefully examined his explanations for absconding. Overall the panel considered that the Applicant's offending in custody and decision to abscond demonstrated poor decision-making which, if it were evidenced in the community, would raise a clear risk of him being drawn into offending. That is a conclusion to which the panel was entitled to come on the evidence, and of itself, in the light of the offending history, is sufficient to justify the decision not to release. The panel further concluded, again reasonably on the evidence, that if the Applicant failed to reside as approved and/or did not maintain contact there would be no means of monitoring risk.

38. The panel considered the further intervention that was deemed necessary, and concluded that the Applicant should undertake that before release rather than in the community, because without it there would be a serious risk of non-compliance in the community. Again, this was a considered decision, based on a proper assessment of the evidence, especially the Applicant's history in the community, and one available to the panel.

39. The panel preferred the offender assessment system OASys of the risk of serious harm (high) to that of two psychologists. It was perfectly entitled to do so, but in any event this was only a part of the panel's overall assessment that the Applicant's release would present more than a minimal risk of serious harm to the public.

40. The Applicant submits that the panel has not based its decision on the test for release. The test for release, the Representations point out, is not whether the Applicant would ever offend again or make poor decisions, but whether or not his continued detention is necessary for the protection of the public. In fact there is no indication that the panel applied anything other than the test which it correctly stated (see above), and the Representations do not refer to any specific passage where is it alleged the panel went astray. Bearing in mind the Applicant's long history of offending, continuing until so recently, the panel's conclusion was a perfectly reasonable and justifiable one.

41. As to Ground B, Procedural unfairness. Whether or not the prison-based psychologist understood correctly what she was permitted to do by the Secretary of State so far as expressing a view about suitability for release, or, indeed, what were her duties as a witness before the Parole Board, and whether or not the Respondent's attempt to control the evidence the Parole Board received is deemed by the courts to be lawful, the panel had her report as to the risk presented by the Applicant and the joint report prepared with the psychologist instructed on behalf of the Applicant. These reports contained full risk assessments.

42. It may be arguable, though it is not expressly put in this way in the Application, that a refusal by a witness to give a recommendation, on the basis, whether correct or incorrect, that the Respondent would not allow her to do so, amounts to preventing the Applicant from putting his case properly. The Respondent's submissions do not deal with this point.

43. The panel considered the recommendations of the COM and the psychologist instructed on behalf of the Applicant, and disagreed with their views. The panel carefully explained why. There is no reason to suppose that, even had the prison-based psychologist given a recommendation, and it was one favouring the Applicant's release, this would have persuaded the panel that the Applicant passed the test for release.

44. Accordingly, even if the prison-based psychologist's refusal to give a recommendation did amount to a procedural irregularity, it made no difference to the outcome. I do not find that Ground B is made out.

Decision

45. 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.

Patrick Thomas
20 September 2022