[2022] PBRA 141

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Application for Reconsideration by O'Connor

Application

1. This is an application by O'Connor (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 11 August 2022 not to direct his 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 oral hearing decision, the dossier, and the application for reconsideration. I have also listened to the audio recording of the hearing of 26 July 2022.

Background

4. The Applicant was sentenced on 4 March 2002 to imprisonment for life following conviction after trial for murder. His tariff expired on 16 May 2016. The Applicant was 20 years old at the time of sentencing and is now 41 years old.

Request for Reconsideration

5. The application for reconsideration is dated 25 August 2022 and has been drafted and submitted by solicitors acting on the Applicant's behalf.

6. It submits that the decision was both irrational and unfair. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No submissions were made regarding error of law.

Current Parole Review

7. This is the Applicant's third parole review. It has a complex and lengthy procedural history spanning over three years.

8. At his last review in December 2018, a panel recommended transfer to open conditions. This recommendation was agreed by the Secretary of State and the Applicant moved to open conditions at his current establishment on 21 June 2019.

9. The Applicant's case was subsequently referred to the Parole Board by the Secretary of State (as part of the Generic Parole Process) to consider whether or not it would be appropriate to direct his release. If the Board did not consider

it appropriate to direct release, it was invited (at that time) to advise the Secretary of State whether the Applicant remained suitable for open conditions.

10. It was first considered by a single-member Member Case Assessment (MCA) panel on 10 March 2020. It was deferred at the request of the Applicant's legal representatives who required further time to take full instructions from him.

11. On 3 June 2020, it was considered by a second MCA panel which directed the case to an oral hearing. On 24 September 2020, the appointed panel chair confirmed that the case would proceed to oral hearing on 20 October 2020 and clarified the directions that had been set to date. The Applicant's legal representative made an application for an adjournment on 13 October 2020, noting a number of reports that remained outstanding and further difficulties in taking full instructions from the Applicant.

12. The hearing on 20 October 2020 was converted to a directions hearing. Various directions were set, and the hearing was re-listed for 24 March 2021. The Applicant's legal representative made a second application for an adjournment so that a prisoner-commissioned psychological report could be prepared and disclosed. The case was adjourned to 8 September 2021.

13. Prior to the hearing, the Applicant's legal representative confirmed that the prisoner-commissioned psychological report was not to be disclosed; a third application for an adjournment was made to enable the Applicant to complete releases on temporary licence (ROTLs); specifically, resettlement overnight releases (RORs). The panel adjourned the hearing to 20 January 2022.

14. The case proceeded to an oral hearing on 20 January 2022 before a three-member panel, including a psychologist specialist member. Evidence was taken from the Applicant and two prison psychologists: the author of a Psychological Assessment dated 12 February 2021 and an Addendum dated 7 January 2022 (Psychologist 1) and the other (Psychologist 2) who had been involved in joint working with the Applicant, his Community Offender Manager (COM1) and his Prison Offender Manager (POM) as part of the Offender Management in Custody (OMiC) Offender Personality Disorder (OPD) pathway services.

15. Also present at the hearing on 20 January 2022 were the POM, COM1 and two further Community Offender Managers who would be managing the Applicant if he was released (COM2 and COM3, who is newly qualified and co-working the case with COM2). It appears there was insufficient time to take evidence from these witnesses and the case adjourned for the fourth time to reconvene on 28 January 2022.

16. COM2 did not attend the hearing on 28 January 2022 due to sickness; neither did the POM who had suffered an injury. A stand-in POM attended and gave evidence. Evidence was also taken from COM1 and COM3. Having heard the evidence, the panel concluded that it needed to hear from the POM and COM2, as well as directing further reports. The case was adjourned for a fifth time.

17. The hearing was re-listed for 4 May 2022, at which the panel indicated that it intended to hear from the POM and COM2, Psychologist 1 and possibly COM3.

However, on 26 April 2022, the panel received notification that one of the COMs (it is not clear which one) was unable to attend and the case was adjourned for a sixth time: it was relisted for 26 July 2022.

18. The hearing reconvened on 26 July 2022. It appears that all oral evidence was completed on the day, but the case was adjourned on 31 July 2022 for a seventh time to allow the panel time to complete its deliberations.

19. On 1 August 2022, the case was adjourned for an eighth time to confirm the terms of the referral from the Secretary of State. It was confirmed that the referral was now confined to whether or not it would be appropriate to direct the Applicant's release. Any view on his continued suitability for open conditions now fell outside the scope of the referral.

20. The panel did not direct the Applicant's release.

The Relevant Law

21. 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.

Parole Board Rules 2019 (as amended)

22. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)).

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)).

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**.

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.

The reply on behalf of the Secretary of State

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

Discussion

32. The panel's decision was made under rule 25(1) and is therefore eligible for reconsideration under rule 28.

Ground 1 – procedural unfairness: evidence misrepresented/misinterpreted

33. The first ground for reconsideration is that the panel either misrepresented or misinterpreted a 'vast amount of oral evidence' and that, as such, the weight

that the panel has assigned to the evidence has caused an unfair and inaccurate assessment of risk which contributed towards the decision not to release the Applicant.

34. In support of this, the Applicant draws reference to various parts of the decision.

35. Paragraph 3.52 of the decision refers to the proposed licence condition relating to the Applicant's restrictions on the use of mobile phones. It states:

> *"[The Applicant] told the Panel he was considering not having a phone at all, because he felt so infringed by the condition; he went on to say he had considered saying he would prefer to stay in prison because there are less controls. The Panel fed back that this seemed remnant (sic) of his attitude of 'cutting off his nose to spite his face', but he denied this was the case. From the Panel's perspective monitoring of [The Applicant's] devices would be necessary and proportionate to manage use of social media, monitor his relationships with women and to ensure he is not using it as a tool to monitor someone's movements."*

36. It is submitted that the Applicant did not say that was considering staying in prison, and this was why he disagreed with the assertion that he was "*cutting off his nose to spite his face"*. The Applicant states he was merely telling the panel that he had fewer controls in custody than he would have had on release.

37. The recording shows that the Applicant said he was "*not inclined to own a phone"* as doing so would tacitly suggest that what he saw as breaches of privacy were acceptable, and that being subject to more monitoring than that imposed in custody would be "*a slap in the face"*. The recording does not indicate that the Applicant said he considered saying he would prefer to stay in prison.

38. I do not find that the error within paragraph 3.52 is sufficient on which to make a finding of procedural unfairness. The overall conclusion of this paragraph regarding the necessity and proportionality of the mobile phone licence condition is one that the panel was entitled to make. It does not make any link between the Applicant's stance and that conclusion. The tenor of much of the Applicant's evidence is that he contested the lawfulness of many of the proposed additional licence conditions, as is dealt with more broadly within the decision as a whole.

39. It is a well-established ground for judicial review that the tribunal has taken into account information which it is accepted is inaccurate. The grounds for reconsideration mirror those for judicial review and therefore it is also a ground for reconsideration. I accept that it is capable of being both irrational and procedurally unfair to take into account inaccurate factual information in making a decision. It is important that decisions are not only fair but are also seen to be made according to a fair procedure. If incorrect information is included in the decision letter, the fairness of the procedure is called into question.

40. However, it will not invariably follow that if there is an inaccurate fact or facts in the decision letter that an application for reconsideration will be granted. Reconsideration, like judicial review, is a discretionary remedy and, if I am satisfied that the incorrect fact did not affect the decision then the application is likely to be refused. The mistake of fact must be fundamental. **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion at (para. 66) as follows:

> *"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."*

41. I do not find that the error within paragraph 3.52 played a material part in the panel's reasoning. It was far from being the only piece of evidence upon which the panel drew to reach its conclusion.

42. Paragraph 3.57 of the decision refers to the Applicant's attitude towards GPS tagging:

> *"If [the Applicant] was to be GPS tagged he told the Panel that he would not go to many "social places" to "avoid people knowing his business" – this would put him in a "tricky situation". The Panel was of the opinion that this reflected a type of grievance thinking around the licence conditions and to try to prove to Probation that their licence conditions are counter-productive."*

43. I have listened to the recording of the hearing and the panel's written summary of the evidence on this point is correct. It is contended that panel's conclusion results from a clear misinterpretation of the evidence as the Applicant was voicing his concerns about his personal safety while in the community. I accept that the Applicant did, in fact, state his concerns about being recognised, and the panel has referenced these concerns at paragraph 3.56.

44. However, the Applicant also gave lengthy and very clear oral evidence which explained how the licence conditions would prevent him from building a stable future. He gave oral evidence to the effect that licence conditions imposed by the Probation Service would be a clear hindrance to his being able to begin his life in the community. It is not unreasonable or unfair for the panel to have reached the conclusion that it did. The Applicant went to great lengths to point out his opinion that licence conditions would be counter-productive in terms of facilitating his effective resettlement. It is not unreasonable or unfair for the panel to categorise this as a "*type of grievance thinking"* as it is very clear that the Applicant felt aggrieved with many of the proposed additional licence conditions as an unjustified and unjustifiable imposition on his civil liberties.

45. Paragraph 3.58 of the decision notes that "*[the Applicant] was adamant that the proposed licence conditions would be 'barriers to his social integration'".* This is disputed. Having listened carefully to the recording of the hearing, the

panel's conclusion on this point is both fair and reasonable. As I have already said, the Applicant gave extensive oral evidence for the reasons he felt many of the proposed licence conditions were neither necessary nor proportionate and there is no force to the assertion that the panel somehow misconstrued his position.

46. Paragraph 3.53 of the decision states:

> *"[The Applicant] went on to say that he had talked to the POM and COM1 about the proposals and had asked [COM1] to withdraw them. He had not had to sign in for curfews at [designated accommodation] so he did not see why he should be asked to sign in at 3pm and he continued to question the proportionality and necessity of the proposed conditions. In fact, he disagreed with the 3pm sign in proposed at the hostel."*

47. It is argued that the Applicant had not disagreed with the proposed 3pm sign in condition but had stated this had not been part of his licence when on temporary release in the community and, as such, the proposed tagging condition (to which the Applicant was manifestly opposed, as discussed above), would not be necessary.

48. The recording shows that the Applicant said he did not agree with the proposed sign in "*to start with"* but said he began to think it was "*fair enough*". Paragraph 3.53 as it stands, does not represent the Applicant's position. Nonetheless, he did continue to question the necessity of the proposed condition regarding tagging. He said that compliance with the exclusion zone would be just as manageable with the 3pm sign in as it would be impossible to return from the exclusion zone in time. While it is clear that the Applicant did not (ultimately) disagree with the 3pm sign in, it was not unfair or unreasonable for the panel to state that he continued to question the necessity of the tagging condition, because he used the 3pm sign in to do just that.

49. While the decision incorrectly records the entirely of the Applicant's stance towards the condition, I do not find that this has had a material impact upon its decision sufficient to make a finding of procedural unfairness or irrationality. The primary concern expressed by paragraph 3.53 is that the Applicant questioned the terms of his licence. That view would not be changed if the final sentence began (correctly) as "*In fact, he initially disagreed…".*

50. In closing, it is submitted that the panel's treatment of the evidence had a sufficiently detrimental effect on the panel's decision for it to have been rendered unfair. I do not find this to be the case, and this ground fails accordingly.

Ground 2 – procedural unfairness: failure to allow cross-examination

51. The second ground for reconsideration is that the panel did not allow cross-examination of evidence in relation to proposals for licence conditions to be changed.

52. The Applicant was legally represented at the oral hearing, and he had the opportunity therefore to challenge Probation Service witnesses about any change

of view being presented. Cases in which the party has been represented by a lawyer are highly unlikely to generate a successful appeal if there had been no challenge made to the alleged irregularity by the Applicant, save in the event for instance of a failure by the other party (for example, a failure to disclose material relevant to the ultimate decision to the Applicant).

53. If the Applicant's legal representative felt he was unfairly prevented from cross-examining evidence at the time, it was for him to say so. While the application submits that the panel was "*quick to move the [Applicant's] legal representative on at this point*" there is nothing within the application that suggests the legal representative raised this as a material issue at the time. If he was content to let the matter rest at the time, he cannot retrospectively say it was unfair without providing compelling evidence to the contrary (which he has not). This ground fails.

Ground 3 – procedural unfairness: failure to consider the Applicant's written evidence

54. The third ground for reconsideration is that the panel failed to consider the Applicant's written evidence. This is expressed in terms that the Applicant "*strongly believes*" that the panel overlooked written comments within the dossier.

55. The application does not explicitly state what evidence is claimed to have been overlooked or provide any evidence that shows that the panel overlooked whatever it was. I note that the dossier contains over 300 pages of information which are bookmarked with a tag beginning 'Offender reps' and I assume the evidence referred to is somewhere within it.

56. The application does mention that the Applicant had to explain the history of his disagreements with professionals in oral evidence which was perceived as grievance thinking and rumination. However, this does not mean that the panel did not read the Applicant's written evidence on the same matters. Neither does it invalidate the panel's conclusion that the Applicant's stance was indicative of grievance thinking or rumination. This was a conclusion that it was entitled to make regardless of whether it was founded on written evidence, oral evidence or (as is most likely here) both.

57. There is insufficient for me to find that the panel did not read the Applicant's written evidence within the dossier. The Applicant's strong belief that it did not do so is inadequate. It fails accordingly.

Ground 4 – irrationality: failure to consider professional recommendations

58. The fourth ground for reconsideration is that the panel failed to give sufficient weight to the evidence of professional witnesses. This is argued on the basis of irrationality.

59. 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.

60. The application sets out various pieces of evidence from Psychologist 1 which the panel did not follow. The panel did not have to follow any of that evidence if it chose not to, provided the reasons for its decision were clear and sufficient to be justifiable.

61. Disagreeing with a panel's weighing of the evidence does not automatically make its decision irrational. The panel sets out clear reasons (paras. 4.6 – 4.8) why it particularly disagreed with the evidence of Psychologist 1. It was entitled to do so, and its reasoning in no way reaches the high bar required for me to make a finding of irrationality in law. This ground fails.

Ground 5 – irrationality: irrational conclusion based on evidence

62. The fifth ground for reconsideration is that the panel's conclusion regarding the Applicant's rigidity and grievance thinking was irrational.

63. Paragraph 2.22 of the decision states:

> "*Significantly, [the Applicant] told the Panel in January 2022 that he was not rigid and was able to approach things in a calm and respectful manner. He cited the example of last being rigid when it was perceived that he had an issue with a former COM around 2017. [The Applicant] went into a large amount of detail about an incident in 2017 when someone had attacked him and then he had been expected to remain on a wing with the same person which he did not think was appropriate. There had then been a mix up with [a Probation Service report] which he had not felt the COM at the time had taken seriously so he had put in a complaint, but this COM had gone on to produce two further [Probation Service reports]. This situation had then also contributed to his refusal to engage with [a behavioural monitoring regime] as he felt that information from this COM had been included in the assessment. While to the Panel his approach to describing all the above came across as grievance thinking [the Applicant] maintained that he had dealt with the complaints above in the correct way and he was justified in doing so.*"

64. It is argued that the panel's conclusion from this evidence was that the Applicant had presented further evidence of grievance thinking and this conclusion was irrational.

65. Paragraph 2.22 does not say that the panel considered this to be further evidence of grievance thinking. It says that the panel considered what the Applicant told it in January 2022 was evidence of grievance thinking. In any event, it was not irrational for the panel to conclude that the Applicant was, or had,

exhibited grievance thinking. It is a reasonable conclusion that another sensible panel may well have come to in the face of both the written and oral evidence.

66. The application also refers to paragraphs 3.89 and 3.61 of the decision.

67. Paragraph 3.89 described COM2's concerns as follows:

> *"Furthermore, COM2 also raised her concerns having reflected on [the Applicant's] evidence, that him suggesting he would raise a civil case if the external licence conditions were applied could amount to manipulation and although raising a civil case was within his rights it also demonstrated the extent of his rigidity and in her experience, this was the first such case she had dealt with. From a professional and risk management viewpoint she could not see why as a life sentenced prisoner you would not want to share information with probation if there was nothing to hide given that the checks were not meant to intrude on privacy but to contribute to public protection and risk management.*

68. Paragraph 3.61 notes:

> "*However, from his evidence, it was clear from his body language even when the Panel was hearing from the COMs in July 2022 – that [the Applicant] was fixated on what had been proposed in January 2022 (which he said he agreed with) and what was now being proposed – and he remained of the view that these proposals had come from the COM rather than from the discussion held with the Panel – even when the Panel members themselves explained this to [the Applicant] and that it would be the Parole Board who set any licence conditions. He was fixated on his view that the COM had "made things more complicated and he did not agree*".

69. It is argued that the panel believed the Applicant's position regarding potential litigation raised concerns about fixation and obsession and a lack of insight into his triggers. Paragraph 3.61 (which is the only paragraph relied upon) mentions fixation, but not obsession or a lack of insight.

70. It is also argued that it was "*concerning"* that the panel believed the Applicant could not challenge restrictions on his human rights.

71. While a concern is not a basis on which to found an application for reconsideration, the decision said no such thing, and neither did COM2 in her evidence.

72. It is also argued that the Applicant's view did not change COM2's recommendation for release, referring to paragraphs 3.76 and 3.77. This is correct. However, paragraph 3.76 also carefully records that COM2 did state that the Applicant's view "*further emphasised…the justification for all the additional licence conditions as being necessary and proportionate"* and paragraph 3.77 says COM2 was of the view that "*[the Applicant's levels of fixation and rigidity did indicate a lack of insight into his risks which therefore made the external controls necessary".*

73. It is argued that it was irrational for the panel to find that rigid thinking about licence conditions was linked to a risk of serious offending from a relationship perspective.

74. However, the evidence of COM2 in paragraph 3.76 (upon which the Applicant seeks to rely) notes that COM2 stated "*[the Applicant] has the capacity and propensity to cause harm in a relationship and in addition his rigid thinking and the resistance he has shown during the hearing further emphasised the need for external controls".* She went on to say (at paragraph 3.78) that COM2 was concerned "*that [the Applicant] was unable to see the risk related rationale"* and would sooner not enter a relationship or have a mobile phone.

75. The application next reiterates the point about cross-examination which I have already dismissed under Ground 2. It therefore has no force here.

76. The remainder of this ground, when reduced to its essence is that it was irrational for the panel to conclude that the Applicant's attempts to understand the changes in proposed licence conditions was evidence that he was fixated (and, I assume) that this fixation was linked to a risk of serious harm.

77. In passing, it is also argued that there was no evidence that the Applicant presented any imminent risk of violence because of his rigid thinking.

78. Regarding imminence of risk, **R (Secretary of State for Justice) v Parole Board [2022] EWHC 1281 (Admin)(Johnson)** states (at paragraph 31):

> *"If an offender poses no risk, the protection of the public will not require his confinement. That does not mean the Board is to ignore anything other than immediate or imminent risk…"*

79. In other words, the Board must consider risks over the long term as well as the risks that may arise immediately or imminently on a prisoner's release. This requires the Board to consider whether risks might arise in the longer term as well as in the shorter term. For prisoners (like the Applicant) serving a life sentence, the Board must always consider risk over an indefinite period.

80. In the light of the Applicant's past conduct (particularly having spent around a year in a relationship before stalking and murdering his ex-partner in an attack described by the sentencing judge as having "*the most terrible ferocity and brutality"*), it was far from irrational of the panel to consider risks in the medium to long term.

81. Having read the entire dossier, and listened to over six hours of oral evidence, it is disingenuous to cast the Applicant's opposition to the proposed licence conditions, which are generally unremarkable and uncontroversial on life licences, as a desire to understand them. It was not irrational for the panel, in any way, to conclude on the basis of the evidence before it that the Applicant's stance was indicative of rigid thinking and that rigidity could cause risk-related issues if released. There is nothing raised in the application that persuades me that all other panels would have concluded otherwise. This ground fails.

Ground 6 – irrationality: body language

82. The final ground for reconsideration is that the panel made an irrational assessment of the Applicant's body language during the hearing.

83. It is argued that the panel's inference that the Applicant shaking his head during the evidence of COM1 indicated disagreement was irrational and, moreover, that the panel would not have been able to assess body language accurately over a video link.

84. I was not at the oral hearing and am therefore unable to take a view on what the Applicant did. However, in my experience, it is perfectly possible to see what participants in an oral hearing are doing. It is also not irrational for a panel to take head shaking to mean disagreement. This ground fails.

Decision

85. For the reasons I have given, I do not consider that the decision was procedurally unfair or irrational and accordingly the application for reconsideration is refused.

Stefan Fafinski
12 October 2022