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[2023] PBRA 141

Application for Reconsideration by Williams

Application

1. This is an application by Williams (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 26 June 2023. The decision of the panel was 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, and/or (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 dossier consisting of 1007 pages; the application for reconsideration submitted by the Applicant's legal representative; and the response by the Secretary of State (the Respondent).

Background

4. On 3 June 1999 the Applicant was sentenced to life imprisonment for offences of rape and indecent assault directed towards a family member, who was under 15 at the time of the offending. The minimum term fixed by the judge was six years and one day.

5. The Applicant was noted to have committed an earlier sexual offence in 1975 involving a girl under the age of 18.

Request for Reconsideration

6. The application for reconsideration is dated 17 July 2023.

7. The grounds for seeking a reconsideration are set out below. For convenience, I have renumbered some of the grounds argued in the application.

Current parole review

8. The Applicant had been released by the Parole Board on licence in June 2014. He was recalled to prison in October 2015. He was recalled following concerns that the Applicant had been seen in the red-light district of a town and had secured the services of a sex worker. There were concerns about the behaviour of the Applicant

towards the sex worker. He had also failed to report this encounter to his probation officer. The current panel were therefore considering release following recall. This was the Applicant's third review since recall.

Oral Hearing

9. The review was conducted by a Judicial Chair of the Parole Board, a psychologist member of the Parole Board and an independent third member of the Parole Board. Oral evidence was given by the Prison Offender Manager (POM), a prison instructed psychologist, a prisoner instructed psychologist, and a Community Offender Manager (COM). The Applicant was represented by a solicitor and also gave evidence.

10. A dossier consisting of 875 pages was considered.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 26 June 2023 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

12. Pursuant to 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)).

13. 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

14. 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."

15. 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.

16. 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

17. 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.

18. 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.

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

20. 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.*"

21. 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.*"

The reply on behalf of the Secretary of State (the Respondent)

22. The Respondent made the following representations.
    a. The Respondent's representative explained that the POM responsible for the Applicant could not be at the hearing. The Respondent's representative however also explained that a senior member of the department stood in for the POM and was able to offer a recommendation. The Respondent's

representative made the point that regardless of any recommendation, it was for the panel to come to a conclusion as to whether the Applicant should be released.

b. The Respondent's representative commented upon the indication within the Applicant's representations that the panel's view may have been coloured by the fact that the number of recommendations by the Parole Board upheld by the Secretary of State had reduced considerably in recent times. The Respondent's representative pointed out that the correct test had been cited in the decision and that it would be inappropriate for the Parole Board to make a decision relating to open conditions based upon the potential acceptance or otherwise of the recommendation.

c. The Respondent's representative commented upon the issue relating to the victim personal statement. The Respondent's representative pointed out that the evidence considered by the Parole Board would be that which appeared on the current dossier and would not be affected by earlier victim statements. The Respondent also pointed out that the non-disclosure process is set out in the rules and that the final decision relating to non-disclosure is one for the Parole Board subject to the rules.

d. The Respodent's representative also commented upon the issue relating to a report which was discussed briefly at the hearing and read subsequent to the hearing by the panel. This is referred to elsewhere in this decision. The Respondent's representative points out that the document was in fact appropriately considered by the panel.

Reconsideration grounds and discussion

Ground 1 (a)

23. The Applicant's solicitor argues as follows: "*at page 31 of the decision letter [the panel] has made it clear that the next panel might direct his release without being expected to move to the open estate"* conditional upon his having *"addressed the further work satisfactorily".*

24. The Applicant's solicitor further submitted that the panel thereby "*fettered their discretion as to whether he might not address the further work in open conditions*".

25. And argued that "*implicit is the impact of the Secretary of State's new eligibility criteria for the open estate".*

Discussion

26. The paragraph cited by the solicitor from the panel's decision (4.13) in fact reads "*The next Panel will assess whether [the Applicant] has, in the intervening period, addressed the recommended further work satisfactorily, perhaps by the provision of a PRA* [psychological risk assessment]*. If he has, then, if he has continued to be compliant within the prison system, he might be able to achieve his ambition of re-release without being expected to move to the open estate*."

27. I detect no issue of conditionality in this paragraph. The panel were simply making the obvious point that a future panel might consider release directly from a closed prison, rather than an interim transfer to an open prison. The panel make no mention of the policy of the Secretary of State and no implication that any such policy is relevant to this comment. In any event a future panel would, as is the norm, be required firstly to consider release. If release were not indicated, a future panel would only then consider a recommendation for a transfer to an open prison.

28. I also detect no element of "*fettering*" of any future panel. As was made clear by the panel in this decision, each Parole Board panel approaches a hearing afresh and will assess the evidence as it then presents itself. Panels will, and often do, take differing views of evidence and are at liberty to reach a conclusion that differs from an earlier panels' conclusion.

29. Additionally, as indicated above, a decision as to whether or not to recommend a transfer to open conditions is not, in any event, susceptible to consideration by way of the Reconsideration process (see the case of **Barclay** above).

30. For these reasons I reject the submission of unfairness as it is argued in relation to this ground.

Ground 1 (b)

31. The panel wrongly considered charges which had been ordered by the court to lie on the file.

32. The Applicant's solicitor argues that an order by a judge that matters are to "*lie on the file*" amounts to an indefinite adjournment, whereby proceedings may only be resurrected with leave of the court. The submission being that the panel were acting unlawfully in considering these matters.

Discussion

33. The decision by a criminal court to leave matters to "*lie on the file*" is referenced by the panel in their decision. The panel acknowledge it was likely that these alleged offences were not pursued (as is commonly the case) because it was the view of the court (within those trial proceedings), that the convictions relating to other offences sufficiently reflected the criminality of the Applicant. The order made by the court is clearly relevant to the reinstatement of further criminal proceedings and effectively gives a defendant some element of finality in connection with the offending.

34. Parole proceedings are clearly not criminal court proceedings. The finding of a panel amounts only to a finding of fact in relation to risk. As referenced, with care, by the panel, the Supreme Court in **Pearce [2023] UKS 13** set out the approach that panels of the Board should take when assessing assertions or allegations which have not been determined by a court. The Court ruled that the then Guidance of the Parole Board was not unlawful (although required some revision).

35. At paragraph 16 of the Supreme Court decision the meaning of the term "*allegation*" was discussed. The definition within the Parole Board guidance (which the Supreme

court did not challenge) was that an allegation amounts to "*Conduct alleged to have occurred which has not been adjudicated upon….and which if true could affect the panels' risk assessment…sometimes these allegations are currently being investigated by the police or others and may be disposed of or adjudicated in the future.*"

36. Within that definition is no bar to allegations which have been left on the file in criminal proceedings, indeed such allegations will often be highly relevant to a risk assessment.

37. I therefore do not find that the analysis of matters and allegations *"left on the file"* in criminal proceedings to be unlawful or unfair or to amount to a procedural irregularity.

Ground 1 (c)

38. The panels' decision was not consistent with the legal principles set out in **Pearce**.

39. The Applicants solicitor submits that the panel failed to adhere to the guidance set out in the case of **Pearce** as it applies to allegations.

Discussion

40. I have considered the panel's decision in this case. The panel meticulously analysed each of the further allegations in this matter. The Applicant was offered an opportunity to comment upon the allegations. The panel acknowledged the difficulties facing the Applicant, in not being able to examine the individual witnesses who had made the allegations. The panel also acknowledged the necessity to act cautiously in making findings. The panel set out in detail their findings and concerns and the evidential basis for reaching their decisions. The panel in my determination conscientiously followed the guidance set out by the Supreme Court in **Pearce**. I find no evidence of unfairness or unlawfulness as submitted by the Applicant's solicitor.

Ground 1 (d)

41. Issues relating to statements made by a victim relating to the impact of the offences.

42. The Applicant's solicitor submits that the panel failed to allow the Applicant's solicitor an opportunity to challenge the contents of statements made by a victim and contained in earlier dossiers (but not included in the dossier being considered by the panel). The complaint also appears to indicate that a statement made by a victim was withheld by way of a non-disclosure application and that the Applicant was precluded from applying within the hearing for sight of that withheld material.

Discussion

43. Rule 17 of the Parole Board Rules 2019 set out a clear procedure relating to applications by either party for non-disclosure of material. Any decision is subject to an appeal process which, for obvious reasons, remains external to the oral

hearing process. An appeal decision is subject to the Rule 17 process and remains final (subject to any further application to the High Court). The rules do not permit a Rule 17 decision to be challenged within the oral hearing process. The panel acted properly in halting any such challenge within the oral hearing. The dossier contained a short summary of the statement of the victim.

44. So far as the challenging or introducing of material, disclosed in earlier oral hearings, is concerned, the parole process relies upon the parties making use of the dossier as the written evidential basis of the hearing. Both parties are at liberty, in advance of any hearing, to apply for further material to be added to the dossier. A panel chair is highly likely to permit such an addition, subject to ensuring that the material is relevant to future risk.

45. However, arguments or reliance upon information which was not before a panel and could not therefore be considered by the parties, is not a ground for procedural unfairness. This has been confirmed in a decision on a previous reconsideration application namely **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for a further oral hearing. This is because procedural unfairness, under the Rules, relates to the making of the decision by the Parole Board panel in the oral hearing, and when making the decision the panel is obliged to consider only the evidence which was available and disclosed to both parties within the hearing.

46. I therefore reject the argument that unfairness occurred in these circumstances.

Ground 1 (e)

47. Information relating to a meeting with a family member of the Applicant might have made a difference to the panel's decision if it was before the panel during the oral hearing. The information was in fact made available to the panel after the hearing as, for technical reasons, it had not reached the dossier.

48. The Applicant's solicitor notes that information relating to a meeting with a family member of the Applicant had been reported in a document which had been written by the Applicant's probation officer, but which had only been seen by the panel after the hearing. The Applicant's solicitor argues that the information relating to this meeting may have affected the panel's decision in the Applicant's favour.

Discussion

49. The panel, in this case, noted that it had received this information after the hearing, but before any decision had been made. The panel indicated that the information would be likely to be relevant to risk planning in the future. The panel indicated firstly that they had considered the information, and secondly that the added information did not impact on the decision that they had reached on this occasion.

50. The Applicant's solicitor had been invited to make final submissions in writing and had indeed made detailed submissions in a document lodged 6 days following the oral hearing.

51. Of note is that no mention is made, in the submissions document, of the relevance or otherwise of the information relating to the meeting with the Applicant's family member. No submission or application was made to the panel to consider reinstating the hearing to allow for this information to be considered further.

52. Where an Applicant is legally represented, as in this case, it is incumbent upon any representative to raise and challenge any perceived issue of irregularity within the proceedings themselves.

53. In the light of the decision in this case, which was a view of the panel that there existed insufficient evidence that the Applicant's risk could be safely managed in the community, information relating to family contact in the future would not, in my determination, have made any material difference to the decision of the panel, a point the panel itself made.

54. I find that this ground does not amount to a procedural irregularity within the definition set out above.

Ground 1 (f)

55. The composition of the panel changed for the final hearing.

56. The Applicant's solicitor submits that the fact that the composition of the final panel changed through the course of the review process *"requires explanation"*.

Discussion

57. This point can be taken shortly. The constitution of the decision-making panel in this case was unchallenged and was clearly legally appropriate. It is not uncommon (particularly in cases which are the subject of multiple adjournments) that members, for various reasons, find themselves unable to continue with hearings. Of importance is that the final adjudicating panel considers the totality of the evidence, and in the case of a change of panel, that all panel members approach the evidence afresh. The panel, in their decision, confirmed that they had done just that. This point cannot amount to a procedural irregularity in the sense set out above.

Ground 2 (a)

58. The Applicant's solicitor lists various relatively minor issues which the Applicant submits amount to factual errors. All are of residual consequence. There is no argument adduced as to the errors having any material impact on the overall assessment of risk. Most relate to the factual background of the Applicant's relationships.

Discussion

59. The Applicant's solicitor argues that the errors and misstatements are said to demonstrate that the panel approached the review with *"an adverse decision already formed"*. Short of this broad submission, the argument is not further developed. As indicated above, errors of fact may be relevant to the fairness of any

decision by a panel, however the errors, if established, must be shown to have been fundamental and to have had a material effect upon the decision of the panel. I can detect no evidence that the matters raised by the Applicant's solicitor either demonstrate prejudice towards the Applicant or made any material difference to the decision.

Ground 2 (b)

60. The panel failed to give explicit reasons for not considering a transfer to an open prison.

Discussion

61. As indicated above a decision whether or not to recommend a transfer to an open prison is not a matter susceptible to a challenge within the Reconsideration process.

The response from the Secretary of State

62. I have also considered the Respondent's representations. Those representations do not impact upon my decision.

Decision

63. In all the circumstances therefore, I conclude that the decision in this case was not irrational in the legal sense set out above and that the decision was not procedurally unfair. I refuse the application for Reconsideration.

HH S Dawson
4 August 2023