[2023] PBRA 18

the Parole Board
working with others to protect the public

Application for Reconsideration by Fitzmaurice

Application

1. This is an application by Fitzmaurice (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 13 December 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:

    a) The Decision Letter dated the 13 December 2022;
    b) A request for reconsideration from the Applicant in the form of written representations dated the 19 December 2022 from his legal representative; and
    c) The dossier, numbered to page 549, of which the last document is the Decision Letter. The panel had a final dossier of 533 pages, together with emailed representations from the Applicant's legal representative.

4. I also asked for additional information to ensure a full and fair review of the application. I received a copy of the Applicant's emailed submissions to the panel of the 11 December 2022 following the oral hearing being adjourned and prior to the panel's Decision Letter being produced.

5. I received a copy of the audio recording of the oral hearing and listened to the evidence of the Probation Officer. The Parole Board liaised, on my invitation, with the Panel Chair who confirmed that additional information (clarification of evidence) was received from the Probation Officer. The Panel Chair confirmed to the Parole Board that the panel had not felt that there was a need to make any amendment to the Decision Letter. I interpreted this to mean that the Panel Chair was satisfied that the evidence had been properly recorded in the Decision Letter and, in fairness to the Applicant, this is why I chose to listen to the audio recording.

Background

6. The Applicant is now 32 years old. On the 21 December 2016, when he was 26 years old, he received an extended determinate sentence, comprising of 10

years custody and 5 years extended licence, following his conviction for a serious assault.

7. The background to the Index Offence is that on the 14 November 2014, the Applicant attacked the victim in the street outside a restaurant. He punched the victim several times to the head and kicked him three or four times so that the back of his head banged against a door. The assault against the victim continued despite him being unconscious and the victim suffered a broken nose, fractured skill, fractured jaw and other injuries. The Applicant was convicted at trial and, although he admitted causing the injuries to the victim, had indicated that he had acted in self-defence.

8. The Applicant became eligible to be considered for release by the Parole Board on the 7 October 2021. The panel's review of his case was the first review by the Parole Board. If not released by the panel, he would otherwise be automatically released (as is required under the law) in February 2025. His sentence ends in January 2030.

9. The Secretary of State referred the Applicant's case to the Parole Board on the 30 December 2020 to consider whether or not his release could be directed. On the 16 June 2021, the Applicant's case was first reviewed by the Parole Board on the papers and an oral hearing was directed.

10. An oral hearing was listed on the 22 November 2021. That hearing was adjourned on the day, without live evidence being considered, so that further written evidence could be produced.

11. The present panel listed the case to be heard on the 31 August 2022, that oral hearing was adjourned on the day, without live evidence being considered, because of an absence of a detailed plan from Probation to manage the Applicant in the community should his release be directed.

12. An effective oral hearing then took place on the 28 October 2022, following which the panel adjourned the review for further written evidence. The panel received this evidence together with written representations from the Applicant's legal representative. The panel then concluded the review on the papers, producing its Decision Letter on the 13 December 2022. At the oral hearing, the panel heard evidence from the Applicant, his Probation Officer in the community, the official supervising his case in prison, a prison psychologist and a psychologist instructed by the Applicant's legal representative.

13. The panel did not direct the Applicant's release, finding that he evidenced a degree of minimisation about the extent of the violence he used in the index offence. The panel considered that he had acted impulsively in committing the index offence and this remained a '*principle risk factor'*. The panel accepted the evidence of the official managing the case in custody that there would be little or no warning signs if the Applicant were to commit a further offence and that this would make it difficult to manage him in the community. The panel was not persuaded by the proposed release plan put forward by the Applicant's Probation officer.

Request for Reconsideration

14. The application for reconsideration is that the panel's decision was irrational and/or procedurally unfair, in that:

    a) It was an irrational decision on the balance of evidence and the panel did not provide sufficient reasoning for taking a decision contrary to the expert psychological evidence;

    b) The panel made two mistakes of fact;

    c) The panel adjourned for further information but didn't reference that information in its reasoning of the decision not to direct release; and

    d) The panel could have reconvened the oral hearing given the concerns it expressed about the risk management plan.

The Relevant Law

15. The panel correctly sets out in its decision letter dated the 13 December 2022 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.

16. 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)

17. 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).

18. 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

19. 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."

20. 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.

21. 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

22. 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.

23. 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.

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

Other

25. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that

there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

26. 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.*"

27. **Johnson EWHC 1282 (Admin)** sets out that 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. The statutory test for release does not include a temporal element. The test is whether release would cause a more than minimal risk of serious harm to the public at any time. Therefore, consideration of risk goes beyond the sentence expiry date.

28. The Applicant relies on **Wells v Parole Board [2019] EWHC 2710 (Admin)**, **Brooke v Parole Board [2008] EWCA Civ 29** and **South Bucks District Council v Porter (No 2) [2004] 1 WLR 1953**. I have noted the points raised within the Applicant's submissions and applied them, where they may be relevant, in the decisions I have reached.

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

29. On the 22 December 2022, the Respondent confirmed that he had no wish to submit any representations.

Discussion

30. The Applicant submits that all professional witnesses at the oral hearing accepted that there is no core risk reduction work outstanding and that there had been no violence in custody. He notes that the panel identified his high risk of serious harm towards the public, but he says that this cannot be reduced from high until he has been tested in the community.

31. The Applicant submits that the panel failed to provide clear reasoning as to why it rejected the recommendation for his release put forward by the two psychologist witnesses at the oral hearing.

32. I do not accept the Applicant's submission. Reading the entire Decision Letter, it is clear that the panel recorded the key points of the evidence it read and heard, including the view of the risk of serious harm and whether there was an identified need for further offence focussed work.

33. Although the Applicant focusses on what he sees as the panel's failure to provide reasons for it rejecting the views of the psychologist witnesses, he fails to recognise that the official supervising his case in the prison was also an expert witness. The panel determined that it should attach weight to the evidence of that witness. The panel was entitled to do so, and it explained its reasoning. In its conclusion, the panel fairly reflected the evidence and the views of the witnesses in the case, including the evidence of the Applicant. It noted his progress but also identified his impulsivity and it weighted the evidence of the official supervising him in custody, saying this:

> "*The panel was impressed with the evidence of [the official supervising the Applicant in custody] and in particular noted her account that there would be little or no warning signs if [the Applicant] were to commit a further offence and that this would make it difficult to manage him in the community. The panel noted that [the Applicant] has displayed poor behaviour to his [Probation Officer] at a time when he is in closed conditions. [The official supervising the Applicant in custody] was asked how the high risk of violence which she told the panel [the Applicant] still presented might be mitigated and said that it was difficult to say because [the Applicant's] attitude was internal and much would depend upon how he worked with his COM in the community*."

34. The Applicant submits that the panel made two mistakes of fact, in that:

> *1.* It wrongly recorded the Probation Officer as saying *"[the Probation Officer] told the panel of the work pressures which he is under which means that the support of offenders cannot be the first priority".* This he says was not correct. The Probation Officer, on the 13 December 2022, having read the Decision Letter emailed the Parole Board to say *"I believe I stated (or intended to convey) the point that – When overcapacity the writing of addendums for custody do not become our first priority as we have to concentrate on community cases first. I would point out that the supporting of offenders in the community is always be our first priority [sic]".*
>
> *2.* It is suggested that the Probation Officer had failed to provide a risk management plan for the oral hearing (which was adjourned on the 31 August 2022) and that in fact there had been no formal direction for a risk management plan. The Applicant submits that there should have been a formal direction as a part of the Panel Chair's case management of the case.

35. Having read the response to the Parole Board from the Panel Chair and having listened to the audio recording of the hearing, I am satisfied that the Decision Letter properly reflected what was said.

36. It is widely reported that the Probation Service has faced pressure, particularly in the area responsible for the Applicant's management in his proposed release area. However, I am not persuaded that this was a critical factor in the panel's decision not to direct his release. Any panel, in considering a risk management

plan provided by the Probation Service, must rely on the professionalism of Probation that it will deliver the plan as outlined.

37. I am satisfied that the panel approached its assessment of the risk management plan properly and fairly. It considered the plan on the basis of the outline put forward by the Probation Officer. The panel was alive to the pressures faced by the Probation Service but its focus on why the plans to manage risk would be ineffective were based on the Applicant's level of risk and its view that he would not be manageable in the community. For example, the panel determined a need for close supervision in the community and it noted that the proposed stay in designated accommodation (where supervision would be enhanced) would only be for a limited period. If anything, on my reading of the Decision Letter, the panel's view of the pressures faced by the Probation Service reflected the fact that there may be less opportunity to offer wider support than the support outlined within the risk management plan. However, as I have said, this was not the deciding factor in determining that the risk management plan itself would be ineffective.

38. The Applicant's submission that the panel should have directed a risk management plan, or that it was wrong in saying the Probation Officer had failed to produce a plan, does not establish irrationality or procedural unfairness. It was the Respondent's duty to produce a risk management plan as a part of the evidence he was required to serve, as outlined in the Schedule to the Parole Board Rules. In any event, the panel did direct that a plan be produced for the final hearing, a plan was produced (albeit late) and it was considered by the panel.

39. In the Applicant's view, the panel's review was procedurally unfair because it adjourned for further information but did not then reference that information in its decision not to direct his release and could, if it had concerns, have reconvened the oral hearing.

40. There is nothing to this ground. The panel reflected what had been identified in the adjournment following the oral hearing in October 2022. However, it was clear as to why it did not find the risk management plan to be likely to be effective and why the Applicant did not meet the test for release. The Applicant had an opportunity to provide submissions following the adjournment and the receipt of further evidence, and he did so on the 11 December 2022, when he stated:

> "*We have now received the [Probation Officer's] report, which the panel were waiting on before issuing it's [sic] decision. I have nothing meaningful to add to the closing submissions save to reaffirm there is no core risk reduction work outstanding, [the Applicant] has insight into his violent risk and the enquiries made by [the Probation Officer] evidences his support network is pro-social. We continue to ask the panel to direct release*".

Decision

41. Two crucially important issues I must decide are first, whether I am satisfied that the conclusions reached by the panel were justified by the evidence and secondly, whether its conclusions were adequately and sufficiently explained.

42. I am satisfied that the decision not to direct release was fully justified on the totality of the evidence. In a thorough and carefully reasoned decision which sets out (in detail) the findings, assessments, operative reasoning and conclusions of the witnesses and takes fully into account all of the evidence given to the panel, including that of the Applicant himself, the panel in my judgment satisfied the public law duty to provide evidence based reasons that in my judgment adequately and sufficiently explained the conclusions it reached. There were no unexplained evidential gaps or leaps in the reasoning provided by the panel and, considering the Decision Letter in its entirety, it is clear to see why the panel reached the decision that it did.

43. For the reasons I have given I am not persuaded that the panel's decision was irrational or that the process it followed was procedurally unfair. The application for reconsideration is refused.

Robert McKeon
30 January 2023