[2023] PBRA 52

the Parole Board
working with others to protect the public

Application for Reconsideration by Whittle

Application

1. This is an application by Whittle (the Applicant) for reconsideration of a decision of a Panel of the Parole Board, dated the 6 February 2023, following a video-link oral hearing on 16 November 2022 and subsequent adjournment for additional information and written submissions. The decision of the Panel was neither to direct release nor to make a recommendation for transfer to open conditions.

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. This is an eligible case.

3. I have considered the application on the papers. These are: the decision of the Panel, the application for reconsideration and the dossier (consisting of 437 pages) and I listened to a recording of substantial sections of the evidence.

Background

4. The Applicant was sentenced in May 2008 to Indefinite Imprisonment for Public Protection with a minimum term of a little short of 3 years and a tariff expiry date of 12 April 2011, for sex related offences, committed over a period of years, including rape, sexual assault and possession and creation of indecent images. After being released on licence in 2016, he was recalled to prison in 2019, receiving a further, determinate, sentence of 20 months for breaching a Sexual Offences Prevention Order (SOP), imposed on the index sentencing, and possession of indecent images.

Request for Reconsideration

5. The application for reconsideration is dated 24 February 2023 and submitted by the Applicant's Legal Representative. It seeks reconsideration on the grounds that the decision is procedurally unfair and irrational.

6. The grounds for seeking a reconsideration, are set out in considerable detail in 11 pages of closely argued submissions. It is not necessary to reproduce the application in full, but all sections have been considered and aspects relevant to procedural unfairness and irrationality are dealt with below.

7. The Applicant submitted:

Procedural Unfairness.

8. The Panel failed properly and fairly to assess the Applicant's full risk profile.

9. The application goes into some depth to identify areas where, it is claimed, that in contrast to the Panel's finding that "*it is not clear why an assessment such as SARN or RSVP was not used to identify all the risk factors"* , the Prison Psychologist Report, dated 10 January 2022, had specifically outlined that areas such as SARN (Structured Assessment of Risk and Need) and RSVP (Risk for Sexual Violence Protocol), had been carried out as part of the Report formulation.

10. The claim of procedural error is further categorised on the basis that the Panel:

i. Failed to properly consider the psychological risk assessment which included a RVSP assessment.

ii. Failed to highlight concerns with the depth of the psychological risk assessment at the MCA (Member Case Assessment) stage, Duty Member review, Panel Chair Directions and Adjournment Letter.

iii. Failed to include a specialist psychologist panel member given their concerns and disputed conclusions of the psychological risk assessment.

iv. Failed to adjourn the matter to address those concerns with the psychological risk assessment, direct the October 2020 HSP (Healthy Sex Programme) assessment be disclosed and reconvene a Panel with a specialist psychological member.

v. It was unfair to conclude the review without seeking further information on [the Applicant's] personality traits which had been identified as helpful for future panels.

Irrationality

11. It was irrational to conclude that "*the bespoke psychological one to one work had not addressed ongoing risk factors and (that) the core risk factor of sexual deviance remained outstanding."*

12. Under this heading, the Application goes into considerable detail claiming that the Panel's conclusions were in direct contrast to the evidence of all professional witnesses who, it was claimed, all "*agreed that the recall offence was linked to (the Applicant's) strong emotions and schemas that prevented him*

from using the skills learnt." Reports of the HSP Facilitator and the Prison Psychologist both concluded that the accredited one-to-one work carried out by the Applicant was sufficient in addressing ongoing risk factors, a conclusion which, it was claimed, was also accepted by all professional witnesses. It was, claimed the Application, irrational for the Panel to conclude that he had not addressed a full range of risk factors within the bespoke one to one work.

13. "*The decision not to direct release was irrational*" Under this heading, there appears to be something of a repetition of the above claimed "*irrational*" conclusion, the Application claiming that it was clear in oral evidence that each witness gave evidence that no further core work was required. Further, in respect of the Panel's findings as to the Risk Management Plan (RMP), the Panel had, again, gone against the positive evidence of the professionals, failing to explain the reasons for departing "from those opinions and risk assessments" and "*failed to justify its conclusions*."

Response from Secretary of State

14. The Secretary of State (SoS), by e-mail dated 14 March 2023, indicated that no representations were made in response to the Application.

Current parole review

15. The Panel considered a Dossier said to be of 389 pages but, as it refers to the post hearing written submissions, it must, by then, have been of 416 pages.

16. The case was referred to the Board by SoS on 6 July 2021 as a Post Tariff Indeterminate Sentence and the Board asked to consider whether to direct release, or, in the alternative, whether to recommend a transfer to open conditions. It was the 2 Review since the Applicant's recall to custody in 2019. At the oral hearing, the Panel heard evidence from the Prison Offender Manager (POM), a stand-in Community Offender Manager (COM), the Prison Psychologist who had submitted the Report dated 10 January 2022, and from the Applicant.

17. In its 10-page decision, the Panel dealt in detail with evidence from the Applicant as to his offending, including the recall offences, gave him credit for his good custodial behaviour and outlined CBT (Compassion Informed Therapy) and ACT (Acceptance and Commitment Therapy) one toone work undertaken with a psychologist and gave him credit for the benefit said to have been gained. It confirmed that the POM considered he had benefitted from the work and was more open in his conversations. It found that the Psychologist believed that the Applicant was enabled to be more assertive in his relationships and that coping mechanisms, helping to deal with relationship breakdowns, would be sufficient to mitigate risks. Schema work, as part of the CBT was accredited. It also recorded that the Applicant had received a number of sessions of EMDR (Eye Movement Desensitization and Reprocessing) which the Applicant had claimed helped him get rid of general anxiety and address feelings of rejection. The Panel recorded the assessment of the psychologist as to a low likelihood and imminence of sexual offending in open conditions or approved premises, and moderate severity of such offending whilst there. It further recorded the

psychologist's view that the risks were manageable in approved premises, a view which was rejected by the Panel which, at that stage, found it difficult to envisage a plan likely to be effective.

18. At each stage, the Panel dealt with individual issues and gave specific reasons for its findings for its non-acceptance of those views stressing, the circumstances of recall, finding that the Applicant's factual evidence had not all been plausible and that his recall indicating a continued sense of entitlement along with a lack of warning signs which could have alerted professionals. It went on to judge that the acknowledged work done by the Applicant since recall would not be sufficient to mitigate risk and that he continued to be aroused by sexual thoughts about children and believed that such thoughts were acceptable. It found that such strategies as had been learnt had clearly been ineffective and that the therapy work would not cover these risk factors. A specific treatment assessment such as SARN or RSVP could have identified all risk factors including sexual interests and sexual deviance about children.

The Relevant Law

19. The panel correctly sets out in its decision letter 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.

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.

21. 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

22. 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."*

23. 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.

24. 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

25. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.

26. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy this Reconsideration Assessment Panel (RAP) 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.

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

27. 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.

28. 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.*"

29. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration

application in **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 an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them.

30. The Panel is subject to the '*duty of enquiry'*, a duty which has been explained in various decisions of the courts and of reconsideration panels including, for example, **Samuel [2021] PBRA 100:** 'One situation which may give rise to a finding of irrationality or procedural unfairness is where a panel has made a decision in the absence of an important piece of evidence which might have made a difference to the decision and which the panel might reasonably have been expected to obtain (adjourning the hearing, if necessary), for that purpose.

Discussion

31. I have carefully considered this application and am satisfied that there has been neither procedural error nor irrationality in the decision. At the hearing which lasted just short of 3 hours 30 minutes, the Applicant was represented by an experienced Legal Representative who, following the hearing, in a 6-page written submission fully outlined his client's case.

Procedural Unfairness:

30. I accept that it is arguable from the wording of the decision that the Panel had suggested that an assessment such as SARN or RSVP had not been used to identify risk factors. Close listening to the recording itself, however, makes it clear that the Panel was aware that in preparing her report, a year earlier, in January 2022, the Psychologist had used RSVP and considered earlier SARNs, and that the Panel had serious concerns, as explored in questioning, relating to the decision to use therapy informed treatment to address risk factors when an assessment based on RSVP and SARN would, in the Panel's view, have ensured treatment more relevant to the Applicant's risks. The Psychologist gave evidence to the Panel for some 39 minutes and all relevant issues were carefully explored including the basis for her views that the Applicant was ready for progress and that the Risk Management Plan (RMP) would safely manage him in the community. The Psychologist, also, under questioning, formally confirmed that the treatment undertaken was not "*necessarily validated*" or "*strictly accredited*" in terms of effectiveness for treating sex offenders although she qualified that by saying that, as part of the work, the Applicant had done "*some schema work*" and that schema therapy was an accredited intervention.

i. Whatever issues might have been raised during the pre-hearing preparation, a Panel comes to its decision based on the dossier as prepared for its consideration and the evidence given to it. There is no suggestion that the

Legal Representative, in this case, suggested that the dossier was incomplete or that the Panel had not, by the conclusion of the hearing, sufficient information to come to a considered decision.

ii. The composition of the Panel, here, unchallenged at any stage, is not a matter for "*procedural error*." Although the Panel did not include a Psychologist Member, it had a broad range of expertise, including expertise in a related field. In listening to the recording, I was impressed by the careful and informed manner in which questions were posed and the scope of the issues explored. In any event, the Legal Representative had the appropriate opportunity to clarify any concerns as to matters, he might have considered, the questioning had revealed, for example, misunderstanding of the relevant issues.

Commented [MR1]: Would you give these their own number so make them 31 and 32 or keep them and I and II?

Irrationality

28. It is difficult specifically to distinguish the grounds of Application from each other and my conclusions as to procedural error are also germane to irrationality. It is clear that, where a Panel differs from the clear advice of professionals, it should give the basis for its findings. In this case it is not always easy to find precise advice from the professional witnesses particularly as they were, then, all labouring under the difficulties of the "*no recommendations*" constraints and, also, from the limited knowledge of the stand-in COM. It is clear to me, however, that such views as were expressed were carefully explored during evidence and that the Panel gives evidence based reasons for its decisions.

Decision

32. 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.

E.
Slinger
24 March 2023