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[2020] PBRA 53

Application for Reconsideration by Jenkins

Application

1. This is an application by Jenkins (the Applicant) for reconsideration of a decision of a three-member panel, dated the 02 March 2020, not to direct his release following an oral hearing.

2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.

3. I have considered the application on the papers. These consisted of the dossier running to 889 pages, the decision letter and the representations for reconsideration.

4. A non-disclosure application was made prior to the hearing. This was approved by the Panel Chair, who directed that the Applicant receive a gist, and his representatives receive both the gist and the full material. I was also provided with both. The Applicant's representative had the opportunity to make representations in relation to the non-disclosure application.

Background

5. The Applicant was sentenced to Imprisonment for Public Protection on 28 September 2007 for offences of armed robbery. The tariff was set at six years (with allowance for time on remand) and expired on 2 November 2012.

6. The Applicant was released on licence on 24 August 2016 but was recalled on 24 October 2016 after he failed to return to the designated accommodation following a period of temporary leave.

7. He was re-released again on 24 July 2017 and recalled on this occasion on 29 May 2018 following his arrest for offences including one of assault. The Applicant pleaded guilty to Actual Bodily Harm (ABH) at Court and the remaining charges were not proceeded with.

8. This was his first review following that recall.

9. Prior to this recall, but following his release, he received a suspended sentence for having a weapon on 5 September 2017.

Request for Reconsideration

10. The application for reconsideration is dated 11 March 2020.

11. The grounds for seeking a reconsideration are that the Panel have reached a decision that is an irrational one, and that it was reached in a manner that was procedurally unfair.

12. There are a number of complaints that are raised, that can be broken down as follows (I have summarised and, to some extent, re-ordered them):

    (a) The Panel failed to take the risks present in the index offence (home-breaking with a weapon) as the starting point;

    (b) The Panel erred by relying on the fact of a previous recall which did not involve further offending or substance misuse;

    (c) The Panel erred by placing excess weight on the fact that the Applicant was convicted of two offences whilst in the community;

    (d) The Panel gave insufficient weight to the fact that the Applicant was not convicted of 'any offence involving the use of a weapon', or robbery, or one involving a trespass;

    (e) There was no reliable evidence that the Applicant now presented a risk of instrumental violence (the use of weapons to achieve an end in this case), which is the historic source of his risk. The Panel wrongly equated the circumstances of the recall offence (which involved reactive violence) to the index offence;

    (f) The recall offence is not capable of leading to a finding of ongoing dangerousness;

    (g) The Offender Manager gave evidence as to whether the Applicant had misused substances that contradicted his written evidence, which led to the Panel misleading itself as to the Applicant's manageability in the community;

    (h) The evidence of both the Offender Manager and Offender Supervisor was that the Applicant's risk would be manageable, provided he refrained from misusing substances. Further, there was no evidence that he had been misusing substances since recall. The Panel erred by placing no (or insufficient) weight on this;

    (i) Given that there were two offences in the community, 8 months apart, the Panel could not reasonably conclude that the Applicant's risk was rapidly escalating;

(j) The Panel erred by concluding that the Risk Management Plan put forward (which involved release to Location A) could not manage his risk given he had been directed to live in Location B (where has previous offending was) previously, and that in Location A he would be away from old associates;

(k) The Panel erred in fact by stating that the Applicant had never worked, when he had previously worked;

(l) The Panel erred by placing too much weight on adjudications accrued since recall as they were not related to risk;

(m) The Panel erred by failing to place any, or any sufficient, weight on the lack of adjudications for violence since recall;

(n) The Panel erred by relying on allegations that were denied, and did not result in an adjudication;

(o) Insufficient reasons having been given for not finding the Applicant's explanation of why he was found with a high risk offender, or why he had a weapon. Neither did the Panel explain what they considered the Applicant to have been doing in either of these incidents; and

(p) The Panel have not explained why a transfer to open conditions would present an unacceptable risk of serious harm to the public.

13. In relation to grounds (a) to (m), I take these to be a complaint of irrationality. In relation to grounds (n) and (o), I take these to be complaint of procedural unfairness.

14. Ground (p) is in relation to the decision of the Panel not to recommend a move to Open Conditions. That is outside the scope of the Reconsideration Mechanism (see **Barclay [2019] PBRA 6**).

Current parole review

15. The Secretary of State referred the Applicant's case to the Parole Board in July 2018 following his recall to consider whether he should be released. If not, then the Panel was invited to advise the Secretary of State on whether he should be transferred to open conditions.

16. An oral hearing was directed in December 2018 which was listed on 9 May 2019. The hearing was adjourned the day before it was due to go ahead as the Applicant was mid-way through completing an accredited programme.

17. The case was re-listed on 20 November 2019, but adjourned again until 22 January 2020, when it was adjourned again until 21 February 2020.

18. On that day, the Panel heard oral evidence from the Applicant, as well as from his former Offender Supervisor, his current Offender Supervisor and his Offender Manager.

19. The dossier contained evidence of risk reduction work completed both prior to release and subsequent to recall, as well as evidence leading to the recall and details of the Applicant's custodial behaviour and concerns about substance misuse since recall.

20. Both the current Offender Supervisor and Offender Manager recommended release.

21. In the decision letter, the Panel considered that the assessment of current risk of the professionals underestimate the risk that the Applicant showed. In light of that, the lack of internal controls and the history of the case, it was assessed that the proposed Plan was not sufficient to manage the Applicant's risk.

22. In light of that, no direction for release was made.

The Relevant Law

23. The panel correctly sets out in its decision letter dated 2 March 2020 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

24. Under 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. This is such a case.

25. Such a decision is eligible for reconsideration on the basis that (a) the decision is irrational and/or (b) that the decision is procedurally unfair.

Irrationality

26. 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."

27. 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.

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

Procedural unfairness

29. 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.

30. 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.

    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 confirmed that he has no representations to make.

Discussion

32. The key issues are whether it was open to the Panel to conclude that the test for release was not met and, if so, whether sufficient reasons were given in doing so.

33. In considering this, I remind myself that this is one compendious question; it is not a question of considering whether there is a risk of a repetition of the index offence. The sole question is whether continuing detention is necessary to protect the public from serious harm.

34. I also remind myself that the grounds have to be considered as a whole and that a series of issues that may not, of themselves, be a material error of law may, when taken together, show that the conclusion of the Panel was flawed.

35. With that in mind, I shall consider the grounds of reconsideration in turn before returning to the question of whether the decision contained a legal error.

36. **Ground (a) – failure to start the risk assessment with the index offence** - Although a Panel is likely to start with the index offence, as that is the proven offence that led to the relevant sentence being passed, this is not a requirement.

37. In fact, it would be an error of law for the Panel to limit the consideration of risk to a repetition of the index offence, or to risk factors present in that offending.

38. **Ground (b) – over-reliance on previous recall** - Whilst it is correct to say that the fact of a recall does not indicate an unmanageable risk of serious harm, the Panel was entitled to consider that the previous recall (which was on the basis of non-compliance in the community) was a relevant factor in considering whether the Applicant's risk was manageable in the community on this occasion.

39. **Grounds (c) & (d) – incorrect analysis of offending whilst on licence** – Although it is correct to say that the Applicant was not convicted of using a weapon, of robbery or of an offence involving trespass, the fact that he was convicted on one occasion of carrying a weapon, and another of ABH, is highly relevant to the question of the risk of serious harm that the Applicant presents to others.

40. **Ground (e) – incorrect analysis of the risk of instrumental violence** – Even if that were so, it would not mean that the Panel should have directed release. They correctly focussed on the level of risk of serious harm that the Applicant presented overall.

41. In assessing that, it is perhaps unhelpful to separate the risk of serious harm from instrumental and reactive willingness to use violence, as there is not a clear delineation between the two and the risks of both are, to some extent, intertwined.

42. In any event, the Applicant was found with an offensive weapon without a reasonable excuse (as he must accept given his guilty plea) and, on another occasion, used unlawful violence. The Panel were entitled to use those convictions to conclude that there was a risk that the Applicant would, in future, be willing to use violence to achieve his aims.

43. **Ground (f) – weight placed on the ABH offence** – Even if the ABH that led to the recall did not show a risk of further offending similar to the index offence, it is plainly a matter from which a Panel could conclude the Applicant presented an ongoing risk of causing serious harm (whether or not it did so conclude, was a matter for the Panel).

44. **Ground (g) – the Offender Manager's evidence** – As the Grounds note, the Panel picked up on these contradictions and questioned the Offender Manager about it. In those circumstances, it cannot be said that the Panel were misled by the incorrect evidence given.

45. **Ground (h) – weight placed on the evidence of the professionals** – It is trite law that a Panel need not accept the evidence or recommendations of the professionals, even when they are in agreement. In this case, the Panel noted the recommendations in the decision letter and gave reasons why they considered

that the Applicant's risk was higher than the assessments of the Offender Supervisor and Offender Manager.

46. In any event, there is no challenge to the finding that the Applicant had recently been misusing medication in custody, which could well be considered to be an instance of misusing substances. Even though this was of a different nature to the misuse in the community, it meant that the Applicant's misuse of substance was still a 'live issue'.

47. **Ground (i) – weight placed on the offending in the community** – The Panel's comment at paragraph 6.3 is a general one in relation to the Applicant's risk profile ('your risk escalates' rather than 'escalated' on that one occasion), and not linked to the two offences in the community. That was a finding that was reasonably open to them.

48. **Ground (j) – analysis of the risk management plan** – The Panel gave reasons why the proposed Plan would not be sufficient to manage the Applicant's risk (including a statement that it appeared to be over-reliant on a move to Location A).

49. The main reason for the Panel's decision was that the Applicant did not have sufficient internal controls to manage his risk, which would be the case wherever he was located.

50. **Ground (k) – error of fact as to whether the Applicant had previously worked** – The Applicant has not indicated where it is in the dossier, or the oral evidence, it is evidenced that he had previously worked, beyond the bare assertion in the grounds for reconsideration.

51. In any event, this line appears in a paragraph of the decision where the Panel adopts the decision of a previous Panel (which was in the dossier). There is no suggestion that the Applicant was sufficiently concerned about the inaccuracy to raise this at the hearing as a factual error in the decision of the previous Panel.

52. Further, the Panel recounted, without any adverse comment, the Applicant's evidence that he would be able to work. For that reason, the error (if it was an error) cannot be considered to be a material one.

53. **Ground (l) – weight placed on the adjudications** – A Panel is entitled to take account of adjudications as relating to the compliance (and therefore manageability) of a person, which then goes to the question of risk.

54. It is then a matter for the Panel as to how much weight should be placed upon it. It is clear that it is one factor, or one of several, that fed into the Panel's general assessment of the case.

55. **Ground (m) – weight placed on the lack of adjudications for violence** – The decision letter sets out the adjudication history, and so the Panel were clearly aware of the lack of proven adjudications for direct use of violence.

56. I note that there was, in fact, an adjudication for threatening words and behaviour from 16 October 2018 where the Applicant was found to have 'adopted a fighting stance' and made what was taken as a threat to assault staff. It is of some age, but it is something that the Panel would have been entitled to consider.

57. In any event, there is no requirement for the Panel to list every factor that featured in its decision, nor does the fact that there have not been any adjudications for violence mean that his risk can be managed in the community – it is but one factor that the Panel has to weigh in the balance. The weight to be attached to it is a matter for the Panel.

58. **Ground (n) – reliance on allegations that were denied** – Whilst it may have been preferable for the Panel to have explicitly set out in relation to each allegation what was, and what was not, accepted and why, the majority of the incidents in the paragraphs that the Applicant raises are either proven adjudications, or matters that were accepted by the Applicant.

59. The Panel also noted the Applicant's account in relation to each of these points. When they had previously disbelieved the Applicant (a matter that I consider in the next ground), they clearly stated so. In those circumstances, there is nothing to say that they unfairly relied on matters that were not proven.

60. In any event, what fairness requires is not that each and every point raised is determined and reasons set out, but that the person reading the decision letter is aware of what the Panel has concluded and why. I consider that the conclusions of the Panel were sufficiently set out.

61. **Ground (o) – insufficient reasons for findings of fact** – Again, whilst it would have been preferable for the Panel to have gone on to explain (albeit briefly) why it was that they found the two accounts to lack credibility, neither matter was central to the conclusion of the Panel, and I do not consider that the absence of reasons can be said to have made the decision procedurally unfair.

62. **Ground (p) – lack of recommendation for a move to open** – This is outside the scope of the Reconsideration Mechanism (see paragraph 14 above).

Conclusion on irrationality

63. I have set out brief reasons on the points above why I do not consider that any of the individual points fulfil the test for irrationality. However, it is necessary to step back and see their cumulative effect.

64. Even taking them together, I do not consider that they are sufficient to say that the decision was an irrational one.

65. The panel had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant as well as the three professional witnesses.

66. 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.

67. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board 2019 EWHC 2710**.

68. This was the second time that the Applicant had been recalled and, on this occasion, it was for a further offence of violence. Although there had not been violence in custody, there had been instances of rule breaking. Given that background, I consider that it is clear that the decision that the Panel made was one that was open to it.

69. In reaching its decision, it fell to the Panel to conduct a balancing exercise of the various factors.

70. Although the recommendations are important, given the Applicant's behaviour in the community and the behaviour in custody, the Panel were entitled to conclude that he lacked the necessary internal motivation to engage with supervision.

71. Although they were not bound to do so, there was ample evidence on which a Panel could conclude that the risk that he presented was too high to be managed in the community. Again, whether they did so conclude was a matter for them.

72. This is provided, of course, that it was sufficiently reasoned, which I shall consider now.

Conclusion on procedural unfairness

73. The Panel's decision letter sets out the history of the Applicant's case and sets out in some detail the events since the Applicant's release and recall, as well as the evidence at the hearing.

74. Other than in relation to the question of the previous employment, which I do not consider that it could be considered to be material, no complaint is made that it does not accurately summarise the written or oral evidence or that any material was omitted.

75. The decision letter sets out reasons why there was outstanding work required in relation to his underlying attitudes to, and use of, violence, which was considered to be a central feature of his case.

76. The Panel have further explained why it is that they took a less optimistic view of the risk that the Applicant presents than the professionals. That was a view that they were entitled to take, and they have explained why they did so.

77. It is always possible to point to some particular point that could have been expressed more fully or drafted better. The ultimate question on a review is to consider the decision letter as a whole to see if it makes a decision that is a sustainable one and is one where the reader understands (even if s/he may not agree with) the reasons for the decision made.

78. In this case, I conclude that there was no unfairness. The Panel set out sufficient reasons why the Applicant did not have sufficient internal control to succeed and why, in their view, the proposed plan for release would not be sufficient to manage his risk.

Decision

79. For the reasons I have given, I do not consider that the decision was irrational, nor was it procedurally unfair.

80. Accordingly, the application for reconsideration is refused.

Daniel Bunting
10 April 2020