[2020] PBRA 58

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Application for Reconsideration by Girre

Application

1. This is an application by Girre (the Applicant) for reconsideration of a decision of an Oral Hearing Panel dated 2 March 2020 not to direct his release.

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 are;

    - The Dossier;
    - The Decision Letter;
    - The Application for Reconsideration;
    - An email from the Applicant's solicitor dated 6 April 2020 clarifying some points in the application; and
    - The Panel Chair's notes from the oral hearing.

Background

4. The Applicant was sentenced to an extended sentence of 8 years comprising of a custodial period of 4 years and an extended licence of 4 years for an offence of Robbery on 19 August 2013. His sentence ends on 9 October 2021.

5. The index offence involved the Applicant and his co-defendant robbing a male victim. Both the Applicant and his co-defendant were in possession of knives and during the course of the offence, the victim suffered multiple stab wounds including suffering a punctured lung due to one of the stab wounds.

6. The Oral Hearing Panel were provided with a Victim Impact Statement which described the continuing effect of the multiple injuries caused during the Robbery.

7. The Applicant was released on licence on 4 July 2016 but was recalled to custody on 14 July after being charged with further offences. Those charges were not proceeded with at court.

8. The Applicant was re-released on licence on 28 February 2018. He was then recalled to custody on 30 March 2019 after he was arrested in connection to a

serious offence. He has never been charged with that offence but remains 'a person of interest'.

Request for Reconsideration

9. The application for reconsideration is dated 30 March 2020 and has been submitted by Solicitors acting for the Applicant.

10. The grounds for seeking a reconsideration are as follows:

That the decision was irrational in that:

i. That the Applicant did not state that he had been in the segregation unit for 5 months in Prison A due to gang issues and that the panel held weight to this incorrect information;
ii. That the Applicant did not break his leg in 2019 (it was in fact mid-2018) and this inaccurate recording of the date by the panel led it to 'jump to the conclusion' that the Applicant may have been involved in a serious offence;
iii. That the Applicant denies any gang affiliations and that there was no evidence of such brought forward in the hearing;
iv. That the Applicant denies being part of the new offence which caused his recall;
v. That the OM or panel did not consider any other alternatives as to whether he could reside out of the London area; and
vi. That the overall decision was based on inaccurate and unfair information.

Current parole review

11. The Applicant's case was referred to the Parole Board by the Secretary of State to consider whether or not it would be appropriate to direct his release.

12. The case was directed to an oral hearing by a single member MCA panel.

13. The oral hearing was convened on 3 February 2020 and on that date the panel heard evidence from the Applicant, his Offender Supervisor and his Offender Manager.

14. At the close of the oral hearing, the panel were invited to adjourn the hearing in order to obtain numerous pieces of information. The panel agreed.

15. The panel adjourned the hearing and directions were set in order to obtain further information.

16. The panel received further information from:

- the police and social services via the Applicant's Offender Manager;
- the probation service records via the Offender Manager; and
- prison staff via the Applicant's Offender Supervisor.

17. In addition, the panel received closing submissions from the Applicant's legal representative dated 19 February 2020.

18. After consideration of the further information, the panel made its decision not to direct release.

The Relevant Law

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.

Mistakes of fact

22. 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.

The reply on behalf of the Secretary of State

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

Discussion

Ground i)

24. The Applicant submits that he did not say that he was in segregation in Prison A for 5 months due to gang issues and he submits that the panel placed weight on this inaccurate information. By way of email dated 6 April 2020, it was clarified that the Applicant stated that he had '*attended the segregation unit once and was there for 30 minutes*'. It is not clear in which prison this is said to have occurred.

25. The decision letter at page 2 records his evidence to have been "*in [Prison A] I was in seg for 5 months. I decided to change it around and asked to transfer outside of London. I had a lot of issues with people in prison*".

26. The Chair's notes are the official record of the hearing. There is no recording in this case due to the recording device not working, as confirmed by the Panel Chair. This was announced to all parties at the outset of the hearing.

27. The Panel Chair's notes do not entirely accord with the quote within the decision letter. The notes read '*I went to [Prison A] and I was in seg for 5 mths before I went. I decided to change it around and asked to go outside London. I had lot of issues with people in priosn [sic]*'.

28. It is therefore clear from the note that the time in segregation was before the move to Prison A. There is in fact numerous references in the dossier (including the previous decision letter from the panel reviewing the case in 2018) to the Applicant spending time in a segregation unit at Prison B. The information is that he spent 'frequent periods' in that unit.

29. I am reminded that this discussion is about the Applicant's time in custody prior to his first release.

30. Whilst his words in evidence were inaccurately recorded in the decision letter, this is limited to the institution where the situation occurred. The overall point remains the same.

31. The panel links the time in segregation to 'issues with people in prison' as those were the words of the Applicant.

32. Whilst it is clear from the decision letter that the panel placed weight on the Applicant's associates and noted that his behaviour was '*originally violent and aggressive towards others*' (page 7), there is no suggestion that specific weight was placed on the length of time spent in the segregation unit or the location.

33. The Applicant's turbulent history in prison during his sentence, in particular before his initial release, is repeated throughout the dossier and the Applicant does not indicate any inaccuracies within the dossier as part of his Application.

34. One inaccuracy of this nature within a decision letter does not lead me to conclude that the decision was irrational. It is not a 'fundamental mistake'. This ground therefore fails.

Grounds ii) and iv)

35. The Applicant says that he broke his leg in July 2018 and submits that the panel incorrectly recorded it as early 2019 and this led them to conclude that he may have been involved in a serious offence. He accepts that he remains a person of interest in this serious offence.

36. The Applicant further submits that he denies being part of the new offence which prompted his recall and whilst he remains a 'person of interest', he is not under investigation for that offence.

37. I will take these two grounds together.

38. The Applicant accepts that he suffered a broken leg and has always maintained that this was as a result of his friend shooting him with a nail gun by accident. The police however, suspect that the injury was caused by a gunshot as a result of information they received.

39. In March 2019, a serious offence occurred. Mobile telephone footage formed part of the evidence obtained during the investigation. It showed the suspects leaving the scene, one of which had a limp. That footage is part of the evidence relied upon by the Police to link the Applicant to the crime.

40. The Applicant became a suspect in that investigation but during November 2019, he was downgraded from suspect status to 'person of interest'.

41. In the decision letter, the Applicant's leg injury is referred to a number of times. In terms of dates, it is said at one point that the police were at the hospital when the Applicant was shot with a nail gun '*in February 2018'*. Later on, it is said '*at some time in early 2019 you were injured in your leg as you told the panel*'. It is therefore not clear whether one of those was in fact a typographical error.

42. Within the dossier, the Applicant's Offender Manager records the injury as having happened after his release in February 2018 but before the November 2018 as it had happened when the Applicant was managed by a different Offender Manager.

43. The Applicant's legal representative at the oral hearing made written closing submissions dated 3rd February 2020. Within those, it was submitted that,

'the only evidence the Police appear to have which would implicate [the Applicant] is 'grainy' video evidence of an individual fleeing the scene who has a limp. [The Applicant] was on two crutches at the time of the murder, completely incapable of walking unaided, let alone running. Indeed he was still on crutches many months later when in custody.'

44. The Applicant was therefore saying to the Panel that the injury was affecting him at the time a serious offence was committed, so much so that it would have

rendered him physically unable to run from the scene and therefore it was not him on the footage. It is not clear from the Applicant's submissions as part of his application for reconsideration why he is submitting the Panel recording it as early 2019 rather than 2018 would have affected their thinking with regards to his involvement with the serious offence, if anything the injury being more 'fresh' than it was would have assisted the Applicant in his argument that he was not involved. I asked for clarification regarding this point, but the response from the Applicant's Solicitors did not address that issue.

45. It is certainly clear from both the notes taken during the hearing and the decision letter that the Applicant has always denied being involved in the serious offence that occurred in March 2019 and the Panel considered his evidence as part of making its decision.

46. The Panel was perfectly entitled to consider allegations that have not been proven to the criminal standard *'as part and parcel of a global assessment of risk'* **(DSD).** The panel is entitled to consider allegations where it is not in a position to make a finding of fact as was the case here (**R (Morris) v Parole Board & SSJ [2020] EWHC 711 (Admin)**.

47. The Panel within its conclusion did not seek to make a finding of fact with regards to the Applicant's responsibility for that offence but did find on the balance of probabilities that he was involved in serious group offending. The Panel is entitled to draw its own conclusions from the evidence it heard, and this is discussed in more detail below.

48. In conclusion it is not clear whether the Panel did record the date of the injury incorrectly but even if they did in fact do so, it is clear that it was not the date of the injury that linked the Applicant to the further serious offence, it was the fact of the injury itself, which the Applicant accepts he had. The Applicant denies this offence and the Panel took account of his evidence and submissions on that issue as is made clear within its decision letter. I do not find that the Panel's decision to explore this further offence was anything other than entirely in keeping with its role and its ultimate decision could not be said to be unfair or irrational.

49. Accordingly, both of these grounds fail.

Ground iii)

50. The Applicant submits that there was no evidence of gang affiliations brought forward in the hearing.

51. Within the decision letter there are references to specific evidence seen or heard by the panel regarding the Applicant's alleged involvement or link to gangs. The dossier provided by the Secretary of State to the panel also includes information regarding the same. The references and information includes (but is not limited to); records of three different prison staff members having conversations with the Applicant regarding his gang affiliations and concerns, a further licence condition to prevent him from attending a well-known Carnival being added to his original licence as a result of the National Probation Service Serious Group Offending Unit recommending such a course of action and the Applicant's own admission that he

is known by a specific nickname which has been linked to a serious gang related crime.

52. I therefore reject the submission that there was no evidence of gang affiliation.

53. It is clear from the Panel's decision letter that the Applicant was asked about gang activity and affiliation. The Applicant repeatedly denied that was the case. The Applicant also made closing submissions on this subject and further denied such a link.

54. The Panel concluded on the balance of probabilities that the available evidence 'shows clear and repeated concerns about [the Applicant's] involvement in serious group offending'.

55. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it, including evidence from the Applicant, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.

56. There are no such compelling reasons here and thus, this ground fails.

Ground v)

57. The Applicant submits that his Offender Manager and the Panel ought to have considered alternative arrangements for him to live outside the London area if released. The Applicant submits that he does not accept that they did so.

58. It is right to say that the risk management plan considered by the Panel involved the Applicant returning to his own property.

59. It is also right to say that at no point did the Applicant request that alternative accommodation was sought, nor did he suggest any different options himself. In fact, his legal representative at the time of the hearing specifically requested that the adjournment be kept to a short timetable to enable the Applicant to be released to his own accommodation before the lease expired (*see adjournment notice dated 25 February 2020 in the dossier*).

60. It is therefore the first time that alternative arrangements outside of London have been mentioned by the Applicant. He was legally represented at the time. It would be illogical to conclude that a decision was irrational for not considering something which was not raised at the time when there was ample opportunity to do so. This ground therefore fails.

Ground vi)

61. The Applicant submits that the decision was based on inaccurate and unfair information.

62. As considered above, it is accepted that there was one example of inaccurate recording of evidence and one possible typographical error or mistake with

regards to a date. These inaccuracies did not appear to me to make any material difference to the decision, nor do they render the decision that the Panel came to as irrational.

63. In terms of unfairness, I will not repeat the discussion above regarding the Panel's findings about the Applicant's involvement with serious group offending and the Panel's entirely correct approach in exploring his possible involvement with a further serious offence. As the Panel itself concluded, a '*panel's risk assessment role extends beyond simple consideration as to whether criminal charges have been laid'.*

64. This ground therefore also fails.

Decision

65. For all the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

Cassie Williams
24 April 2020