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[2021] PBRA 182

Application for Reconsideration by Salmon

Application

1. This is an application by Salmon (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 29 October 2021 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 decision letter, the dossier and the application for reconsideration.

Background

4. The Applicant is serving a sentence of imprisonment for public protection imposed on 4 April 2007 following conviction for conspiracy to commit robbery, possession of a small firearm and possessing ammunition without a certificate. His tariff expired on 27 August 2011.

5. He was released on licence on 3 September 2018 following an oral hearing. His licence was revoked on 6 February 2020 following allegations of grievous bodily harm *("the alleged GBH"*) and criminal damage. He was returned to custody the same day. This was his first recall on this sentence and his first parole review since recall.

6. The Applicant was aged 27 at the time of sentencing. He is now 42 years old.

Request for Reconsideration

7. The application for reconsideration is dated 24 November 2021 and has been submitted by counsel acting on behalf of the Applicant.

8. It is submitted that:

   a) The panel's decision was irrational as it failed to take into account the Applicant's reduced cognitive ability and short-term memory issues which impacted on his insight and his ability to give evidence;

   b) The panel's finding of fact in relation to the alleged GBH was irrational as the panel failed to refer to a retraction statement made by a witness;

c) The decision was procedurally unfair as the panel made no adjustments for the Applicant's cognitive difficulties when questioning him; and

d) The panel's reliance on *"untested hearsay evidence"* in relation to the alleged GBH was procedurally unfair.

9. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

10. The Applicant's case was referred to the Parole Board by the Secretary of State in February 2020 to consider whether or not it would be appropriate to direct his immediate release.

11. The case was twice deferred by Member Case Assessment (MCA) panels on 23 March 2020 and 5 June 2020, noting that the allegations from the time of recall were progressing through the courts. It was further adjourned for the same reasons by a third MCA panel on 22 September 2020 and 14 December 2020.

12. The alleged wounding charge was dismissed on 7 January 2021 when the Crown offered no evidence. It is reported that the complainant in the matter retracted his statement.

13. The case was directed to oral hearing on 17 March 2021. The directions acknowledged the alleged wounding had been dismissed but noted the criminal damage charges remained outstanding.

14. The criminal damage charges were dismissed on 22 March 2021.

15. The case proceeded to an oral hearing before three independent members on 13 August 2021. It was adjourned on the day for the Applicant's Community Offender Manager (COM) to provide further information relating to the recall matters.

16. The hearing reconvened on 16 September 2021. The case was again adjourned on the day. The Applicant had not seen much of the newly disclosed information. Although the panel took some oral evidence from him, it adjourned when it considered that he was sufficiently disadvantaged by not having had an opportunity to consider the new information that it would be fair to continue.

17. The hearing reconvened on 27 October 2021. It was held by video conference. Oral evidence was taken from the Applicant, his Prison Offender Manager (POM) and his COM. The Applicant was legally represented throughout. The panel did not direct the Applicant's release (nor make a recommendation for open prison conditions).

The Relevant Law

18. The panel correctly sets out the test for release in its decision letter dated 29 October 2021.

Parole Board Rules 2019

19. 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. 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)).

20. 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**.

Procedural unfairness

21. 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.

22. 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.

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

Irrationality

24. 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."

25. 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.

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

The reply on behalf of the Secretary of State

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

Discussion

28. The panel made a finding of fact in relation to the alleged GBH. It is submitted that this finding of fact was irrational for two separate reasons:

    a) That the panel failed to consider the Applicant's reduced cognitive ability and short-term memory issues which impacted on his insight and his ability to give evidence; and/or

    b) That the panel failed properly to consider the impact of a second retraction statement given by the complainant in the alleged GBH.

29. The application for reconsideration can only be granted if it is shown that the decision not to direct the Applicant's release was irrational. However, the panel's final decision appears to have been influenced by the finding of fact to the extent that its final decision not to direct release may have been different if that finding of fact had not been made. I therefore find that the two decisions are linked such that if I find the finding of fact to be irrational for either of the reasons set out above, then the panel's decision not to direct release might well be (but will not necessarily be) irrational as a consequence.

Ground (a): Irrationality: Applicant's cognitive ability and memory

30. The first ground of irrationality argues that the panel failed to consider the Applicant's reduced cognitive ability and short-term memory issues which impacted on his insight and his ability to give evidence. The Applicant's cognitive and memory difficulties are well-documented within the dossier and would therefore have been known to the panel from the outset.

31. In making its finding of fact in relation to the alleged GBH the panel carefully set out nine reasons for making such a finding, including one which states that the panel did not find the Applicant's evidence convincing, nor his explanation credible. The decision does not explicitly refer to the Applicant's difficulties. It may have been that the panel did not feel the need to document these difficulties further given that they

are well rehearsed elsewhere. There is nothing to suggest they were raised by the Applicant's legal representative in the oral hearing or while the Applicant was being questioned.

32. I am not therefore satisfied that the panel's finding of fact was irrational for its failure to document the Applicant's cognitive and memory difficulties (of which it was aware) as part of its conclusion that it found the Applicant's evidence unconvincing. The panel set out eight other reasoned points to support its finding of fact and, even if I were to discount the point regarding the Applicant's credibility, I cannot see any way in which the panel's finding might have been different. Therefore, this ground fails.

Ground (b): Irrationality: second retraction statement

33. The second ground of irrationality relates to retraction statements made by complainant in the alleged GBH. In the first statement, the complainant notes his worries about "*further consequences*" of pursuing his complaint. In the second statement the complainant says he is less confident than he was about the circumstances of the alleged GBH. The panel used the first statement to evidence its concern that the complainant withdrew his statement due to fears for his own safety but did not refer to the second statement in which the complainant said he was less sure who assaulted him. There is a comment in both statements stating the complainant was not pressured or coerced into making them.

34. The panel's conclusion regarding the first statement is not outrageously illogical. While the complainant may well have retracted his original complaint of his own free will, it does not mean the panel has to accept that the retraction is true, nor that it cannot question the complainant's motive for making that retraction. The complainant specifically referred to potential adverse consequences for himself and his family and it was not unreasonable for the panel to conclude that the complainant did so in fear of reprisal.

35. It is unfortunate that the panel did not address the second statement explicitly in its decision as this would have made it clear that it had taken it into account. It is argued that the second statement fatally weakened the logic of the panel's overall finding of fact regarding the alleged GBH. However there are (as I have already mentioned) eight other reasoned points which support the logicality of the panel's finding of fact. Even when taking the matter raised in ground (a) which I have dismissed - into account, the Applicant has not taken issue with the rationality of the remaining seven reasons. These uncontested reasons are, in themselves, sufficient in my view to support a rational finding of fact in relation to the alleged GBH (particularly to the lower civil standard of proof required in these proceedings). This ground also fails.

Ground (c): Procedural unfairness: lack of reasonable adjustments

36. It is next submitted that the panel failed to make reasonable adjustments when questioning the Applicant despite his documented cognitive and memory problems.

37. Although a duty to make reasonable adjustments for disability arises under the **Equality Act 2010**, the application rightly concedes that illegality is not a basis on which to found an application for reconsideration. If the Applicant was prevented from putting his case properly, that could give rise to potential procedural unfairness within the scope of the reconsideration mechanism.

38. It is argued that, as no such adjustments were made, the Applicant was not questioned fairly and the panel's assessment of his credibility leading to the finding of fact on the alleged GBH was unfair. I have already found this finding of fact to have been material to the panel's decision not to direct release.

39. No suggestion is made as to what those reasonable adjustments might have been. The Applicant was legally represented throughout the hearing and if his legal representative felt that the panel's questioning was somehow unfair or disadvantageous to the Applicant then he had the opportunity to redress this unfairness during the hearing. There is nothing before me to suggest he did so. There is also no suggestion that the Applicant struggled to understand the panel's questions or give understandable answers in either the decision letter or the application for reconsideration.

40. There is no evidence to support procedural unfairness on this ground. In any event, as I have already stated, the Applicant's credibility was not the only factor which led the panel to its finding of fact. This ground also fails.

Ground (d): Procedural unfairness: untested hearsay evidence

41. It is next submitted that the panel's reliance on untested hearsay evidence (namely a police summary of evidence and a witness statement) was unfair. The decision notes that this point was also raised during closing submissions.

42. Rule 24(6) provides that the panel may receive any evidence whether or not it would be admissible in a court of law. Regardless of whether a court of law would have decided to find either piece of evidence inadmissible in legal proceedings, the panel was entitled to receive both pieces of evidence and decide how much weight to give them.

43. With regard to the police summary of evidence, the decision carefully notes the panel's awareness of its provenance and that the panel proceeded with caution as a result. It further noted that the Applicant's legal representative had not sought to call any witness to challenge the reports and concluded that is it was satisfied that it could make a fair finding of fact on the cumulative weight of the evidence.

44. It is further argued that following **Osborn [2013] UKSC 61** the panel should not have been predisposed to favour the official account of events over the case advanced by the prisoner. There is no evidence to suggest the panel was predisposed to favour the police evidence. Preferring a particular piece of evidence does not imply a predisposition to preferring it. The decision sets out the analysis taken by the panel and I am not satisfied that it started from anything other than a neutral stance.

45. With regard to the witness statement, it is submitted that the panel started from a position that the statement must have been true, and this unfairly put the burden on the Applicant to disprove the allegations.

46. The panel, in its analysis, weighed the various pieces of evidence in coming to its decision. It started from a neutral position. It did not start from an absolute acceptance of its truthfulness. It gave the witness statement evidence considerable weight, and it was perfectly entitled to do so. This ground also fails.

Decision

47. For the reasons I have given, I do not consider that the decision not to direct the Applicant's release was procedurally unfair or irrational and accordingly the application for reconsideration is refused.

Stefan Fafinski
17 December 2021