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[2023] PBRA 197

Application for Reconsideration by Maxwell

Application

1. This is an application by Maxwell (the Applicant) for reconsideration of a decision of a panel following an oral hearing on 26 September 2023 who decided 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 Applicant's dossier prepared by the Secretary of State (the Respondent), the Applicant's written application for reconsideration dated 20 October 2023 and the panel's decision letter dated 26 September 2023. I have also consulted the *Risk of Serious Harm Guidance October 2023 version 3* published by HM Prison and Probation Service.

Background

4. The Applicant, who is now aged 41, is serving an extended determinate sentence of 9 years and 6 months, comprising a custodial term of 6 years and 3 months and an extended licence period of 3 years and 3 months. The sentence was imposed on 19 March 2019, when the applicant was aged 35, following his guilty plea and conviction of robbery. At the same time, he pleaded guilty to possessing a lock knife (an offensive weapon) and received a concurrent sentence of 9 months' imprisonment. This was the Applicant's first review by the Parole Board, and he sought a direction for his release.

Request for Reconsideration

5. The application for reconsideration is dated 20 October 2023.

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

   The panel's decision not to direct the Applicant's release was **irrational** because: -

   (i) The panel misinterpreted the extent of the Applicant's previous violent offending by attributing to him an offence of 'reactive' violence;

(ii) The panel failed to adequately justify its decision that the Applicant poses an imminent risk of serious harm; and

(iii) The panel failed to adequately justify concluding that the Applicant has not developed sufficient insight into his risk factors.

Current parole review

7. The review was first considered at a hearing on 17 January 2023, which was adjourned for further assessment of the Applicant. A second hearing on 13 July 2023 was adjourned because a witness was unable to attend. Finally, a third hearing was convened on 26 September 2023 and evidence was taken from the Applicant and witnesses on behalf of the Respondent.

8. The panel of three members, including a judicial member and a psychologist member, considered a dossier submitted by the Secretary of State consisting of 442 pages of evidence. The Applicant was legally represented. The Respondent was not legally represented and did not make any oral submissions. Oral evidence was heard from the Applicant, the Prison Offender Manager (POM) who is the person responsible for managing the Applicant in prison, the Community Offender Manager (COM) who is responsible for managing the Applicant in the community if released, and a psychologist.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 26 September 2023 the test for release.

Parole Board Rules 2019

10. 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)).

Irrationality

11. 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."

12. 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.

13. 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

14. 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.

15. 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.

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

Other

17. 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.

18. 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.*"

The reply on behalf of the Respondent

19. The Respondent made no submissions in response to the application.

Discussion

20. 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 other witnesses. The Applicant was also legally represented throughout.

21. The witnesses each provided an opinion as to the Applicant's suitability for release and the manageability of his risk in the community. They were all in agreement that he had met the test for release, although with varying degrees of certainty. The panel disagreed with their opinions.

22. Where there is a conflict of opinion, it was plainly a matter for the panel to explain why their opinion differed from that of the witnesses, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above.

23. 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.

24. 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**.

25. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the witnesses, 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.

26. The reconsideration mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

27. In their grounds, the Applicant relies on three failures by the panel which, he asserts, led to its decision being irrational. I will address each in turn: -

i. <u>The panel misinterpreted the extent of the Applicant's previous violent offending by attributing to him an offence of 'reactive' violence.</u>

The Applicant refers to his previous conviction for wounding, which was recorded in the decision letters as being on "*a man with whom [the Applicant's] brother had a grievance relating to a … debt*". The Applicant asserts that this should have been categorised by the panel as instrumental violence rather than reactive violence, because it was premeditated and intended to achieve a goal.

I am satisfied that in its decision letter, the panel did attribute the Applicant's conviction for wounding as being a 'reactive' violent offence.

The offence was committed by the Applicant with his brother, they both were holding knives (although the Applicant denies doing so) and the victim sustained three stab wounds.

Whilst it is apparent that there was some premeditation in the offence, which is often considered to be a characteristic of instrumental aggression, I note that the Applicant was said to have been acting with hostility towards the victim in support of his brother. Based on the evidence in the dossier I am not satisfied that it was irrational for the panel to identify the Applicant's actions in the commission of this offence as reactive rather than instrumental. In my judgement, it was open to the panel to interpret the Applicant's behaviour in that way.

ii. <u>The panel failed to adequately justify its decision that the Applicant poses an imminent risk of serious harm.</u>

In reviewing the evidence of the witnesses at the hearing on 26 September 2023, the panel noted the Applicant's risk of causing serious harm in the community was assessed by the probation officer who would supervise his behaviour in the community as being high to the public, medium to known adults and medium to children.

An assessment of high risk of serious harm, according to the *Risk of Serious Harm Guidance October 2023 version 3* published by HM Prison and Probation Service, is described as being appropriate where the person,

> *"Is likely to appear on the lookout for opportunities to offend or engagement in regular behaviour that places them at significant risk of causing serious harm"* and *"the harm is not imminent as they may lack a specific target or circumstances are missing that would cause offending but this could change at any time".*

The panel recorded their conclusion that "*these assessments represent a reasonable indication of [the Applicant] s current levels of risk".* This

is not to say that the panel's own assessment of the Applicant's current level of risk was the same.

The panel noted that the psychologist witness "*did not consider risk of serious harm to be imminent as … [the Applicant] had enough understanding of his warning signs and they should be apparent to professionals*". The witness concluded that "*on balance risk could be manageable in the community although caution should be exercised in light of the Applicant's past pattern of behaviour*", according to the decision letter.

The panel also noted that the psychologist witness was concerned that the Applicant had not taken learning from an accredited programme he had completed to address learning and had consistently offended from a young age.

In its conclusion, the panel clearly set out its acknowledgement that all three professional witnesses considered that the Applicant's risk could be safely managed in the community, and that it "*did not depart lightly from their conclusions and paid them the respect they deserve but, in the final analysis, could not agree with them*". It went on to explain that it differed from the witnesses in its conclusion because it "*placed weight on [the Applicant's] previous offending, having regard to the frequency and extent of violence used, persistence of offending and its escalation*", and that whilst the Applicant had demonstrated good custodial behaviour this was "*of limited value when attempting to predict how he might react to problems and stressful situations in the community. His track record on this aspect is very poor*".

The panel was clear in defining why it did not agree with the professional witnesses' opinions, explaining it had concluded that they "*placed undue emphasis on [the Applicant's] prison behaviour and insufficient weight on his poor history of offending and compliance*".

I am satisfied that, in its reasoning, the panel identified the current risk factors in relation to the Applicant, and explained that it had not found sufficient evidence of the Applicant being able to manage those factors. I do not find that the panel's explanation of its assessment of imminence of risk is one so lacking in reasoning that it offends the guidance in **Oyston** and **DSD**, and I do not agree that the panel failed to adequately justify its decision that the Applicant poses an imminent risk of serious harm.

iii. <u>The panel failed to adequately justify concluding that the Applicant has not developed sufficient insight into his risk factors.</u>

The panel noted the evidence that, despite completing an accredited programme to address his use of violence in 2017, the Applicant went on to commit the index offence in 2018, and he told the panel he had not learned much from it. He did however find a more recent accredited programme addressing thinking skills to have been more useful.

It recorded that the probation officer in the community had concluded the Applicant showed "*some insight*" into his behaviours. The psychologist agreed that the Applicant had not taken any learning from the programme on violence. The panel recorded that, in his own evidence during the hearing, the Applicant had "*failed to instil any confidence in the panel that he had changed substantially from the person who had offended in the past*".

The panel, in its reasoning, did not say that the Applicant had no insight into his risk factors, but that he did not have sufficient insight. It also clearly set out its difference of opinion with the professional witnesses as to the weight to attach to the Applicant's previous pattern of offending behaviour.

I am therefore satisfied that the panel's reasoning was sufficiently clear to justify its conclusion that the Applicant had insufficient insight into his risk factors to enable it to be satisfied that he had met the test for release.

Taking all three limbs to the Applicant's grounds of application, and applying the guidance set out in **Oyston** and **DSD** in particular, I am not satisfied that the Applicant has met the high hurdle of proving that no sensible person who applied his mind to the question could have arrived at the same decision as the panel.

Decision

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

Victoria Farmer
14 November 2023