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[2024] PBRA 100

Application for Reconsideration by McNally

Application

1. This is an application by McNally (the Applicant) for reconsideration of a decision dated 23 April 2024, following an oral hearing on 5 April 2024. The decision of the panel of two Parole Board members was to make no direction for release and no recommendation that the Applicant progresses 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.

3. I have considered the application on the papers. These are an application made by the Applicant's solicitors, Tuckers, dated 24 April 2024, and the dossier of papers considered by the Parole Board panel at the oral hearing, numbering 276 pages. No other relevant material has been brought to my attention.

Background

4. On 14 December 2010, when he was aged 19, the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection (IPP) with a minimum tariff of 1 year 325 days That sentence was imposed following his conviction of wounding with intent to do grievous bodily harm (the index offence), contrary to section 18 of the Offences Against the Person Act 1861. The offence, to which the Applicant pleaded guilty, was committed on 11 June 2010.

5. The circumstances of the index offence were that the Applicant had an altercation with his cousin and aunt, and aunt's partner. During the altercation, the Applicant struck his aunt's partner several times to the head with a metal bar, causing the victim serious injury.

6. Prior to the index offence, the Applicant had a significant history of offending, including a number of convictions for violence.

Request for Reconsideration

7. The application for reconsideration is dated 24 April 2024.

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

    a) That the decision is irrational;
    b) That the oral hearing was procedurally unfair;
    c) And/or there has been an error of law.

9. The particulars of the grounds, whilst indicating in the "*Introduction*" section of the representations made on behalf of the Applicant that the writer was of the view that "*and/or there has been an error of law*", were silent as to any suggested error of law. I have however identified the issues, on the basis they are raised in the "*Representations*" section of the submissions, as follows:

    Procedurally unfair

    - The panel placed too much weight on the Applicant's use of drugs and that drug misuse in this case is not linked to serious harm.
    - The panel did not take into consideration information about how the Applicant spent his time in the community, and the panel erred in its assessment that isolation and introvert behaviour is linked to risk.
    - The panel did not take into consideration the Applicant's willingness to go to a residential rehabilitation placement.
    - The panel erred in its assessment that the Applicant was not sufficiently open and honest with his Community Offender Manager (COM).

    Irrational

    - The panel did not take sufficient note of the Applicant having committed no further violent offences since the index offence.
    - The panel was irrational in the weight it attached to the Applicant's difficulties coping in a custodial setting, and when indicating that a period of stability and time to improve his relationship with professionals was required, because there is no evidence of violent behaviour in custody.
    - The panel's assessment that drug misuse by the Applicant was linked to serious harm was irrational.

Current parole review

10. The Applicant was first released on licence on 21 August 2018 at the Parole Board's direction following an oral hearing. He was recalled on 28 October 2018 after a reported breach of his licence, but remained unlawfully at large until 14 November 2018 when he was returned to custody.

11. He was then released for a second time on 3 June 2019, again at the Parole Board's direction following an oral hearing. He remained in the community on licence until his second recall on 11 August 2023, returning to custody on 15 August 2023.

12. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in September 2023, following his recall and the oral hearing that took place on 5 April 2024 considered that referral.

13. The hearing on 5 April 2024 was conducted by two independent members of the Parole Board. Oral evidence was taken from the Applicant, his COM and his Prison Offender Manager (POM). The Applicant was legally represented at the oral hearing by a representative from Tuckers Solicitors.

14. Following the hearing there was a short adjournment whilst the decision letter was being finalised. It was subsequently issued, dated 23 April 2024.

The Relevant Law

15. The panel correctly sets out in its decision letter dated 23 April 2024 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 (as amended)

16. 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)).

17. 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

18. 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."*

19. 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.

20. 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

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.

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

23. 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.

24. 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

25. On 1 May 2024, the Respondent confirmed that he offered no representations in relation to this application.

Discussion

26. Whilst in their submissions, the Applicant's representatives have particularised the areas in which they suggest the panel erred or was irrational separately, there is a considerable degree of overlap. I have first considered the area of the significance of

the Applicant's drug use to decide whether there was procedural irregularity, irrationality or any error of law.

27. The Applicant submits through his representatives that the panel were wrong to equate his substance misuse with risk of causing serious harm.

28. It is accepted and established that the Applicant has used drugs in the past. He has admitted using cannabis and cocaine some years before committing the index offence, although denies that he was doing so at the time of committing that offence.

29. In November 2016 the Applicant escaped from open conditions after he had used cannabis and cocaine.

30. In July 2023 the Applicant disclosed to a member of Probation Service staff that he had begun to misuse cocaine and cannabis when in the community on licence.

31. Since his return to custody, the Applicant has spent time on the Drug Recovery Wing, which the panel clearly noted. Nonetheless, on his own admission the Applicant used Spice in prison as recently as February 2024.

32. A security report indicates that the Applicant was found to have hooch (alcohol) under the bed in his cell in January 2024. However, no adjudication appears to have been held and the Applicant denies possessing or knowing about the existence of the alcohol. The panel does not appear to have placed any significant weight on the finding of that alcohol.

33. It is therefore clear that misusing drugs was an ongoing and present feature in the Applicant's life, which the panel set out in its decision letter.

34. In that letter, the panel identified substance misuse as being one of several "*major risk factors*" linked to his offending history, concluding that the abuses of substances could act to disinhibit the Applicant and make him more likely to offend.

35. The panel's decision letter records that during the course of his sentence, the Applicant has completed offending behaviour programme work on drug and alcohol misuse. Clearly therefore drug and alcohol misuse has historically been identified as a risk factor relevant to the Applicant's offending.

36. The decision letter records the oral evidence of the Applicant's POM being that one of the Applicant's main risk factors is substance misuse, and that the Applicant did not have "*a clear understanding of why he was using cannabis and cocaine in the community*". They recommended that he complete further one-to-one work on substance misuse in custody before release, as well as remaining drug free for a "*longer period of time*".

37. The Applicant's own oral evidence was that he was using cannabis regularly for self-medication and cocaine regularly, possibly for "*self harm reasons*". His evidence was that substance misuse was one of his risk factors, and he admitted using Spice in January and part of February 2024.

38. The Applicant's COM's evidence acknowledged that he had not committed any offences in custody whilst misusing substances, but that he needed to show a period of stability before being suitable for release, which included being substance free.

39. Engagement with a substance misuse support service was a licence condition on the Applicant's previous releases, and proposed as part of the risk management plan presented to the panel at the oral hearing.

40. The panel clearly sets out in its conclusion to its decision letter that "*many of [the Applicant's] previous offences were linked to substance misuse*". I note the information in the OASys assessment in the dossier that previous offences of violent disorder, wounding, actual bodily harm and possession of an offensive weapon were committed whilst under the influence of alcohol.

41. The Applicant submits that his offending is linked to alcohol misuse and not drug misuse. He refers to a previous panel decision letter (dated 5 May 2019) where that panel agreed that drug misuse was not linked to the risk of serious harm. I do not find that this panel is bound by the findings of a previous panel, and disagree that the previous panel's identification of risk factors means that this panel was not entitled to take a different view.

42. The Applicant submits that whilst he has self-harmed whilst misusing drugs, no other person has been at risk of harm from the Applicant. He submits that "*there is no risk whilst [he] is using drugs*".

43. I also note the OASys assessment in the dossier at page 107 of the dossier, which sets out that the Applicant has misused substances to "*self-medicate*" and to "*escape his lifestyle and thoughts*", as well as to lessen the symptoms of poor mental health. It notes that drug misuse has previously been linked to the risk of serious harm, but acknowledges that "*there has been an absence of offending, aggression and harm towards the public*" whilst the Applicant has misused drugs. The conclusion of the OASys assessor is that the risk is of serious harm to the Applicant himself.

44. I note that the panel, in its decision letter, indicates that it has concluded that when the Applicant is "*misusing substances and not stable there is a heightened risk*". It is unclear however how the panel has linked that increase in risk to the misuse specifically of drugs rather than of alcohol.

45. I have carefully considered whether the panel has sufficiently linked the misuse of drugs specifically to the risk of serious harm, such that it cannot be said to be irrational to do so, and that they have properly considered and identified the correct risk factors so that the process was procedurally fair.

46. I have looked to the decision letter to set out the panel's rationale for doing so. Unfortunately, in relation to the assessment of the risk arising from the Applicant misusing drugs, the panel's reasoning is unclear.

47. I note that the panel refers, in its conclusion, to "*many of [the Applicant's] previous offences were linked to substance misuse. In the panel's opinion, this is a key risk factor*". It is clear that the Applicant has used, and until recently at least continued to use, drugs. There is however no evidence that I can identify that he has, since 2010,

used violence or caused serious harm to others whilst under the influence of drugs. There is no evidence of the Applicant using violence whilst in the community following his escape from open conditions, or during the almost four years he was in the community on licence between June 2019 and August 2023.

48. It is also clear that his failure to engage with a substance misuse service in the community, which put him in breach of a licence condition to do so, was an important factor in the decision made by the Probation Service to recall him. The panel records that "*it was assessed by probation that his risk had increased, substance misuse being linked to his risk factors, and as a result he was recalled*." That panel considered that decision to recall to be appropriate, but again there is insufficient explanation as to why the misuse of drugs increased risk, in the absence of evidence of increasing harm to others when the Applicant has not caused serious harm to others whilst having misused drugs in 2016, whilst on licence between 2019 and 2023, and in custody in 2024.

49. The panel refers to the Applicant's instability in custody, and identifies instability as the other key risk factor, in their assessment. I note that whilst the Applicant has "*self-medicated*" with illicit substances, there is also indication in the dossier of long-standing and serious mental illness, which has contributed to his instability and chaotic lifestyle.

50. It appears, on the evidence before me, that the panel has not sufficiently clearly distinguished in its rationale between alcohol misuse (of which there is plenty of evidence linking it directly to the Applicant's risk of serious harm) and drug misuse (of which there is not).

51. It is important to note that the panel agreed with the opinions of the Applicant's POM and COM, that his release was not manageable in the community at the time of the hearing, and the particular opinion of his POM that his drug misuse was a key factor in reaching that decision.

52. 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.

53. It is a well-established ground for judicial review that the tribunal has considered information which it is accepted is inaccurate. The grounds for reconsideration mirror those for Judicial Review and therefore it is also a ground for reconsideration. I accept that it is capable of being both irrational and procedurally unfair to consider inaccurate factual information in making a decision. It is important that decisions are not only fair but are also seen to be made according to a fair procedure. If incorrect information is included in the decision letter, the fairness of the procedure is called into question.

54. In this case, I am being asked to conclude that the linking of drug misuse to risk of causing serious harm to others is incorrect and inaccurate. I find that the area of concern is the panel's conclusion that there is a risk of serious harm when the Applicant misuses drugs, which does not amount to a "*fact*" or "*factual information*", but rather its assessment when factual information in the dossier is inconsistent with its conclusion. In my judgement the panel has not sufficiently explained their reasoning

as to why there is a link specifically between drug misuse (rather than alcohol misuse) and the Applicant having caused/being likely to cause serious harm to others.

55. I have looked closely at whether that assessment was such a significant part of the panel's rationale for not directing release as to make the decision as a whole irrational. I have borne in mind the high hurdle which must be crossed to find irrationality, namely:

"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."

56. The panel is clear in its conclusion that substance misuse is a "*key risk factor*". It refers to his ongoing substance misuse (in fact drug misuse, but not specified as such) in prison since recall. Whilst there were other factors clearly set out by the panel as contributing to its decision (including the Applicant's difficulty coping with pressures of community life, concerns around the strength and openness of his relationship with his COM, and an over-reliance on self reporting in the risk management plan) the panel is clear in its conclusion that "[*the Applicant] does not meet the test for release. He needs a period of stability, remaining substance free and improve his relationship with professionals*".

57. I do not find therefore that the panel based its decision not to direct release solely on the assessment that drug misuse is a key risk factor and linked to serious harm in the Applicant's case. However I do find that assessment was a significant factor in its decision making, and I am satisfied that it did affect the panel's decision. I make this finding because:

a. The panel clearly links substance misuse to risk of serious harm.
b. It found that the decision to recall the Applicant, based on his ongoing substance misuse and disengagement from appointments and support albeit with there being no evidence of threat or harm to others, was appropriate.

58. I have not, however, concluded that the decision not to release the Applicant meets the very high test of irrationality.

59. It may well be the case that the panel concluded that the Applicant's drug misuse was an indicator of instability which could lead to reoffending, but following ***R (Wells) v Parole Board*** **[2019] EWHC 2710 (Admin),** I must consider whether there is an unexplained evidential gap or leap in reasoning which fails to justify the conclusion. I find that there is. The decision infers, without reference to substantive evidence or other explanation, that there is a link between the Applicant misusing drugs, and him causing serious harm to others. Therefore, I have concluded that the failure to give clear reasons for its decision, amounts to a procedural irregularity.

60. Having reached that finding, with the inevitable consequence that the application is granted, I have not gone on to consider the other grounds as there is no need to do so.

Decision

61. Accordingly, whilst I do not find there to have been a procedural irregularity, I do consider, applying the test as defined in case law, that the decision not to direct the Applicant's release, was procedurally irregular. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

Victoria Farmer
20 May 2024