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[2019] PBRA 43

Application for Reconsideration by Joseph

Introduction

1. This is an application by an indeterminate sentence prisoner, Joseph ("the Applicant"), for reconsideration of the decision of a panel of the Board in his case. The decision was issued on 13 September 2019 after a series of oral hearings. The Oral Hearing Panel ("OHP") did not direct his release on licence and did not recommend to the Secretary of State that he should be moved to open conditions.

2. The case has been reviewed by a Reconsideration Assessment Panel ("RAP") which has considered the following material:

- Dossier running to 840 pages which includes the 29-page decision letter;
- Representations running to 34 pages submitted by the Applicant's solicitor on 2 October 2019 in support of the application;
- E-mail dated 11 October 2019 from PPCS stating that they do not wish to make any representations in respect of the application.

Background

3. The Applicant is aged 47. It is agreed that he suffers from paranoid schizophrenia (said to be controlled by medication and currently in remission) and has a paranoid personality disorder. There is a difference of professional opinion about whether he also has an anti-social personality disorder: the OHP, which included a psychiatrist member of the Board along with two independent members, concluded that he does. It was fully entitled on the evidence to reach that conclusion.

4. On 21 February 2003 the Applicant received a 15-year sentence for his part in a conspiracy to commit armed robbery. In May 2003 that sentence was varied by the Court of Appeal to a hospital order under sections 37 and 41 of the Mental Health Act 1983. The Applicant was treated for a time at a secure hospital but then transferred to a medium secure one from which, in July 2007, he was conditionally discharged to a hostel in the community.

5. On 7 September 2007 he was involved in another conspiracy to commit armed robbery ("the index offence"). After being arrested, charged and sent for trial he tendered a plea of guilty on a written basis which stated that, although he was the person who threatened the victim with a gun, the gun was an imitation one and he was acting under duress from another man (M). At a later stage he was allowed to retract his plea of guilty, and there was a trial in

which he denied any involvement at all in the robbery and did not pursue any suggestion of duress. However, the jury convicted him (according to the judge's sentencing remarks, on clear evidence).

6. The sentencing did not take place until 15 April 2011. Extensive investigations into his mental health had been carried out to see whether another hospital order was appropriate. The judge decided on the medical evidence that it was not. He therefore imposed a sentence of imprisonment for public protection ("IPP") with a tariff of 102 months less the substantial period which the Applicant had spent in custody on remand.

7. Unfortunately the account of the index offence contained in early versions of the an assessment of risks and their origin appears have been based on the retracted basis of plea rather than on the trial judge's sentencing remarks which set out the true facts as they emerged at the trial. Later versions of the an assessment of risks and their origin did not repeat this misleading account, but the earlier versions remained (uncorrected) in the dossier and appear to have caused a certain amount of confusion (see below).

8. As a result of the different sentences for the two offences of conspiracy to commit armed robberies, the Applicant can only be released from prison if (a) the Board directs his release on licence under the IPP and (b) the Secretary of State consents to a further conditional discharge under the section 41 hospital order (he is currently regarded by the Secretary of State as being conditionally discharged to prison). If and when released he will be subject both to the conditions of his IPP licence and to the conditions of his discharge under the hospital order.

9. In 2013 the Applicant spent three months being assessed in a secure hospital before being returned to the prison system, where he has remained.

10. His IPP tariff expired on 15 December 2016, and this is the first review of his case by the Board. It has been substantially delayed, for reasons set out in detail in the OHP's decision. In summary it was initially deferred for an independent psychiatric report to be prepared, and then deferred again to allow the Applicant to complete an offending behaviour programme: it was then adjourned no fewer than 3 times by the OHP itself. The principal hindrance in the way of the earlier conclusion of the review was a series of regrettable failures on the part of probation to provide a satisfactory risk management plan or to achieve a "*joined up approach*" with the Community Mental Health Team.

The relevant law

11. The OHP's decision not to direct the Applicant's release on licence is eligible for reconsideration under Rule 28(1) of the Parole Board Rules 2019.

12. Although criticisms are made on the Applicant's behalf of the decision not to recommend a move to open conditions, that decision is not eligible for

reconsideration: Rule 28(1) is confined to decisions about a prisoner's suitability for release on licence.

13. The only two grounds for reconsideration under Rule 28(1) are irrationality and procedural unfairness.

14. Irrationality is a concept well known in judicial review proceedings in the High Court. In ***R (on the application of 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 paragraph 116 of its judgment:

"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".

This was the test set out in a different context by Lord Diplock in the House of Lords in ***CCSU -v- Minister for the Civil Service [1985] AC 374.***

15. 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.

16. The fact that Rule 28 uses the same word as is used in judicial review cases clearly demonstrates that the same test should be applied when considering an application for reconsideration of a panel's decision.

17. Procedural unfairness may result from a variety of procedural irregularities. Not all such irregularities will affect the fairness of the proceedings and afford grounds for reconsideration.

Solicitors' representations

18. The Applicant's solicitors submit that the OHP's decision not to direct release on licence was both irrational and procedurally unfair. Under both headings they make a large number of complaints which will be discussed in detail below.

Representations on behalf of the Secretary of State

19. There are none (see above).

Discussion

Complaints of irrationality

20. The multiple reasons for the solicitors' suggestion that the decision was irrational can be grouped under the following headings:

- Failure to accept the recommendations of the professional witnesses

- Mistakes of fact
- Attaching undue weight to various parts of the evidence
- Failing to attach sufficient weight to other parts of the evidence and
- The OHP's approach to the Applicant's mental health difficulties and his problems with professionals.

The OHP's failure to accept the recommendations of all six professional witnesses

21. The six professional witnesses, all of whom by the time of the hearing were supporting release on licence, were:

- The previous Offender Supervisor;
- The current Offender Supervisor;
- The Offender Manager;
- The Head of Services for the Offender Manager's probation area;
- A Prison Psychiatrist; and
- An Independent Psychiatrist instructed by the Applicant's solicitors.

22. 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 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.

23. If a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses without giving any reasons for doing so, that might be a ground for saying that the decision was irrational. Similarly if it were to give reasons which were flawed or which did not on proper analysis support their conclusion, that might also be a ground for saying that the decision was irrational.

24. However, in this case neither of those situations arose. The panel gave detailed, clear and convincing reasons for its own conclusions and for departing from the views of the professional witnesses.

Mistakes of fact

25. The solicitors submit that the OHP made several mistakes of fact in this case. Mistakes of fact do not necessarily render a panel's decision irrational, but may do so if they have a significant impact on the decision.

26. **The Applicant's previous convictions.** The solicitors' submissions on these are a little confusing and appear to conflate convictions relating to two separate incidents: (a) a conviction in December 1991 for the unusual offence of causing bodily harm by furious driving, for which the Applicant received a 12-month sentence and (b) a conviction in January 1996 for assaulting 2 police officers, for which he received a 60-day sentence.

27. It is correct that the OHP made one mistake in relation to the 1991 offence. Having earlier in its decision correctly referred to that offence as including "*bodily harm*", in summarising the Applicant's evidence it referred to it as including "GBH".

28. In relation to the 1996 conviction, the panel made no mistake: it merely noted that the Applicant had been convicted of assaulting a police officer when he had attempted to resist arrest, and it gave no further details. The 60-day sentence for the offence suggests that the magistrates regarded it as quite serious. The solicitors state that the arrest was due to mistaken identity but that does not alter the fact that the Applicant was convicted of assaulting the officer(s).

29. **The facts of the index offence.** The OHP summarised the index offence as follows:

"You were convicted of one count of conspiracy to rob ... You pleaded guilty on a basis of plea … This robbery took place with the context of a series of cash in transit robberies which took place throughout the South East over an extended period. It involved others, including a man, who was ultimately shot dead by police … The robbery in which you were involved was committed with another. You threatened a Group 4 security guard with a handgun, outside a bank. The security guard dropped the cash box. In your haste you fled the scene, inadvertently leaving the cash box (with £15,000 in it) behind.

"Some time later a 'lock up' was searched as part of on-going police investigation. Inside a handgun was recovered hidden in the unit. It had five live rounds in its chamber. The gun found was similar to the gun described by the victim in your index offence. At the time of sentence, the Judge stated that he considered you were one of the group 'who was prepared to and did carry firearms'. However, you were convicted on a basis of plea, namely that the gun used was an imitation."

30. The solicitors state that it was factually incorrect to state that the gun found was similar to the gun used in a previous offence. That is not what the OHP stated: it stated (correctly) that the gun was similar to the gun described by the victim of the index offence.

31. The panel did make one mistake of fact to which the solicitors have not drawn attention: it stated that the Applicant was convicted on a basis of plea when in fact he was permitted to withdraw his plea of guilty and the accompanying written basis, and was convicted by a jury after a contested trial. This mistake was no doubt a consequence of the misleading account in some of the probation documents.

32. The solicitors emphasise that it is the Applicant's contention that he was not guilty of the index offence and that his guilty plea was entered on the basis of a plea bargain on the advice of trial counsel, which he then retracted. A point was evidently made at the hearing on the Applicant's behalf that a barrister

who had acted for him (the OHP understood it to have been the one who advised on the plea bargain and basis of plea) had at some time been struck off. The representations state that it was in fact a barrister who had acted for him on an earlier occasion.

33. The final mistake (and perhaps the most significant one) identified by the solicitors is that the OHP was mistaken in stating that *"During your sentence you have given various accounts in relation to the index offence. You have variously denied being involved altogether or, believe yourself to be the victim of a conspiracy between the police and court services, or stated that you were only involved because you were under duress."*

34. The panel was clearly confused about this. Careful examination of the dossier shows that throughout his sentence the Applicant has consistently denied any involvement in the index offence: he has made various suggestions about why he was convicted, including the suggestion that his conviction was the result of a conspiracy between the police and court services. The allegation of duress was not made during the Applicant's sentence but was contained in the written basis of plea which he was permitted to withdraw.

35. The significance (or lack of it) of the various misunderstandings of fact on the part of the OHP will be discussed under the "Decision" heading below.

Attaching undue weight to various parts of the evidence

36. It is submitted that the OHP attached undue weight to a number of factors in making its risk assessment. It is unnecessary to itemise these factors: it is sufficient to say that the RAP is not persuaded that there is any force in the complaints made about any of them. All of the factors were ones which the OHP was fully entitled (and indeed bound) to take into account in its risk assessment, and the RAP is unable to find that the weight attached to any of them by the OHP reached the high threshold for a finding of irrationality.

Failing to attach sufficient weight to other parts of the evidence

37. The solicitors draw attention to a number of positive factors which they submit outweighed the negative ones and to which they submit the OHP failed to attach sufficient weight. These include the Applicant's successful completion of the relevant rehabilitation and victim awareness courses; evidence of some improvement in the Applicant's insight into his offending; evidence of his abstinence from substance abuse; the absence of any evidence of actual violence in custody; his ability to pursue complaints in the appropriate way; his good work as a peer mentor and helping people with disabilities; the lack of evidence of association with problematic prisoners; and evidence of likely sources of legitimate funds.

38. All of these factors were recognised by the OHP, which was fully entitled to its conclusion that they were outweighed by the negative factors which it carefully identified in its exceptionally detailed decision. Those included, crucially, a findings that "*the Applicant's insight into his offending and core risk factors*

was underdeveloped" and that "*there were outstanding core treatment needs, namely work to address his significant and enduring personality issues*."

39. There was evidence to support the OHP's conclusions on each of the negative factors which it identified. There was also evidence to support the panel's finding on another factor suggested by the solicitors to be a positive one. That finding was as follows:

    "Although report writers spoke of improved behaviour, the panel was not so convinced. In their assessment, your enduring sense of 'own right' remains evident and the examples of improved compliance occur predominantly in situations when you have managed to secure your own way, or when you are doing something you like. There was clear evidence to show that when the reverse is true you will speedily resort to hostile and obstructive behaviour. Having listened to extensive evidence, the panel concluded that because of how you have presented in the past, and your propensity to complain and seek legal redress, staff and other professionals may be more likely to appease you to avoid confrontation and difficulties, to some extent."

The OHP's approach to the Applicant's mental health difficulties and his problems with professionals.

40. The Applicant has certainly had his problems (not all of which may have been of his own making) with his Offender Manager, some members of the Healthcare Team and some members of the wing staff. The solicitors criticise the OHP's approach to these matters as being unduly negative. The RAP does not agree.

41. The solicitors suggest that the OHP *"failed to entertain how the Applicant's mental health problems may influence his behaviour and other people's responses".* However, the OHP was clearly well aware of that situation, and was fully justified in regarding it as a risk factor. It acknowledged the Applicant's progress in developing insight into his paranoid traits (and therefore an ability to manage them) but concluded - as it was entitled to do on the evidence - that he had not made the same progress in relation to his anti-social traits.

42. On any view the Applicant's relationship with his Offender Manager had not been good. That was probably due to a combination of his own problematic personality traits and the Offender Manager's failings, which were clearly recognised by the OHP. It was encouraging that there had been recent signs of an improvement in the relationship, but the panel was fully justified in treating it as relevant to risk and something which needed to be improved if his risk was to be safely manageable in the community.

43. There had also been problems in his relationship with the Healthcare Team. He had taken against the Healthcare Manager and another nurse who was made responsible for dealing with him. He wanted another, less experienced, nurse to be responsible for his case, and was resentful when his wishes were not met. He refused to deal with the manager and the nurse allocated to him

(a fact confirmed by the Offender Supervisor in his evidence to the panel). All the faults may not have been on his side, but the panel was fully justified in treating his own problematic personality traits as having contributed substantially to the problems. Engagement in the community with mental health professionals (whose views the Applicant may not appreciate or respect) is an important part of any risk management plan.

44. There were a large number of c-nomis entries and security reports relating to the Applicant's challenging attitudes and behaviour towards staff, though these had reduced dramatically in recent times. The solicitors emphasise that the Applicant is a black Muslim and as such, he says, suffers from racial prejudice on the part of some members of staff which may account for some of the negative reports that have been made. Regrettably, as the OHP will have been fully aware, there are some people - both in prison and the community - who are racially prejudiced, and coping with the challenges which that presents is important.

45. Whilst it may be the case that some members of staff are prejudiced against the Applicant, it is clear that many of the matters recorded against him cannot be explained in that way. The Offender Supervisor, who knows the Applicant well and is generally supportive of him, confirmed in evidence that he still presents as paranoid; he gets on well with some staff (those that he likes) but not with others; and he still tends to become angry and aggressive at times. The OHP also had the advantage of seeing the Applicant give evidence, and its observations were consistent with the picture which emerged from the various reports by staff members.

46. All in all the RAP cannot find that anything in the OHP's approach to the Applicant's mental health difficulties and problems with professionals comes anywhere near irrationality.

Complaints of procedural unfairness

47. The solicitors make a number of complaints about things which did or did not happen during the review, but the RAP is unable to find that any of the matters complained of could amount to procedural unfairness. The complaints are as follows.

    (1) *That the OHP failed to hold a directions hearing.* Whether to hold a directions hearing was entirely a matter within the discretion of the OHP. There were in fact a number of oral hearings after which directions were given, and other directions were also given from time to time. At one point the panel chair proposed to hold a directions hearing, but then decided that it was unnecessary: she was fully entitled to do so. The absence of a directions hearing cannot have affected the OHP's decision.

    (2) *That the OHP failed to bring a timely resolution to the review.* The OHP did its best to progress the review but was repeatedly frustrated by failures on the part of probation. It would not have been fair to the Applicant to make a decision without all the necessary information.

(3) *That the MCA member should have requested a copy of the Applicant's conditional discharge licence.* This is not an omission which could possibly amount to procedural unfairness. A MCA member, reviewing the case on paper, cannot reasonably be expected to foresee every piece of additional evidence which the oral hearing panel might wish to have.

(4) *That the OHP failed to provide a memorandum of the evidence heard at the hearing on 8 October 2018.* Again this is not an omission amounting to procedural unfairness.

(5) *That at the final hearing in August 2019 the OHP should not have received evidence from a psychologist with the Mental Health InReach Team ("MHIT"), who was unprepared and unable to provide any real assistance.* The OHP, entirely reasonably, requested the attendance of another representative of the MHIT when the witness originally scheduled to attend failed to do so. The OHP was not to know that the new witness's input was going to be limited. Its summary of the witness's evidence, such as it was, shows that it was actually helpful to the Applicant's case.

(6) *That it was unfair to hear evidence from Head of Healthcare as she was the subject of a complaint by the Applicant.* The Head of Healthcare gave evidence at the hearing in February 2019 but not at the final hearing in August 2019. It was clearly important for the OH to hear from the Head of Healthcare about her dealings with the Applicant, and the RAP cannot accept the contention that it should not have taken evidence from her because of his outstanding complaint. In fact the OHP's summary of her evidence reveals only two points adverse to the Applicant. The first (that he had on a number of occasions failed to collect his medication) she modified when questioned by the Applicant's solicitor: she had said at first that it was her impression that he had chosen not to attend, but she then accepted that staff were sometimes unreliable about bringing prisoners over to Healthcare. The second (that he had refused to work with herself or another nurse) was clearly correct, and was confirmed by the Offender Supervisor. The RAP can see nothing in her evidence which made it unfair for her to have been called as a witness.

Decision

48. As explained above, the OHP's decision not to recommend a move to open conditions is not eligible for reconsideration, and the RAP's task is therefore confined to deciding whether the decision not to direct release on licence was irrational or procedurally unfair (or both).

49. As also explained above, the RAP is unable to find that any of the grounds alleging procedural unfairness have been substantiated.

50. Equally, for the reasons explained above, and putting aside for the moment the OHP's mistakes of fact, the panel is unable to find that any of the other grounds alleging irrationality have been substantiated. It follows that the outcome of this application must depend on whether the OHP's mistakes of

fact, cumulatively or individually, had an impact on its decision such as to render it irrational.

51. The mistaken belief that the Applicant was convicted and sentenced on the basis of the agreed basis of plea was clearly in the Applicant's favour: it meant that the OHP proceeded on the basis that the gun which he used was an imitation one, whereas in fact it was a real one and loaded. This mistake cannot therefore have rendered the decision not to direct release on licence irrational.

52. The mistake (if such it was) about which barrister had been struck off clearly had no bearing on the OHP's decision. The fact that a barrister had been struck off was, in any event, completely irrelevant to the issues which the panel had to decide.

53. The mistaken reference to the furious driving having caused GBH as opposed to ABH might appear, at first glance, to be something which might be significant. However, closer examination shows that not to be the case. The mistake needs to be viewed in the context of (a) the Applicant's undoubtedly substantial record of serious and dangerous offending and (b) the offence of which the causing of bodily harm formed part.

54. The Applicant's record includes convictions for two conspiracies to commit armed robbery, another robbery, possessing a shortened shotgun and ammunition, affray, assaulting police (x2) and burglary (x9). Furious driving, even if it did not result in serious bodily harm in this instance, is a serious offence creating a significant risk of such harm, a fact reflected in the sentence imposed on the Applicant. In the light of that sentence it is not surprising that the OHP did not find the Applicant's account of the offence to be credible.

55. In these circumstances it is inconceivable that the OHP's assessment of the Applicant's current risk of serious harm would have been any different if it had not mistakenly believed the furious driving to have caused a more serious injury than it in fact had.

56. The OHP's mistaken belief that the Applicant had given different accounts of the index offence during his sentence is another matter which might appear at first glance to be something which might be significant. Once again, however, closer examination shows that not to be the case.

57. The point to which the OHP linked this mistaken belief was that there was no clear evidence of the triggers for the Applicant reverting to serious crime so soon after his discharge from hospital. That remains a valid and important point on the true facts as described above. The Applicant had done well in hospital and had been considered safe for release into the community. Yet within a matter of weeks of his discharge he was associating with a serious professional criminal and committing an armed robbery with a loaded gun. He had offered a partial and self-serving explanation in the basis of plea, but had been permitted to retract that explanation and to contend at his trial that he

had had nothing to do with the robbery, a stance which he has maintained since then.

58. Whilst the solicitors emphasise the Applicant's consistent denial during his sentence both of the index offence and of the earlier conspiracy to commit armed robbery, the panel was of course obliged to make its decision on the basis of the jury's verdicts. The Board does not have the authority or the resources to re-investigate criminal cases. Only the Court of Appeal can do that, and unless and until that court quashes a conviction the Board is obliged to proceed on the basis that the prisoner was guilty of the offence(s) of which he was convicted. There are references in the dossier to the Applicant having taken steps to appeal against his convictions for the two conspiracies, or at least having wished to do so, but there is no suggestion that any appeal was successful.

59. Whilst denial is not in itself a risk factor, in this particular case the Applicant's continued denial of his most serious offences left him in the position that there remained no explanation for his disturbing return to serious crime so soon after his discharge from hospital. This is a point which the OHP was fully entitled (and indeed bound) to take into account, just as much on the true facts of the case as on its mistaken beliefs that (a) the Applicant had been convicted and sentenced on the basis of his self-serving basis of plea and (b) he had been inconsistent in his accounts of the index offence during his sentence.

60. It follows that, once again, the OHP's mistake of fact about changing accounts during his sentence had no significant impact on its decision, which would undoubtedly have been the same if it had not made that mistake.

61. Accordingly there is no basis on which the RAP can find that any of the OHP's mistakes afford any basis for saying that its decision was irrational.

62. In the light of the RAP's conclusions as set out above, this application for reconsideration must be refused. The OHP stated the correct test for release on licence, and faithfully applied it in a decision which, despite a few mistakes of fact, was conspicuous for its clarity and thoroughness.

Jeremy Roberts
22 October 2019