[2019] PBRA 44

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Application for Reconsideration by Fell

Application

1. This is an application by Fell (the Applicant) for reconsideration of a decision made under Rule 28 of the Parole Board Rules (SI 2019 number 1038) for reconsideration of the decision of an oral hearing panel dated the 12 September 2019 not to direct his release or recommend open conditions.

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 that (a) the decision is irrational or (b) that it is procedurally unfair.

Background

3. On the March 2010, following his conviction by a jury, the Applicant was sentenced to 10 concurrent Indeterminate sentences for the Public Protection. The tariff was set at 10 years (less 440 days spent on remand); this expired on December 2018.

4. Whilst in custody on remand awaiting trial, the Applicant recruited an acquaintance to intimidate the victim into not giving evidence. He provided this accomplice with a list of the names of the victim, her family and other prosecution witnesses. He also persuaded another accomplice to visit a friend's farm and there retrieve a sawn-off shot gun. The trial judge had been satisfied that, if necessary, the Applicant would have recruited someone to use the shot gun to frighten off prosecution witnesses. Both accomplices received prison sentences.

5. This was the Applicant's first review.

6. The Applicant (as the trial judge noted) had an extremely serious history of violent offending, frequently with weapons. The offences included assault occasioning actual bodily harm, two separate occasions of wounding contrary to section 20, wounding with intent to cause grievous bodily harm, conspiring to pervert the course of justice and, robbery using a sawn-off shotgun.

7. The professional evidence is that whilst in prison, the Applicant has completed all the core offending work including an additional programme which he completed in December 2018.

Request for Reconsideration

8. The application for reconsideration is dated the 3 October 2019.

9. The grounds for seeking a reconsideration are *"(i) The Panel made several findings of fact, unsupported by the evidence which led to material mistakes in fact being made. (ii) The Panel did not apply the correct legal test for recommending the Applicant's transfer to open conditions."* The Applicant submitted with the grounds a short memorandum, dated the 27 September 2019, from the Trainee Forensic Psychologist, who had given evidence at the oral hearing.

Current parole review

10. The Secretary of State referred the Applicant's case to the Board on 13 March 2018 to decide whether to direct release or, if not directed, to consider whether the Applicant was ready to be moved to open conditions. The panel met on the 3 September 2019 and heard evidence from the victim, from the Offender Manager, the Offender Supervisor, the Trainee Forensic Psychologist and from the Applicant. The three professional witnesses did not support release on licence, but they did support a move to open conditions. The Applicant said he wanted to be released because he felt confident he would succeed on licence; having experienced open conditions during two previous sentences, he did not want to return to a Category D prison.

The Relevant Law

11. The submissions drafted by the Applicant's solicitor on behalf of the Applicant helpfully set out a number of authorities. As far as the first ground is concerned, the case providing the most general assistance is **E v Secretary of State for the Home Department (2004) QB 1044** where the preconditions are set out: *"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."*

12. As to the second ground, there is a well-established line of authorities going back to **R (Hill) v the Parole Board [2011] EWHC 809 (Admin) and including R (Rowe) v the Parole Board [2013] EWHC 3838 (Admin), R (Hutt v) the Parole Board [2018] EWHC 1041 (Admin)**. Essentially the test for removal to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. **R (Virgass) [2017] EWHC 3022 (Admin)** confirmed that the panel must carry out a balancing exercise in accordance with the law as set out in the statutory direction. Again, helpfully, the Applicant's submissions set out the statutory direction and the four factors the panel must take into account and I do not repeat them here.

13. 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."

Discussion

14. I deal first with the suggested mistaken findings of fact.

15. At page 11 of their letter, the panel stated: "*The Trainee Forensic Psychologist believed that your past lifestyle and experiences contributed to the callousness that you demonstrated towards the victim*." The psychologist continued that, in her memorandum, she had been misquoted and had not used the word "*callous*". Unfortunately, she does not indicate what she did say, nor did she suggest that the misquotation materially misrepresented the purport of her argument.

16. My view is that nothing turns on the incorrect attribution of the word to the Trainee Forensic Psychologist. The word may have been chosen by a member of the panel; it seems to describe accurately the Applicant's criminal attitudes and the grounds for reconsideration do not argue to the contrary as they would have had to do in order to establish the mistake was material. In addition, almost all the reports investigate the connection between the Applicant's earlier lifestyle and his criminal attitudes which included the use of violence or threats of violence as a normal means to achieve what he wanted. In the Structured Assessment of Risk and Need (Sexual Offending) of October 2015 at page 169, it is observed that psychometric evidence revealed that the measure relating to the Applicant's "*callous attitudes to women*" was elevated albeit not amounting to a treatment need. The Offender Supervisor said in his report, dated the 17 May 2018, that the Applicant's prolonged denial demonstrated "*a high level of callousness*".

17. The second suggested mistake again relates to the Trainee Forensic Psychologist's assessment. The panel had expressed the opinion that a psychological risk assessment containing a framework to address sexual and violent offending should have been used and should be used in the future. In her memorandum, the Trainee Forensic Psychologist said that within her overall assessment she had used a tool called HCR – 20 which "*can be used to assess the risk of sexualised violence and general violent offending*" and which was particularly useful for planning purposes.

18. Not only does nothing turn on the ground put forward, but I doubt whether there was a mistake of fact. I say this because the panel were aware at the hearing of the Trainee Forensic Psychologist's views on her assessment tool. The panel expressed an opinion with which the Trainee Forensic Psychologist disagrees. The panel was entitled to express and act upon the opinion; the panel included a psychologist panel member; the formulation of the opinion expressed in the letter did not arise from a mistake or misunderstanding. This is demonstrated by the passage at page 10 in the Decision letter which states "*The Trainee Forensic Psychologist said that she had considered which assessment tool to use but decided that due to your previous history of violence, to use the HCR – 20. She*

said that she felt that the tool covered the relevant risk factors, including your attitudes to sexual offending."

19. The third suggested mistake occurred in the panel's Decision letter at page 18 where it was recorded "*the fact you have repeatedly refused to engage in a personality assessment*." It is submitted on behalf of the Applicant that he refused to engage with the assessment only once. The first point to make is I am not persuaded this mistake has been established. The Structured Assessment of Risk and Need (Sexual Offending) of October 2015 suggested a psychological assessment of personality. The note then recorded the Applicant "*agrees to comply with the above recommendations although he had some reservations regarding an assessment of personality and concerns about the 'Self Change Programme'*." In March 2017, the assessment by the previous Forensic Psychologist in training recalls that the Applicant declined to undertake an MCM I – III assessment to ascertain his personality traits. He was suspicious as to why this had been recommended and even after discussing the problem with his Offender Manager and his solicitor he declined to engage. In March 2019, the Trainee Forensic Psychologist deals with the topic and records that the Applicant would not engage with an assessment. As a consequence, she was not able to be clear whether some of his personality traits were due to a personality disorder or drugs misuse. At page 10 of the panel's Decision letter, it is recorded she gave evidence to the effect that the Applicant would not consent to such an assessment because he did not consider it necessary.

20. In those circumstances, it seems to me the Applicant has maintained his reluctance to engage on more than one occasion over a significant period of time. However, it is also plain that the panel were less interested in the precise number of refusals as opposed to the strength of the Applicant's refusal or reluctance to engage with the assessment. This point has no merit.

21. As to the second ground, the Applicant's submissions appear to concede that the panel was aware of the correct approach; the complaint is that the panel did not apply the correct test. Certainly, the correct test is set out fully in paragraph 1 of the Decision letter. Although the panel had to adopt a different approach and test for the question whether the Applicant was suitable to move to open conditions and could be managed in open conditions, it did not follow that the factors (or at least some of them) relied on by the panel as reasons for refusing to release on licence could not then be used a second time as a basis for refusing to recommend a move to open conditions.

22. It is necessary to look at the entirety of the panel's Decision letter. It is a long letter running to 18 pages. It contained a lengthy and conscientious analysis of the evidence interspersed with the positives for the Applicant as well as the areas which remained an anxiety for the panel.

23. The panel set out between pages 6 and 8 of the Decision letter, the long-standing risk factors. The panel also recorded the changes since the previous review. It took the view that the picture was mixed. It noted that in April 2018, the Offender Supervisor had not supported a progressive move and at this oral hearing has said that ideally the Applicant would have engaged in an assessment of his personality.

The panel noted that the Applicant's view of his own risk factors was that he was no risk to others and the public have nothing to fear from him.

24. The panel also recorded the offending work undertaken by the Applicant and that he was an enhanced status prisoner together with the positive factors and recommendations recorded by the professionals.

25. However, the panel remained of the view that the Applicant had limited insight into his risk factors and the high-risk situations he might find himself in. The panel had been particularly unimpressed by the Applicant's evidence that if he met old criminal associates in a pub, they would have to accept that he had moved on and refrain from trying to persuade him to return to his previous pattern of life. The panel clearly took the view that the Applicant presented a greater risk than that assessed by the professionals.

26. On page 18 of the Decision letter, the panel set out significant concerns and then refused to direct release on licence. It then considered the question of a move to open conditions. It did not repeat the test set out in paragraph 1: to do so would have been otiose. The panel recorded the factors which were in addition to its list of significant concerns, and which related specifically to the prospect of open conditions. They were; a failure to address and reduce risk to a level consistent with protecting the public from harm and the desirability of doing the further work which originally had been identified in October 2015. Here again the panel disagreed with the professionals who had opined that no further work was necessary.

27. I bear in mind the experience and expertise of the panel which included a psychologist member, and which was able to make its own assessment of the Applicant from hearing his oral evidence. The panel found that the Applicant's insight remained poor, that he was not frank with the panel and that consequently his level of risk remained potentially significant and that without improvement he was unsuitable for open conditions. The panel considered the evidence carefully and although the format of the Decision letter might have been a little clearer in the way it described how it had applied the test, it seems to me it did carry out the balancing exercise consistent with the statutory direction, and I do not consider the panel's findings are open to challenge on the basis of irrationality.

Decision

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

James Orrell
24 October 2019