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[2020] PBRA 184

Application for Reconsideration by Buller

Application

1. This is an application by Buller (the Applicant) for reconsideration of a decision of an oral hearing panel made on 7 October 2010 not to direct release. The panel consisted of two independent members and a judicial member.

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 a dossier consisting of 307 pages, a document entitled 'Appeal Representations and the oral panel's decision letter.'

Background

4. The Applicant is serving an indeterminate sentence for public protection which was imposed on 3 May 2007. The sentence minimum term was 2 years and 22 days. The tariff expired on 24 of May 2009. This was a second review of this recall. The Applicant had been released on licence on three earlier occasions in 2010, 2012, and 2013 and had been recalled following these releases in 2011, 2012 and 2016 respectively.

5. The reference from the Secretary of State was to consider whether the Applicant should be released.

6. The Applicant was in open conditions and therefore the reference was also to consider the Applicant's suitability to continue in open conditions.

7. As indicated the Applicant was last recalled on 16 June 2016, having been arrested in relation to offences of conspiracy to rob committed while on licence. He was tried for these offences and subsequently sentenced to a period of 6 years imprisonment which ran concurrently with his indeterminate sentence. His conditional release date in relation to the concurrent sentence was 9 July 2020.

8. It is the facts of the offences committed on licence in 2017, for which the Applicant was sentenced to 6 years imprisonment, which are the subject of this application. At the time of sentencing for these offences, the Applicant was 31 years old. At the time of the current review, he was aged 34 years.

Request for Reconsideration

9. The application for reconsideration is dated 13 November 2020. The application was not made on the published form CPD2 which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well grounded and focused. The document explains how to look for evidence to sustain the complaints and, reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made.

10. The grounds for seeking a reconsideration are that the panel relied upon the Applicant's history of offending in its general assessment of risk. In assessing that risk, the panel made an error in considered the Applicant's previous criminal history.

11. The specific complaint being that the panel mistakenly attributed a conviction for an offence (and a set of facts) to the Applicant.

Current parole review

12. As indicated above, the Applicant's case had been referred by the Secretary of State to consider whether he should be released and, in the event of him not being released, to consider whether it was appropriate for him to remain in open conditions. The hearing took place on 7 October 2020 by way of video hearing due to the current restrictions imposed by the Covid-19 pandemic. The matter was adjourned on one occasion for further information to be secured. The panel confirmed that they would make the decision available by 9 November 2020. The decision letter is dated 2 November 2020.

13. Relevant to this application was the previous history of criminal convictions recorded against the Applicant. In particular, the convictions which led to his recall and a further sentence being imposed of 6 years' imprisonment. The facts relating to this sentence were gleaned from the judges sentencing remarks which formed part of the dossier.

The Relevant Law

14. The panel correctly set out in its decision letter 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

15. Pursuant to 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

16. ***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."

17. 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.

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

19. Although irrationality was not argued by the Applicant's solicitor in this case, it appears that the basis of the Applicant's argument is that the panel reached an irrational conclusion on the basis of incorrect facts and therefore I have considered both irrationality and procedural unfairness in reaching my decision.

Procedural unfairness

20. 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.

21. 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.

22. In this case the Applicant's solicitor argues that he was not given a fair hearing because of an error in understanding the offences recorded against him.

23. Although (as indicated above) the Applicant does not argue irrationality. It is possible that mistakes in findings of fact made by a decision maker can result in the final decision being irrational, but the mistake of fact must be fundamental. **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."

The reply on behalf of the Secretary of State

24. The Secretary of State has not responded to the application.

Discussion

25. In the panel's decision letter under the heading of 'Analysis of Offending', the panel set out details of the facts relating to various offences which the Applicant had committed or been associated with since 2007. Having briefly set out the facts of those offences. The panel reached the following conclusion in relation to the Applicant's risk:

"The panel finds that there is a clear pattern of you engaging in criminal group activity using weapons to terrorise and steal"

26. In assessing this application, I have considered whether this conclusion, which relates to risk and therefore relates directly to the question required to be addressed by the panel, was fairly and appropriately reached or whether it was irrational or unfair.

27. The panel correctly identified the following offences in the Applicant's history:

a. In 2000 he had committed 6 robberies and an assault over a period of 3 days- the targets being students from whom he stole mobile phones and money;
b. In 2007 the index offence was committed, which related to the robbery of a jeweller's shop. The Applicant and two co accused used an axe to break open jewellery cabinets in a planned and professional attack where masks were worn and jewellery worth £11,000 was stolen;
c. In 2012, the Applicant was acquitted of robbery on the basis of lack of evidence, however, the facts were that the victim was a lady carrying a bag containing £700 from a bank. Two men wearing balaclavas grabbed her and dragged her down the road during struggle one of the men dropped a glove which was later to can which was later found to contain the Applicant's DNA. The co-defendant in this offence was a man who is a known associate of the Applicant; and
d. In 2017, whilst on licence, the Applicant was sentenced to the period of 6 years' imprisonment mentioned above and which is the subject of this complaint. The sentence was in respect of an offence of conspiracy to rob.

28. The Applicant was sentenced in relation to the 2017 matter alongside a co-accused. The sentencing judge had dealt with a series of co-defendants who were not present at this sentencing hearing.

29. Unfortunately, a copy of the indictment charges with sentences appended was not available on the dossier (as is common in Parole Board dossiers). It was therefore necessary for the panel to extract the identity of the offenders, the individual offences and their facts from the sentencing remarks.

30. The judge's opening remarks were as follows *"the offences to which you have pleaded guilty (when referring to 'you' the judge had named the [Applicant] and the co-accused) were part of a series of robberies charged as separate conspiracies in this overall operation."*

31. The judge, in a later paragraph, described (count 6) - a robbery on 2 May 2016 of a restaurant, which had involved the use of a sledgehammer, a female member of staff was present, and a substantial amount of cash stolen. This offence was attributed by the judge to the co-accused and not to the Applicant.

32. The judge later described (count 8) of the indictment, as being a conspiracy to rob between 22 May 2016 and 16 June 2016.

33. It should be noted that a criminal conspiracy amounts to an agreement between two or more persons to commit a criminal offence or offences. The agreement is the offence. The agreement is commonly evidenced by either an offence (or offences) committed or evidence of a plan to commit an offence (or offences). However, of importance is the fact that it is the agreement which is the offence.

34. In this case, therefore the Applicant was convicted of an agreement to rob between the dates set out.

35. In describing the factual evidence supporting the agreement, the judge confirmed that the Applicant was sentenced in relation to two incidents:

    a. The first was a jewellery robbery on 12 June 2016 where the two robbers smashed the front window of a jewellers shop with a sledgehammer and a heavy metal drainage grid; and
    b. The second incident was a robbery which did not come to fruition. The Applicant was arrested on 15 June 2016. He was in a Land Rover vehicle and balaclavas, gloves and a drainage grid were found in the vehicle. The judge found that the Applicant and others were *"clearly on their way to commit a robbery of a similar type to that as had happened earlier in the month."*

36. In the decision letter, the Parole Board panel incorrectly described count 6 as involving the Applicant. It is clear that it did not, and this was a factual error on the part of the panel.

37. In the representations by the Applicant's solicitor, correctly complains that both the 'restaurant' robbery and the 'jewellery shop' robbery were taken into account the panel's assessment of risk.

38. Although the Applicant's solicitor is entirely correct in identifying the error by the panel, it is also clear that the panel were correct in attributing <u>two</u> robbery incidents to the Applicant.

39. The first correctly attributed was the jewellery shop on 12 June 2016. The panel failed to attribute the second incident, namely the arrest of the Applicant in circumstances where a similar robbery was imminent.

40. The legal position is set out above- in assessing irrationality,
    a. First, there must be an uncontentious mistake, which there was in this case.
    b. Secondly that mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.

41. In the context of the assessment by this panel, I have approached the question of the materiality of the mistake by asking the question:
Would this panel or any fair-minded panel have reached a different conclusion as to the Applicant's risk if they had correctly interpreted the judges sentencing remarks?

42. A correct interpretation of the judges sentencing remarks would have been to assess the Applicant's risk on the basis of the robbery at the jewellery shop together with another similar robbery at a jewellery shop which would have taken place, but for the intervention of the arrest.

43. If the panel had correctly identified the two incidents which led to the six-year prison sentence, and had also taken account of the history of criminality of the Applicant over many years - would they have reached a conclusion which was different to that which they set out in the letter, namely that they found *'that there is a clear pattern of you engaging in criminal group activity using weapons to terrorise and steal"?*

44. The determination I make is that the conclusion reached by the panel is overwhelmingly supported by the evidence of historical conduct. In light of the Applicant's criminal history, the finding would have been perfectly supportable and applicable even if the Applicant had been convicted of only one offence in 2017.

45. In fact, the Applicant was convicted of two incidents involving a committed robbery and a potential robbery, both of those incidents clearly and unambiguously fitted the pattern that formed the conclusion of the panel. Namely, group criminal activity; weapons to terrorise; and stealing.

46. The decision of the panel was based upon a risk assessment which included the assessment relating to prior criminal conduct. I conclude that, even though the panel mistakenly described the detail of the Applicant's second (2017) offence, the conclusion reached by the panel on risk was fully supported by the evidence. The error was not therefore material and I therefore determine that there is no basis to find that the panel's decision was irrational in the sense of the definition set out above.

47. Neither do I find that there is any evidence that the Applicant's case was dealt with unjustly or that there was any procedural unfairness or lack of a fair hearing.

Decision

48. 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.

HH S Dawson
28 November 2020