the Parole Board

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[2020] PBRA 33

Application for Reconsideration by Ashby

Application

1. This is an application by Ashby (the Applicant) for reconsideration of a decision of an Oral Hearing dated 9 February 2020 to recommend a transfer to 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 (a) that the decision is irrational and/or (b) that it is procedurally unfair.

3. I have considered the application on the papers. These comprise the dossier, the Decision Letter and the application for reconsideration dated 16 February 2020. I requested and received the following further information that was before the panel in February 2020: a copy of the adjournment letter dated 8 October 2019; and a security update dated 30 January 2020.

The reply on behalf of the Secretary of State

4. The Secretary of State indicated on 25 February 2020 that he did not wish to make any formal response to the application, however confirmed that the Applicant was not convicted of the charge of assault of a police constable (see below).

Background

5. The Applicant is serving a sentence of Imprisonment for Public Protection (IPP) imposed in September 2006. The index offence is of false imprisonment. The Applicant also received an extended sentence at the same time for assault occasioning actual bodily harm. His tariff, set at 18 months less time spent on remand, expired in January 2008.

6. Following an Oral Hearing in 2013 a panel of the Parole Board refused to direct release and recommended the Applicant be transferred to open conditions, and he was transferred to an open prison establishment in April 2013. After absconding from the open estate not long after transfer and being found unlawfully at large in the community, the Applicant was sent to closed conditions in June 2013 where he remained until a panel of the Parole Board directed release in August 2016. It should be noted that open conditions were not an option for the Applicant at this point according to a policy of the Secretary of State. This policy is no longer in effect, and the current referral includes possibility of a recommendation for open conditions.

Request for Reconsideration

7. The application for reconsideration is dated 16 February 2020.

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

   a) That it was irrational and procedurally unfair for the initial hearing (on 7 October 2019) to be adjourned.
   b) That the panel was 'unreasonable and irrational' in their decision (not to release) in that they relied unduly on evidence about management in the community as opposed to considering the test for release.
   c) That the panel was irrational in that it made numerous errors in reaching their decision.

Current parole review

9. The Applicant's case was referred to the Board, in summary, to consider whether to direct his release. The referral goes on to state that if release is not directed, the Board is invited to advise the Secretary of State whether the Applicant should be transferred to open conditions.

10. The matter was first heard on 7 October 2019. It was adjourned on the day and the hearing was concluded on 3 February 2020. The panel consisted of two independent members and a psychologist member. A dossier of 321 pages was considered, and some additional information was provided to the panel on the day of the hearing. The Decision Letter states that this included a letter from a prospective employer, and updated security information. The panel took oral evidence from the Applicant's Offender Manager, Offender Supervisor, Prison Psychologist and from the Applicant himself.

The Relevant Law

11. The panel does not set out the test for release in its Decision Letter. The only statement made in the Decision Letter that might relate to what test was used for re-release and for any recommendation to open conditions appears in the final paragraph of the introductory section of the Decision. This states:

    "The Secretary of State's referral to the Parole Board dated 24 January 2020 is for consideration of release in which case the Panel is asked to comment on any aspects of your behaviour, which need to be monitored in the period prior to release and on your return to the community. You are now also eligible for open conditions if the Panel conclude that your risks are not manageable in the community at this time and further testing is appropriate. If the Panel make a recommendation for open conditions, they are asked to consider the degree of risk involved and any continuing areas of risk that need to be addressed."

12. Neither test is accurate, but for the purposes of this reconsideration only the release test is relevant. The test is that the Parole Board must not give a direction

for release unless it is satisfied that it is no longer necessary for the protection of the public that the person should be confined.

Parole Board Rules 2019

13. 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)).

14. 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

15. 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."

16. 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.

17. 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

18. 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.

19. 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.

Other

20. 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.

21. 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

22. I will first deal with the Applicant's challenge with respect to the Adjournment. The Application states that the decision to adjourn was both irrational and procedurally unfair.

23. A decision to adjourn is not within scope of the reconsideration process. Only a decision to release (or not) is within scope. However, a failure to adjourn or other adjournment decision might give rise to a procedural unfairness that renders the release decision unsafe. Only if such a procedural unfairness arises can one consider ordering reconsideration.

24. The Applicant's arguments in support of their application in this respect are, in summary as follows:

a) The further information that the panel decided that it required was not needed;
b) The decision that the hearing would have to commence too late in the day (after 3pm, when the Psychologist witness was available) was not sound because all witnesses indicated they were able to stay on for the hearing that day.

25. I have carefully read both the Adjournment Letter dated 8 October 2019 and the Decision Letter dated 9 February 2020 in relation to the Applicant's submissions on the decision to adjourn.

26. The panel, in its Adjournment Letter, states that it was concerned about the implications for risk in relation to recently added security information and made a decision that they required further detailed security information, an addendum Risk Assessment from the psychologist witness and further reports taking developments into account by the Offender Manager and Offender Supervisor. They were also informed at the pre-hearing discussion on 7 October 2019 that the psychologist witness was at another hearing that had over-run and could not attend this hearing until after 3pm.

27. I further note that in the Adjournment Letter it states clearly that the panel discussed the issues of concern with the Applicant's legal representative. In the Decision Letter the panel indicates that "The Panel discussed the above with your legal representative, mindful that you were visibly distressed at the suggestion of adjourning. The Applicant's legal representative agreed to the adjournment period, which would allow for an addendum psychological report to be provided, the security information to be updated, a period of time for the Applicant to ensure there were no further negative entries or concerns generated and further drug testing.

28. At no point in either the Adjournment Letter or the Decision Letter is it indicated that the Applicant's legal representative was not in agreement with the decision to adjourn. While the Application for reconsideration challenges the decision, it is silent on whether there was any submission made by the representative at the time not to adjourn. In my opinion this considerably weakens any challenge to the decision to adjourn in any event.

29. I note that the primary reason given for the adjournment in the relevant letter is that there was insufficient time for the Hearing. The initial time estimate for the Hearing as directed at the Member Case Assessment was three hours. Had the Hearing started promptly at 3pm (and it appears that it might have been sometime after 3pm in any event), the hearing would not have concluded before 6pm.

30. Given the problem with the start time and the additional concerns of the Panel with the new security information, it was reasonable that a decision was made to adjourn.

31. There is no evidence that the decision to adjourn in itself led to a procedural unfairness that rendered the release decision unsafe, given the above discussion.

32. I will now turn to the Decision itself, which was not to release. The recommendation for open conditions is not in scope of the reconsideration.

33. Regrettably, the panel did not state the test for release, as indicated above in paragraph 10. I accept the Applicant's submission on this point.

34. Just because the test was not stated accurately or at all, it does not automatically follow that the release decision was flawed. If in their analysis of the evidence and the reasons given for the decision it appears that, even had the panel evidenced application of the correct test, their decision was likely to be the same, the reconsideration may be refused.

35. I have therefore given careful attention to the contents of the Decision Letter, and at this point considered the submissions in relation to inaccuracies. These are considered and dealt with in turn below.

36. The Applicant states that although the panel's Decision Letter refers to the Applicant being charged with assaulting a police officer while in the community, it fails to mention that he was found not guilty (presumably after a trial).

37. The statement in the Decision Letter was a factual one in relation to the circumstances of the recall *"You were released on 13th October 2016 and recalled on 14th November 2016 for poor behaviour, non-compliance and having been charged with Assaulting a Police Officer."* There is nothing inaccurate in that statement and there is no evidence that any weight was given to the allegation of assault in the consideration of the panel leading to its decision.

38. A similar factual statement made about the circumstances of the charge in the Decision Letter is also challenged and I find again that there is no evidence of any weight given to the allegation of assault in the consideration of the panel leading to its decision.

39. The Applicant states that the panel was not accurate in repeating a finding made by a previous panel that he had problems in his relationship with his mother. The Applicant states that this was a misunderstanding, and the difficulty was in his relationship with his mother's partner.

40. The adopting of the previous panel's finding in respect of the Applicant's relationship with his mother is only relevant if it formed part of the reasoning that led to the decision not to release. I can find no evidence of this in the Decision Letter instead, there is reference to very full evidence taken from the Applicant relating to the circumstances of the recall. In that evidence it is stated that he said that if he were to be released again, he would not see his mother as frequently as he had when he was released on licence: *"You told the Panel that you intend to only visit your mother a couple of times a week rather than each day as you were previously on release …"* No comment is made in the Letter about whether the Applicant's relationship with his mother was a concern at this time. The panel's attitude towards the Applicant's relationship with his mother is really only indicated in the final section of the Decision Letter, which provides a guide as to what would be helpful for a future panel. This states: *"A future Panel will benefit from reports detailing how you progress in open conditions, ongoing engagement with* [a programme offering a coordinated approach to help resettle in the community], *re-establishing regular contact with your mother, son, and members of your support network in the community and evidence of being able to deal with the challenges of re-integration."* From this paragraph it is clear that the panel does not see any current problems in the Applicant's relationship with his mother.

41. Therefore, even if there was an inaccuracy in the letter regarding the Applicant's relationship with his mother as adopted from the previous panel, there is nothing to indicate that it was material to the Decision reached by the panel.

42. The Application also states that a statement in the Decision Letter implies that the Applicant breached his exclusion zone, and that this was not accurate. The statement in the letter is as follows: "*You met up with old associates when you returned to your mother's address although you said you did not enter the exclusion zone*". I find no evidence that there is any finding in the Decision Letter by the panel that the Applicant breached his exclusion zone. All this statement says is that the Applicant says that he did not. I cannot find any implication regarding the exclusion zone.

43. The Application states that the panel claims that it remains "uncertain regarding (the Applicant's) anxieties." The application goes on to state that in evidence the Applicant was clear that he was anxious during his time in the community.

44. I can find no evidence of irrationality here. The words of the panel in their Decision Letter as repeated in the Application indicate that the panel '*… remained uncertain as to the* ***extent of your anxiety*** *(*my emphasis*) on release against naturally reverting back to your previous lifestyle, which the evidence indicates."* This is clearly different to a simple statement of uncertainty about the Applicant's

anxieties. It is entirely within the remit of a panel's powers to weigh evidence that could go to future risk in this way.

45. The final point made by the Applicant in relation to inaccuracy is that the panel stated that the Applicant had only recently shown consistent positive behaviour and stability – since the adjournment in October 2019. The Applicant points out that the evidence was that he had done well on a prison wing regime designed and supported by psychologists to help people recognise and deal with their problems and that "a deterioration of mental health does not support that he was unstable and continued to display negative behaviour".

46. The panel adjourned the hearing in October 2019 and at that point it registered concerns about a number of security incidents detailed in a security report dated 26 September 2019. The panel sought further information and an addendum Risk Assessment in relation to these matters. In the Decision Letter after the hearing in January 2020, the panel details the evidence from all the witnesses, who largely acknowledge that since the adjourned hearing, the Applicant had shown an improvement. The panel acknowledges this improvement*: "It is to your credit that during the adjournment period you showed motivation, commitment and a far greater level of stability than has previously been shown. The Panel also give you credit for the engagement on the [relevant] unit, commitment to working with [a programme offering a coordinated approach to help resettle in the community] and being open and honest. You present as having a high level of insight but evidence of putting this into practice has not been consistent and present when you need to make good decisions."*

47. I concur with the Applicant that many of the 'High' security incidences prior to the adjournment indicate poor emotional control and distress, relating to the Applicant's mental health. The security information also indicates that the Applicant was behaving in a volatile and erratic manner and made threats to staff. The panel reasonably took into account this emotionally unstable behaviour when making its assessment of the Applicant's ability to be stable under pressure. In its conclusion, the panel states: " *…the Panel concluded that given the speed with which your behaviour deteriorated on your previous release resulting in increased risks to the public, staff and yourself, a longer period of stability, consolidation of your skills and motivation to comply, as well as evidence you can abstain from alcohol and substances in a less structured environment was necessary. At this stage, the Panel were not confident that you could manage under pressure, when struggling to cope and when your emotions are running high, which are all factors highly relevant to risk management."*

48. In my judgement, the panel made a carefully balanced assessment of progress, taking into account the Applicant's history of offending, history of progress and compliance during his sentence, recent security material (some of this graded as

'High' and therefore more likely to have occurred as opposed to the grading of Low), as well as what the panel assessed as a quick deterioration in behaviour when he was released. They assessed that this deterioration when released on licence resulted in a rising risk and weighed that against the evidence of more recent progress and the recommendations of the witnesses, in favour of release.

49. The panel took full evidence from all witnesses, including the Applicant, and made its decision on the evidence before it. While the test is not stated, there is no evidence that the panel's conclusion would have been any different if they had stated the correct test. Full reasons were given for the decision not to release. Management of risk, and risk of serious harm are both elements that in any event are considered when a Parole Board panel is using the correct test for release. That the panel took these factors into account does not therefore indicate a flawed approach to its Decision.

Decision

50. For the reasons I have given and applying in particular the principles in the case of **DSD and others** I do not consider that the Decision was either irrational or procedurally unfair and accordingly the application for reconsideration is refused.

Chitra Karve
06 March 2020