[2020] PBRA 50

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Application for Reconsideration by Arnold

Application

1. This is an application by Arnold (the Applicant) for reconsideration of a decision of a panel of the Parole Board on 28 February 2020.

2. The Applicant sought a direction that he be released or transferred to an open prison. The panel of the Parole Board did not accede to his application.

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

4. The Applicant seeks to rely on both limbs.

Background

5. The Applicant is now aged 39. He has been in custody since 12 December 2006. The index offence of Wounding with Intent to Cause Grievous Bodily Harm whilst resisting apprehension was committed on 8 December 2006, when the Applicant was 25.

6. On 15 March 2007, when he was 26, the Applicant was sentenced to an indeterminate sentence of Imprisonment for Public Protection (IPP). The Applicant pleaded guilty to the index offence and the determinate term, having been given credit for the plea, was set at four years. The minimum term to be served, having regard to the period in custody, was set at one year eight months and 29 days. The Applicant is now significantly post tariff having served over 13 years in prison.

7. Prior to the imposition of the IPP sentence, the Applicant had acquired a lengthy offending history comprising of offences of violence and dishonesty totalling 33 convictions for 84 offences.

8. The Applicant progressed through the prison estate, but not without difficulty. Nevertheless, on 18 April 2013, when he was 32 years old, a panel of the Board acceded to an application that the Applicant be transferred to the open estate. In June 2013 he moved to an open prison.

9. Within a matter of hours, the Applicant absconded. He travelled to another country in the United Kingdom to see his children. He returned to this country and

after 3 weeks of being unlawfully at large he was arrested. He was in possession of a bladed article. He pleaded guilty and he received a further sentence of imprisonment of 12 months, concurrent to the IPP prison term which he continued to serve on his return to the custodial estate. In addition to the further offence, it is reported that he relapsed into the use of an illegal drug.

10. Between 2005 and 2014, both before and after he was transferred to the open prison, I note that the Applicant undertook a considerable number of offending behaviour programmes and offence-related work which were intended to address his identified risk factors. These programmes were intended to address his attitude towards victims; a training course to address his thinking skills (a course I note he took three times), a training course to address the management of his anger; a training course to address his substance misuse and a cognitive self-change programme to address his decision making and better ways of thinking. The programmes were intended to assist the Applicant to cope both in prison and the community. I note that he has also gained a number of educational achievements.

11. In or about 2010 the Applicant entered a regime to help people recognise and deal with a wide range of complex problems, but he was deselected.

12. I note that the Applicant has been the subject of several reports from Psychologists and a Forensic Psychiatrist, who has provided two reports. The investigations were instituted to see how the Applicant might best be assisted to gain release by identifying his level of risk and what needed to be done to reduce it so that it could be managed in either open conditions or on release. Report writers have concluded that the Applicant suffers from an underlying disorder of the personality.

13. I note that the panel were in possession of a recent report from another Psychologist, a Psychological risk assessment, dated October 2019 and prepared for the hearing. The Psychologist in question considered the dossier and the previous psychological risk assessments. She did not recommend a move to the open estate or release.

14. In April 2019, the Applicant's previous Offender Supervisor concluded that the Applicant should demonstrate a period of good behaviour in Category C conditions in her report. She thought that if this happened, the Applicant might then be moved to a regime designed and supported by psychologists to help people recognise and deal with their problems in the community.

15. To enable the Applicant to meet that target the Applicant achieved Category C status and, on 24 April 2019, he transferred to the prison where he is currently held.

16. I have reviewed the Applicant's behaviour since he transferred to his current prison and I note that the Applicant has continued to be a management problem, incurring further adjudications and significant criticisms about his behaviour.

17. The Psychologist who prepared the October 2019 report, and the Offender Managers, both the Community Offender Manager and the Custodial Offender

Manager, all gave evidence at the oral hearing. The panel reviewed their evidence in the decision letter.

18. The reports before the panel indicate that despite a significant number of interventions by the prison authorities both before and after the Applicant absconded, the Applicant still is unable to manage his personality disorder and his problems regarding substance misuse.

19. The panel were in possession of a dossier containing 619 pages which sets out fully the Applicant's progress in the custodial estate. They had the advantage, too, of seeing and hearing the Applicant as well as the witnesses. The Applicant was also legally represented throughout the proceedings. The reports before the panel, which, according to the decision, were confirmed by oral evidence, did not put forward any recommendation that the Applicant should be moved out of the closed estate to conditions of lesser security, nor did they advocate that the Applicant be released from prison.

Request for Reconsideration

20. The panel decision is dated 2 March 2020. The Application for Reconsideration was received on 19 March 2020. The Applicant has invited a reconsideration of the decision of the panel. This is an eligible application and the decision is in law capable of being reconsidered.

21. The Applicant has lodged written submissions in support of his application, which I have noted. The Secretary of State has declined to lodge any representations.

22. The Applicant contends that the decision of the panel was irrational: for the following reasons:

    (a) The panel's decision overemphasised the negative points and under emphasised the positive points; and

    (b) The decision as drafted cannot be supported by the evidence in the dossier or the evidence that was heard at the hearing.

23. The Applicant supports those representations by a submission that the panel erroneously "*over-relied on a recent adjudication*" as to his conduct relating to an illegal substance, which the Applicant asserts he was "*mistakenly*" said to have been using.

24. The Applicant further contends that by reason of this purported error of fact, overall, therefore, the panel formed an erroneous judgement as to the Applicant's risk and consequently the decision that he should remain in the closed estate as a Category C prisoner is procedurally unfair.

25. The Applicant relies upon the comments of Owen J in **R(Kitto) v The Parole Board [2003] EWHC 2774 (Admin)** and **E v Secretary of State for the Home Department [2004] QB 1044**. I note from the judgements that even if there had been a mistake of fact, the mistake must be found to be "*material*".

26. Finally, the Applicant contends that the decision of the panel is unlawful in that it is said to contravene **Article 5 of the Human Rights Act 1998**.

Current parole review

27. On 25 January 2019, the Applicant's case was referred to the Board. As the panel pointed out, this is the Applicant's sixth review.

28. The first reference by the Secretary of State did not invite consideration of a move to the open estate. However, on 29 June 2019, a second referral letter required the panel to consider whether the risk the Applicant presented could be managed either in the open estate or in the community, applying the appropriate tests. The panel considered both referral documents.

The Relevant Law

29. 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 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."*

30. This test was set out by Lord Diplock in **CCSU -v- Minister for the Civil Service [1985] AC 374.**

31. 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.

32. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'.

33. The fact that Rule 28 of the Parole Board rules contains the same adjective as is used in judicial review shows that the same test is to be applied. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

34. It will also be borne in mind that in the case of oral hearings it is the panel members who saw, heard and assessed the evidence of witnesses before them.

Discussion

35. I have examined the decision letter. I have considered the written evidence available to the panel and I have had regard to the written submissions.

36. The decision letter properly deals with the circumstances which may have led to the reason why it was then necessary to impose an IPP sentence. The decision charts the Applicant's progress following his return to the closed estate. I note that the panel gave the Applicant credit for the further offending behaviour

training courses he has done since his return. Nevertheless, the panel went on to point out that despite the offending behaviour training courses the Applicant had undertaken throughout his time in prison and despite the length of time he had been in custody, the evidence demonstrated that the Applicant still displayed periods of poor behaviour and an inability to manage his risk.

37. The decision of the panel indicates that the panel examined all the written and oral evidence. The panel saw and heard the witnesses, including the Applicant. The panel noted the fact that the Applicant disputed some of the assertions made by the professional witnesses. The panel were able to assess the risks the Applicant presented and form a judgement on all the evidence available to them.

38. In my judgement, the panel did not overemphasise negative points nor did they underemphasise positive points. The panel was obliged to consider all the evidence and the decision letter indicates that they did. Where the evidence was at odds with the application the Applicant was making, the panel gave it proper consideration.

39. The panel concluded that, taken as a whole, the evidence demonstrated that the Applicant still persists in the use of illegal substances, for which finding there was ample evidence, not just the disputed evidence about which the Applicant complains. That conclusion was clearly one which was open to the panel on the available evidence.

40. Since he transferred to his current prison, the Applicant has been the subject of a number of adjudications and negative reports about his conduct and his continuing poor attitude towards authority; some of the allegations about his conduct were found to have been proven. He has been reduced to the Basic Regime from time to time. Those findings undermine the expectations behind the reason for his transfer; which was to provide him with the opportunity to demonstrate an extended period of good behaviour.

41. I note that the panel referred to evidence which they received in the course of the hearing that the Applicant had been the subject of recent adjudications in February 2020, shortly before the hearing. The finding of the panel regarding the issue of an adjudication, which is the subject of a complaint by the Applicant, if wrong (and that issue is not free of doubt having regard to the totality of the information about the Applicant's misuse of substances) is not, in my judgement, material to the overall finding of the panel. The panel properly considered all the evidence before it. There was, in my judgement ample evidence to support the findings of the panel.

42. In any event it will not invariably follow that if there is an inaccurate fact or facts in the decision letter that an application for reconsideration will be granted. Reconsideration, like Judicial Review, is a discretionary remedy and, if I (as the Reconsideration Assessment Panel) am satisfied that the incorrect fact did not affect the decision then the application is likely to be refused. The overall weight of the evidence supported the conclusion the panel arrived at.

43. In my judgement the decision letter, taken as a whole, fairly reflects the information available to the panel. The panel applied the correct legal tests. The

panel were entitled to conclude that on all the available evidence, the risks the Applicant presented could not yet be managed either in the community or in the open estate.

44. In his written submissions, the Applicant complains that it is unclear why any outstanding work directed by the Board could not be completed in the open estate. There was no evidence available to the panel from the professional witnesses which would support the Applicant's application. In my judgement the decision makes clear why there is outstanding core risk work to be completed before he transfers back to the open estate. Moreover, those witnesses told the panel that the risk the Applicant presents could not be managed in the open estate.

45. Finally, the Applicant's representative relies on **Article 5 of the Human Rights Act 1998** and makes the broad submission that the Applicant's detention is unlawful. The submission is based on the proposition that there is *"nothing further in custody that the Applicant could have done to sufficiently reduce his risk further"*. That submission is at odds with the evidence before the panel and in my judgement has no merit.

46. I have considered the case the Applicant relies upon: **James, Wells and Lee v United Kingdom (2013) 56 EHRR 12**. I have also considered **Article 5 Human Rights Act (1998)**. There has been judicial criticism of the IPP sentencing regime. In my judgement the Applicant is properly detained. He has been given ample opportunity to address the risks he presents.

Decision

47. Where a panel arrives at a decision, 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.

48. For the reasons I have given, I do not consider that the decision was irrational or procedurally irregular and accordingly, the application for reconsideration is dismissed.

Nicholas Coleman
5 April 2020