[2021] PBRA 139

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Application for Reconsideration by Rotherforth

Application

1. This is an application by Rotherforth (the Applicant) for reconsideration of a decision of a Panel of the Board contained in a letter dated 24 August 2021 (the Decision Letter) not to release him. This followed an oral hearing held on 12 August 2021 conducted remotely via a video link due to the COVID 19 restrictions in place at the time.

2. The Panel consisted of a judicial chair and two specialist members.

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

4. I have considered the application on the papers which comprise the Decision Letter, the Application for Reconsideration and the dossier paginated to 351 pages since it now contains proposed licence conditions and the Decision Letter.

Background

5. The Applicant is serving an extended determinate sentence of 6 years and 8 months comprising a custodial element of 4 years and 8 months and an extended licence period of 2 years. The sentence was imposed, upon his guilty pleas, in January 2018 for an offence of robbery committed on 3 January 2017, whilst the Applicant was on licence and subject to bail, with concurrent determinate sentences imposed for two matters of theft and one of criminal damage.

6. The Applicant was 29 years of age at the time of sentencing and is now 32 years old. His Parole Eligibility Date is 16 April 2020, his Conditional Release Date is 8 January 2022 and his Sentence Expiry Date is in November 2023.

7. On 31 December 2016, the Applicant entered the home of a 75 year old woman and stole £500 from her purse.

8. On 3 January 2017, the Applicant went to the home of the victim, a vulnerable 26 year old man. He compelled him to go to a cash machine and withdraw money which was then forcefully taken from him. The Applicant accompanied the victim back to his home where he stole a laptop (which was needed for an Open University course) and a bottle of whisky.

9. In both instances, the Applicant targeted vulnerable victims.

10. The Applicant was on licence at the time from a sentence of 52 months imprisonment imposed in March 2015 for a street robbery from which he had been released in May 2016.

11. Later in 2015, whilst serving that sentence, he received a further sentence of 2 years imprisonment for vehicle theft and possession of a bladed article.

12. The Applicant had a history of convictions for over 30 offences which also included street robbery, wounding with intent, criminal damage, witness intimidation, affray, common assault, and Actual Bodily Harm. In addition, he had responded poorly to supervision and trust in the community by failing to surrender to custody, committing offences whilst on bail and breaching court orders.

13. His prison record is described as "mixed" with a number of proven adjudications.

Request for Reconsideration

14. The application for reconsideration is dated 14 September 2021.

15. The grounds for seeking a reconsideration appear in the Application as follows:

a) Within the context of the hearing, the assessment for release is one of posing serious risk of harm should he be released. He has 4 months remaining prior to his release;

b) All professional witnesses including a psychologist recommended the Applicant's release. It was identified that he had completed all available risk reduction work and he had done so successfully. Whilst the Applicant provided limited evidence of his understanding the psychologist who had seen him in the days running up to the hearing confirmed his knowledge was there, but the hearing setting given his medical issues meant that he would find it harder to identify these under the pressure of the hearing setting;

c) All witnesses were clear that risk was manageable, risk of harm was not imminent and that there would be warning signs prior to any offending;

d) The previous Panel in May 2020 had considered it necessary prior to release to develop greater self-management, skills and insight. Since then even with the limitations of the pandemic, he successfully completed a training course addressing decision making and better ways of thinking, and completed the Restorative Choice Programme (this was voluntary);

e) With the exception of the adjudication in the week preceding the hearing, he had been adjudication free and had earned more privileges through custodial conduct prior to the adjudication. This was a great improvement in his behaviour, something that had started prior to the previous hearing and had continued after in spite of

the knock back, which went to prove that he had not 'kept his head down' just for the previous review which had been suggested;

f) Had the Applicant not had an adjudication in the week prior to the hearing, there is no reason to believe that he would not have been directed for release. The Panel seems to have not given weight to the intervention of the Governor in this adjudication, that it was an administrative adjudication rather than one related to risk;

g) He had been having trouble with his medication (being given a tablet which made him drowsy at 8.30am when he had just woken up and really needed it later in the day). Prior to the adjudication, no one had helped him seek alternative remedies until the Governor listened to him and intervened. Whilst he accepted without hesitation, he was not always taking the medication at the time he was given it (instead taking it later in the day), he was not failing to take it. Further the security information related to his appearance, especially in the workshop when others thought due to his drowsy appearance that he was on drugs. None of which led to any positive drug test and there was no evidence that he was using drugs outside of his prescribed medication;

h) This issue within itself would not suggest that his risk of serious harm to the public could not be managed. There has been no violence recorded against him in prison and any adjudications which may suggest harmful behaviour in the last 2 years; and

i) The adjudication and issues around prescribed medication do not warrant continued detention.

16. It is therefore submitted on behalf of the Applicant that the decision of the Panel was irrational. It is not submitted that there was procedural unfairness.

Current parole review

17. The Secretary of State referred the Applicant's case to the Parole Board in September 2020 to consider whether to direct his re-release.

18. At the hearing on 12 August 2021 the Panel considered a dossier of 342 pages and there was no evidence which could not be disclosed to the Applicant. The Secretary of State did not express a view and was not represented. The Applicant was represented by his solicitor, who sought a direction for release.

19. The Panel heard evidence from:

a) A stand-in Prison Offender Manager (POM);

b) The Applicant;

c) A Forensic Psychologist in Training, who had prepared a Psychological Risk Assessment dated 16 February 2021; and

d) The Community Offender Manager (COM) since April 2021.

20. The professional witnesses were all supportive of release. However, the Panel concluded that it continued to be necessary for the protection of the public that the Applicant should remain confined. Therefore, the Panel did not direct the release of the Applicant.

The Relevant Law

21. The Panel correctly sets out in the Decision Letter the test for release.

Parole Board Rules 2019

22. 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)).

Irrationality

23. 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."

24. 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.

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

Other

26. 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.

The reply on behalf of the Secretary of State

27. The Secretary of State confirmed via PPCS by email on 17 September 2021 that no representations were offered in response to the Application.

Discussion

28. In dealing with the grounds for reconsideration, it is necessary to stress certain matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgement of the Panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those found by the Panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the Panel.

29. The second matter of material importance is that when deciding whether a decision of the Parole Board was irrational, due deference has to be given to the expertise of the Parole Board in making decisions relating to parole.

30. Third, where a Panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact 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.

Decision

31. The Grounds relied on at 15 (b) to 15 (e) of the Application amount, in essence, to further submissions that the Panel should have arrived at a different decision and directed release on the basis of the Risk Management Plan and accepted the professional recommendations.

32. The Panel accepted that the Applicant's general behaviour in custody was stable and, since the previous Review, had been good and that he had recently completed a training course addressing decision-making and better ways of thinking (and had shown a good grasp of the learning) and an intervention concerning victim awareness, the Restorative Choices Programme. It also acknowledged that the period of risk under review (until 8 January 2022) was short.

33. The Panel was well aware of the recommendations for release but noted the pattern of frequent serious offending often involving threats and/or violence against vulnerable victims and went on to express considerable "reservations" which it set out in detail in 11 numbered points to which the COM and the psychologist had, in the Panel's view, attached insufficient weight when assessing risk.

34. It is unnecessary to set out these factors in full but they relate, to a considerable extent, to the content of the Applicant's own evidence, compliance with medication (to which I will return later) and unaddressed risk factors.

35. As to the Grounds relied on at 15 (f) to 15 (i) of the Application, the Panel was obviously aware that the Governor had expressed the view that the adjudication, which the Applicant had received just prior to the hearing, was a technical/administrative breach.

36. The Panel did not agree and set out its reasons in detail finding, having listened to the Applicant's evidence on this issue, that he had pretended to take the medication and hidden it to take later. The Panel recognised that this was the Applicant's first adjudication for 3 years but found it to be an example of poor decision-making, relevant to risk and suggestive of devious behaviour. It reminded itself that risk management was reliant on compliance with medication and it found the Applicant's behaviour at the hatch to have been strange.

37. The Panel heard evidence on this point and made its own finding, as it was entitled to do. In addition, I find that the submission on behalf of the Applicant that *"Had the Applicant not had an adjudication in the week prior to the hearing, there is no reason to believe that he would not have been directed for release"* to be a bold one and, in the light of the evidence, untenable.

38. In my view the Panel set out clear findings to support its decision and arrived at a conclusion, exercising its judgement based on the evidence before it and, having regard to the fact that it considered the dossier and saw and heard the witnesses, it would be inappropriate, I find, 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. I find that, in this case, there are no such reasons.

39. Accordingly, for the reasons I have given, I do not consider that the decision was irrational and the application for reconsideration is refused.

Peter H.F. Jones
25 September 2021