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[2021] PBRA 14

Application for Reconsideration by Wells

Application

1. This is an application by Wells (the Applicant) for reconsideration of a decision of a Panel given on 15 January 2021 to make no direction for his release without having taken all reasonable steps to acquaint itself with the relevant information to enable it to decide whether it was necessary for the Applicant to remain in custody.

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 the Oral Hearing decision letter dated 15 January 2021, the Reconsideration Representations dated 19 January 2021 and the Dossier consisting of 332 pages.

Background

4. On 27 September 2005, when aged 34, the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection for an offence of robbery, to which he had pleaded guilty. His minimum tariff of 2 years' imprisonment expired on 27 September 2007.

5. On 20 May 2005, the Applicant committed the index offence which occurred when he and his co-defendant stopped a man in the street at 12.35am before demanding money and cigarettes from that man while threatening him. The Applicant's co-defendant placed his hand on the victim's chest so as to prevent him from leaving and then the Applicant and his co-defendant took from the victim his wallet, which contained bank cards, and a mini-disc player. The Applicant then insisted that they should go to a cash machine so that more money could be obtained from the victim's account, but the victim escaped.

6. The Applicant was released on 20 November 2017, but he was subsequently recalled on 26 January 2018, after he had failed to comply with the licence condition requiring that he confine himself to his approved address between certain hours. He had discharged himself from rehabilitation on 25 January 2018 and thereafter had failed to make contact with the appropriate authorities. He was unlawfully at large for 2 months but no offences were committed during that time.

7. After a hearing on 2 April 2019, the Parole Board refused to direct his release, but instead it recommended his transfer to open conditions.

8. That decision was later quashed and a new hearing was ordered in front of a new Panel.

9. The new hearing took place on 12 March 2020 when the Applicant's release was directed.

10. He was duly released on 7 May 2020, but he was recalled for breaching some conditions of his licence.

Request for Reconsideration

11. The application for reconsideration is dated 19 January 2021.

12. The grounds for seeking reconsideration are that the Panel should not have directed that he should not be released, but that instead it should have granted the application by the Applicant's representative made at the conclusion of the oral hearing on 14 January 2021 to adjourn the Applicant's case for referrals to be made for his accommodation by his Offender Manager.

13. The application is brought under both irrationality grounds and grounds of procedural unfairness. The grounds for seeking reconsideration are that:

    Ground 1: The Panel's decision not to direct release and the decision not to adjourn the case for accommodation referrals was irrational;

    Ground 2: The Panel should have adjourned the hearing so as to:
    (i) allow the Offender Manager to make the requested and necessary accommodation referrals so that the Panel had access to and could review all the relevant material; and/or
    (ii) enable various referrals for accommodation for the Applicant to take place; and/or that

    Ground 3: the decision not to adjourn/defer for the requisite further information was Wednesbury unreasonable.

Current parole review

14. On 8 July 2020, the Secretary of State referred the Applicant's case to the Parole Board to consider whether to direct the Applicant's release.

15. On 10 August 2020, a paper review was carried out by a duty member who made no direction for release. After that decision had been appealed, the Applicant's case was directed to an oral hearing which took place on 14 January 2021.

16. The oral hearing took place on 14 January 2021 when the Applicant was aged 50. Due to the current Covid-19 restrictions, the hearing was heard remotely by a telephone hearing from the prison. The Panel comprised a judicial chair

and an independent member. The Applicant, his Offender Manager and Offender Supervisor gave evidence.

17. The Offender Manager had not completed any accommodation referrals before the oral hearing, and as the Applicant did not own a property, he would have had nowhere to live if released.

18. At the conclusion of the oral hearing and before a decision was given on release, the Panel was asked to adjourn the Applicant's case for the appropriate referrals (the accommodation referrals) to be made for accommodation by his Offender Manager and they were for:

(a) a referral back to supported housing ;
(b) a referral for residential rehab, which the Applicant was willing to engage with. That would have required him to go through a specific charity that offers assistance in obtaining accommodation. The decision states that the Applicant had not made contact with that Team but this is incorrect;
(c) a referral back to designated accommodation; and
(d) a referral for council accommodation, such as those suggested by the Offender Manager.

19. The Panel refused the application to adjourn and made no direction for release. On the issue of the Applicant's risk, the decision letter stated that:

"The panel considers that the assessments of medium risk of general and violent offending and medium risk of serious harm to the public are appropriate based on your record of offending to date. The panel considers that without accommodation and support your risk of serious harm could be raised."

The Relevant Law

20. The Panel correctly sets out in its decision letter the test for release.

Parole Board Rules 2019

21. 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 license and the only grounds for reconsideration are that the decision was irrational or procedurally unfair. In this case, the Panel decided that the Applicant was not suitable for release on license.

Irrationality

22. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court (adopting the approach set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** explained that 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."

23. The Divisional Court in **DSD** (Supra) 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 application of this test has been confirmed as correct in previous rule 28 applications for reconsideration: **Preston [2019] PRBA 1**.

Adjournments

24. The Parole Board Rules, 2019, include the following rules of relevance at Part 2 Section 6(11):

    "The panel chair or duty member may adjourn or defer the proceedings to obtain further information or for such other purpose as they consider appropriate".

25. The decision in **Secretary of State for Education and Science v Tameside MBC** [1977] AC 1014, clarified the principle of sufficient enquiry/procedural fairness.

26. In **R (Plantagenet Alliance Ltd) v Secretary of State for Justice** [2014] EWHC 1662 (Admin) it was explained that the under the Tameside principle:

    "A public body has a duty to carry out a sufficient inquiry prior to making its decision. This is sometimes known as the 'Tameside' duty since the principle derives from Lord Diplock's speech in Tameside where he said: 'The question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?".

27. Mr Justice Haddon-Cave observed in the **Plantagenet case** that:

    "The following principles can be gleaned from the authorities:
    (1) The obligation upon the decision maker is only to take such steps to inform himself as are reasonable.
    (2) Subject to a Wednesbury challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken.
    (3) The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision.
    (4) The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient.
    (5) The principle that the decision maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion.

(6) The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it".

The Reply on behalf of the Secretary of State (the Respondent)

28. The Respondent has stated that he does not wish to make any representations.

Discussion

29. When the Panel was asked at the conclusion of the proceedings before it reached a decision on the Applicant's claim for parole case to adjourn the hearing and not to decide whether the Applicant could be released so that the referrals set out in paragraph 18 above could be made for accommodation by his Offender Manager, it had two important duties, which were that: -

    (a) it had the **Tameside** and **Plantagenet** duty to take reasonable steps to acquaint itself with the relevant information to enable it to answer the relevant question which was whether the information being sought was (in the words of the Secretary of State's own Guidance set out in paragraph 25 above) "*liable at any stage to influence the eventual parole outcome*"; and (b) because the Applicant had then *been* in custody for more than 13 years (less short periods spent on release) after the expiry of his tariff of 2 years on 27 September 2007, there was an enhanced duty on the part of the Panel to scrutinises the Applicant's level of risk because, as Lord Reed explained in **Osborn v Parole Board** [2013] UKSC 61, the Parole Board: "*when dealing with cases concerning post-tariff indeterminate sentence prisoners, it should scrutinize ever more anxiously whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff".*

30. The consequence of the Applicant having spent very long periods in custody after the end of his tariff meant that the Panel was obliged to scrutinize even more anxiously than it was bound to do in a normal cases the issue of whether the Applicant's level of risk was unacceptable under different release plans. The duty of the Panel to act even more anxiously meant that it was required to consider each possible release plan for the Applicant (and in particular places where he could stay) to see whether if he was placed in any of them his level of risk would be of a level so as to permit his safe release especially as there was no finding or any evidence that the Applicant could not be safely managed in any or all of the places referred to in the accommodation referrals. Indeed, there was evidence that he could be safely managed in such premises as I will explain.

31. So in the absence of evidence, let alone a reasoned decision, showing that there was no point in adjourning for the purpose of making **each and every one** of the accommodation referrals because he could not be safely managed in **any** of them, the Panel should have acceded to the request for the adjournment as part of its duty to see if the level of risk posed by the Applicant in any of them was acceptable. The Panel's failure to do so and to make a decision refusing to release the Applicant was irrational and or Wednesbury unreasonable even after taking account of the deference due to the Panel.

32. There are further or alternative reasons which individually or cumulatively show why the Panel should have refused to direct the Applicant's release without having taken all reasonable steps to acquaint itself with the relevant information by acceding to the request for accommodation referrals to enable it to decide whether it was necessary for the Applicant to remain in custody. The irrationality of the failure of the Panel to accede to that request caused a procedural irregularity which rendered the decision to refuse parole amenable to reconsideration.

33. First, there was evidence in the most recent psychological reports available to the Panel that in an appropriate location for him, the Applicant's risk might well be manageable in the community because in a Memorandum of Agreement dated 21 March 2019 it was stated by the two psychologists who examined him that:

    (a) "Both psychologists felt that [the Applicant] demonstrated good insight but that his ability to apply this learning at times of acute stress is somewhat impaired, possibly due to his cognitive limitations, and that he requires support to try and integrate his learning into real life scenarios/settings;"
    (b)" Both psychologists recommend that [the Applicant] be transferred to residential rehabilitation unit in the community;" and that
    (c) "Both psychologists agree that release to an [approved premise] could be safely manageable if sufficient support around substance misuse was available but this is a secondary recommendation to residential rehabilitation".

34. In addition, an independent psychologist concluded in 2019 that the Applicant's "*risk can be safely managed in the community if he were released to a rehabilitation environment or to an [designated accommodation] with plans for a moderate–high level of support for his substance misuse".*

35. In other words, the information being sought in the accommodation referrals was in the words of the Secretary of State's own Guidance (set out in paragraph 25 above) *"liable to influence the eventual parole outcome"* and this supports the conclusion that it was irrational or Wednesbury unreasonable to have refused an adjournment for the accommodation referrals to be made. There are five other factors which individually or cumulatively fortify that conclusion and which I will set out in no order of importance.

36. First, at the time of the oral hearing although residential rehabilitation had been identified as a possible avenue for the Applicant, his Offender Manager and Supervisor had not explored places where this would be available for the Applicant.

37. Second, the Applicant has expressed his agreement to embark on residential accommodation.

38. Third, the Applicant has not committed any offences since his index offence and had not come to the attention of the police when he had been in community even when spending 2 months unlawfully at large.

39. Fourth, at the time of the oral hearing, the Applicant's Offender Manager and Offender Supervisor had stated that there was no core risk reduction work for the Applicant to complete in custody and that the Applicant had completed a substantial number of accredited offending behaviour programmes since he was sentenced. In other words, there was no need for the Applicant to stay in custody to carry out more programmes there.

40. Fifth, the Panel considered that without accommodation and support, the Applicant's risk of serious harm could be raised from his current assessment of being a medium risk.

Decision

41. For the reasons I have given, I consider that the decision to refuse to direct the Applicant's release without carrying out further inquiries such as acceding to his application for an adjournment was irrational. The irrationality of the failure of the Panel to accede to that request caused a procedural irregularity which rendered the decision to refuse parole amenable to reconsideration. The irrationality of the failure of the Panel to accede to that request caused a procedural irregularity which rendered the decision to refuse parole amenable to reconsideration. Accordingly the application for reconsideration is granted.

42. I have given careful consideration to whether this case should be reconsidered by the original Panel or whether it should be considered afresh by another Panel.

43. I have no doubt that the original Panel would be fully capable of approaching the matter conscientiously and fairly. However, the question of justice being seen to be done arises again. If the original Panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was wrong. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh Panel.

44. I have also made directions for the Offender Manager and the Offender Supervisor to produce reports before the re-hearing. I have not made any order for a psychological report and if either party regards it necessary to have such reports, an application can be made in the usual way.

Sir Stephen Silber
22 February 2021