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[2023] PBRA 80

Application for Reconsideration by Logan

Application

1. This is an application by Logan ("the Applicant") for reconsideration of a decision of the Parole Board dated 28 March 2023 not to direct his release. The decision followed an oral hearing which took place on 9 November 2022 and 22 March 2023.

2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) on the grounds that (a) the decision contains an error of law, (b) is irrational, and/or (c) is procedurally unfair.

3. I have considered the application on the papers. These are (1) the dossier, now running to some 570 pages including the decision; (2) the application for reconsideration supported by written submissions from the Applicant's legal representative; and (3) further submissions from the Applicant's legal representative lodged at my request to address the very recent decision of the Supreme Court in **R (on the application of Pearce and another) v Parole Board of England and Wales** [2013] UKSC 13 (5 April 2023)("**Pearce**").

Background

4. On 25 October 1999 the Applicant was sentenced to life imprisonment for the murder of his father. The minimum term for his sentence was set at 11 years. This minimum term expired on 5 February 2010.

5. The murder took place on 27 January 1999. The Applicant was then 20 years of age. By this age he already had a serious drink problem. He had three previous convictions, two for common assault, all associated with the consumption of alcohol. He had a volatile relationship with his father. On the day in question he had been drinking alcohol but was not drunk. He stabbed his father with a knife and hid the body. He used his father's credit card fraudulently to purchase drink, food and trainers. Initially he denied responsibility; when he accepted responsibility for the stabbing he said that his father had been shouting at him and demeaning him.

6. The Applicant was first released on licence on 4 October 2010. He has now been released on licence and then recalled on no less than 11 occasions. On every occasion his recall has been associated with relapse into drinking; he has not, however, been recalled merely because of the relapse, but because of persistent risky and unlawful behaviour while under the influence of alcohol. This has included driving while three times over the permitted alcohol limit, battery, criminal damage;

common assault; threats of violence and many instances of aggression. These relapses have occurred despite repeated assurances from the Applicant that he will abstain from alcohol and despite placements in approved premises, specialist residential rehabilitation and dry houses. Instances have occurred at or in the vicinity of the homes of adults known to him, including his own mother and a previous intimate partner. Details of the first ten of these recalls will be found in a decision dated 27 April 2021 (dossier pages 28-40). Most recently, the Applicant was released on 13 May 2021 and recalled on 23 November 2021.

Request for Reconsideration

7. Submissions in support of the application for reconsideration are developed under three headings.

8. Firstly, it is submitted that the panel's reliance upon the circumstances of the recall incident as evidence of the risk of serious harm was conducted without procedurally fair safeguards and without fair weighing of other available evidence.

9. Secondly, it is submitted that the panel was irrational in concluding that the recall matters were index offence paralleling behaviours that play to his risk of serious harm.

10. Thirdly, it is submitted that it was irrational for the panel to conclude that there is core risk reduction work that can only be dealt with by his remaining in custody when that work was to address risks which have not been identified as linked to his serious harm.

11. Each of these submissions is developed in some detail; I will return to the detail in my later discussion of the case.

Current parole review

12. The Applicant's case was again referred to the Parole Board in December 2021 following his latest recall. On 27 January 2022 directions were given for the preparation of an up-to-date psychological assessment, police report and COM report. At that time there were outstanding police investigations. In November 2022 the panel was informed that the allegations against him had not reached the charging threshold. The oral hearing began on 9 November 2022. That hearing was adjourned – in part for want of time, in part to obtain updated reports in the light of developments. The hearing resumed and concluded on 22 March 2023.

13. The panel consisted of an independent member in the chair and two co-panellists – an independent member and a psychiatrist. The panel heard from the Prison Offender Manager ("the POM"), a prison psychologist, the COM and the Applicant himself.

The circumstances of recall

14. The Applicant had been released to a dry house. In October 2021 he had been evicted from the dry house following a relapse into drinking. He was given permission to reside temporarily with his current partner. He told probation services

that he was abstinent again. However, it was alleged that on 20 November he struck his partner in the mouth and threatened to stab her. He left her property on that day. The allegation was first made to the police by a friend of the partner on 21 November. On 22 November the Applicant returned to his partner's property; he was intoxicated and attempting to gain entry. He was arrested by the police in a state of drunkenness. He was interviewed and bailed with an exclusion area and non-contact condition. Shortly afterwards he was recalled to prison.

15. As to the circumstances of recall, the panel had information from the police, including a witness statement from the partner, an explanation as to why no charge had been preferred, and evidence from the Applicant.

16. There was significant common ground about the circumstances of recall. The Applicant accepted that he had relapsed into drinking and been evicted from the dry house and was living with the partner in question. He accepted that he had continued to drink while he was at the partner's home – he said *"on and off"*. Both the Applicant and the partner said that on 20 November there was an argument when she challenged him about messages sent by the Applicant on his mobile phone to other women. The Applicant accepted that he had struck the partner in the area of the mouth. He also accepted that he had drunk a great deal in the succeeding two days and was drunk when arrested on 22 November at his partner's property.

17. There were, however, also significant differences in the account of the Applicant and his partner. He said that he had struck her only in self-defence when she was attacking him and that his blow was not sufficiently hard to damage a tooth. She said that he had struck her suddenly as she was leaving the room and that the blow was sufficient to cause her mouth to bleed and two teeth to be loosened – one, she said, fell out the following evening.

18. Against this background it is not surprising that the Crown Prosecution Services advised that the threshold for prosecution was not met. They stated that it was essentially one person's word against another. They sought expert dental advice; this was to the effect that the partner's teeth were generally in poor condition and might for that reason more easily be dislodged.

19. The panel stated that it had taken into account the Parole Board's Guidance on Allegations and followed the process set out in those Guidelines. It did not make findings of fact as to the disputed circumstances which I have summarised in paragraph 18. It expressed its conclusions in paragraphs 2.23 to 2.33 and again in paragraphs 4.5 to 4.6. It is sufficient to quote the latter.

"4.5 The panel expressed a level of concern against the circumstances leading to [the Applicant's] recall and placed some weight upon it. The panel noted that no further police action was taken as a result of the allegations and the potential charges made against [the Applicant] but took account of all the circumstances surrounding the recall and [the Applicant's] past behaviour and the potential index paralleling offence behaviour. [The Applicant] initially appeared to minimise the circumstances of the recall but upon reflection has stated that he understood why it occurred and can understand the concerns that others would have had regarding this.

4.6 His recall stemmed from poor decision making, return to alcohol misuse, lack of compliance, concerns about his emotional management, his alleged use of violence and the risk of serious harm to his partner. This was his eleventh release on this sentence."

The assessment of risk

20. As noted above, the panel had a recent report and evidence from a psychologist as to the Applicant's risk. The panel set out her evidence at considerable length in its decision. In brief, her view was that the Applicant's drinking led to aggressive behaviour and increased the imminence and likelihood of further violence; that he did not understand his level of risk, in part because of unaddressed issues in his life; that, while risk management plans had been effective in recalling him before something serious happened, he had committed acts which could have led to very serious harm. She said that he needed to develop an understanding of why he returned to using alcohol and to strengthen his skills in dealing with it; and needed to have worked on this prior to a further release. She did not think that work in the community – for example with the Intensive Intervention and Risk Management Service ("IIRMS") or drug addiction services or specialist approved premises – would suffice.

21. The Applicant's COM took a similar view. She too felt that core risk reduction work required to be completed prior to release. She had concerns about the Applicant's openness and honesty based on her dealings with him. She was prepared to contemplate a move to open conditions to complete risk reduction work, but she did not know whether the work she contemplated could be done in those conditions. She did not support release.

22. The panel set out its conclusions at considerable length. It accepted the evidence of the psychologist, of which it took particular note (see paragraphs 4.11 to 4.13). It is sufficient to quote the following paragraphs –

"4.09. [The Applicant] appeared to set out what he thought he had done to address his risks, what internal strategies he had pursued of his own volition, who best he could talk to most effectively, what would be best to assist him and where best he would be released to. He appeared to see the world as those who were with him or those who were against him. He appeared to take criticism and comments about his risk personally rather than something which was there to help him in his plans to be released. [The Applicant] has failed in all different types of environments. He didn't take note of the concerns of professionals and the concerns they had and what they assessed was the correct route for managing his risks and eventually releasing him safely.

4.10 [The Applicant] does not have the skills to manage his risks. [The Applicant] is alcohol dependent. He has plans for managing his dependency but his stated protective plans are not as strong as he feels they are as he has not addressed why he returns to alcohol in the first place. He manages well in custody but once tested in the community, as he has been eleven times now, he follows through a combination of not managing, not coping, getting stressed, return to alcohol, get into a relationship with a vulnerable person, risk escalates and he is recalled. The panel saw little from what [the Applicant] put forward which showed how any of this had changed and his internal controls had not matured or progressed. The

panel assessed that his insight into his risk factors was impaired and all protective factors for him remained external.

…….

4.16 The panel agrees that, in supporting the development of an achievable risk management plan for the future, [the Applicant] will need to demonstrate how he manages risky situations and challenges and how he can make informed decisions. For now, given his outstanding risk factors, his unaddressed risks and the need for core risk reduction work to be undertaken, there is no sufficiently robust risk management plan in place to safely manage his risks in the community. ***The panel concluded that it remains necessary for the protection of the public that [the Applicant] continues to be confined and does not direct his release."***

The Relevant Law

23. The panel correctly set out the test for release in its decision. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.

24. The panel's decision as to release is eligible for reconsideration since the Applicant is serving an indeterminate sentence and the decision was taken under rule 25(1) of the Parole Board Rules: see rule 28(1) and 28(2)(a) of the Rules. The panel's decision not to recommend open conditions is not eligible for reconsideration.

25. It is not necessary to set out an exhaustive statement of the circumstances in which a decision will be unlawful. Broadly, a decision will be unlawful if it is taken in contravention of some legal principle or duty applicable to the case; or if it leaves out of account a factor which the law requires to be taken into account; or if it places weight on a factor which is irrelevant in law; or if the reasons fall short of the standard which the law requires for the decision.

26. The concept of irrationality is derived from public law. The test is whether the 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."* See **CCSU v Minister for the Civil Service** [1985] AC 374, applied to Parole Board decisions by **R (DSD and others) v the Parole Board** [2018] EWCH 694 (Admin). This is the standard I have applied when considering this application for reconsideration.

27. The concept of procedural fairness is rooted in the common law. A decision will be procedurally unfair if there is some significant procedural impropriety or unfairness resulting in a manifestly unfair or flawed process. The categories of procedural unfairness are not closed; they include cases where laid-down procedures were not followed, or a party was not sufficiently informed of the case they had to meet, or a party was not allowed to put their case properly, or where the hearing was unfair, or the panel lacked impartiality.

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

28. The Respondent has informed the Parole Board that he does not offer any representations concerning this application.

Discussion

Ground one – the recall

29. As noted above, this ground is concerned with the panel's approach to allegations concerning recall. It is said that the panel took the circumstances of recall into account when assessing the Applicant's risk of serious harm without necessary procedural safeguards and without taking into account other relevant information. In support, reference is made to what is described as a thorough police investigation; the taking of dental advice; the Crown Prosecution's decision that no further action should be taken; the fact that his COM had approved his living at the address; and that his drinking of alcohol *"is not in itself a factor of risk of serious harm and has not resulted in such an act".* It was unfair for the panel to find that the relapse related to serious harm or that it indicated a need for core risk reduction work which could only be addressed in closed prison conditions. While the panel applied the Guidance which was approved in **Pearce**, it is submitted that the panel would have benefitted from the additional clarification provided by the Supreme Court, and reached a decision which was unfair and irrational.

30. The panel applied Parole Board Guidance on Allegations revised in July 2021. Put in the broadest of terms, this Guidance encouraged panels to reach findings of fact about allegations if they considered that they had the material to do so and could do so fairly; but permitted them, if they felt unable to make findings of fact, to attach a *"level of concern"* to the allegations when assessing risk. On 14 January 2022 the Court of Appeal in **Pearce** held that aspects of this guidance were unlawful: see [2022] EWCA 4. Again put broadly, the Court of Appeal held that allegations must only be brought into account to the extent that a panel was able to and did make findings of fact fairly about them; to the extent that no such findings of fact could be made, the allegations must be left out of account. Recently, however, on 5 April 2023, the Supreme Court allowed the Parole Board's appeal in **Pearce**. It upheld the Guidance, while suggesting ways in which it could be clarified (see paragraphs 88-93 for the suggestions).

31. The panel, taking its decision in March 2023 prior to the decision of the Supreme Court, applied the Guidance on Allegations without reference to the decision of the Court of Appeal and registered a *"level of concern"* about the circumstances of recall, including the allegation of violence, without making a precise finding of fact about the allegation of violence. At first sight this may seem surprising. I am, however, aware that the Guidance on Allegations was never formally withdrawn, so many members will have downloaded and kept it on their computers; and it is only one of many separate pieces of guidance with which members must keep up to date. Members do not have any equivalent of the Bench Books which are used in criminal and civil proceedings. I have seen other cases since January 2022 where chairs and panels were unaware of the import of the Court of Appeal decision.

32. Now that the Supreme Court in **Pearce** has upheld the Guidance on Allegations, I must consider whether the panel's approach accords with that Guidance as explained and clarified in **Pearce**. I will take the Guidance as read; and although

the whole judgment of Lord Hodge and Lord Hughes repays careful reading it will be sufficient if I quote part of the summary given in paragraph 87.

"(iv) What procedural fairness requires of the Board in its impartial performance of its statutory remit is determined by the statutory terms of that remit and the wider legal context of the common law.

(v) If weight is to be given to an allegation of criminal or other misbehaviour in the risk assessment, the Board should first attempt to investigate the facts to enable it to make findings on the truthfulness of the allegation. If, as may often be the case despite its efforts to obtain the needed information, the Board is not able to make such a finding, it should investigate the facts to make findings as to the surrounding circumstances of the allegation which may or may not point to behaviour by the prisoner which is relevant to the assessment of risk.

(vi) In some circumstances, however, the Board may not be able to make findings of fact as to the truth of an allegation either because of an inability to obtain sufficiently reliable evidence or because it would be unfair to expect the prisoner to give an answer to the allegation when he is facing criminal or prison disciplinary proceedings in relation to that allegation.

(vii) In such circumstances the Board, having regard to public safety, may take into account the allegation or allegations and give it or them such weight as it considers appropriate in a holistic assessment of all the information before it, where it is concerned that there is a serious possibility that those allegations may be true. But the Board must proceed with considerable caution in this exercise because of the consequences of its decision on the prisoner. Procedural fairness requires the Board to give the prisoner the opportunity to make submissions about how the Board ought to proceed. There may be circumstances where, because of the inadequacy of the information available to the Board, it concludes that it should not take account of an allegation at all. There may also be circumstances where the information is less than would be desired but the allegation causes sufficient concern as to risk that the Board treats it as relevant. Its assessment of the weight to be attached to an allegation is subject to the constraints of public law rationality.

(viii) Thus, a failure to make findings of fact where it was reasonably practicable to do so or an irrational reliance on insubstantial allegations could be a ground of a successful public law challenge."

33. In my view the panel's decision meets the requirements of the Guidance as clarified in **Pearce**. It has investigated the circumstances of recall as fully as can reasonably be expected and has made findings of fact on many aspects. The problem for the panel lay in making findings as to the precise circumstances in which the Applicant struck his partner in the mouth. The allegation of his partner that he had done so suddenly and without warning could not be ignored: there was a serious possibility that it might be true, especially bearing in mind the Applicant's history of risky and aggressive behaviour. It was not an insubstantial allegation. But the panel was entitled to conclude that it could not make a precise finding on that issue where there was a dispute about it, the partner could not be questioned by the panel (and had not been questioned in any court), the partner had her own vulnerabilities and herself said she had challenged the Applicant about his messages to other women.

34. I do not accept the submission made on the Applicant's behalf that the panel took its decision without procedural safeguards. The panel investigated the matter to the extent that was reasonably practicable and it afforded the Applicant the opportunity to put his side of the case. It is true that the partner was not called or cross-examined; but it is not part of the panel's task to conduct a trial, nor would it have been practicable to do so. Nor do I accept the submission that the panel left out of account relevant information: it is plain from its reasons that it took account of all the information it had, from the police and from the Applicant.

35. In summary, I consider that the panel made findings of fact to the extent that it was reasonably practicable to do so, approached its task holistically, and rationally found a level of concern based on allegations which were substantial and which it could not sensibly have left out of account.

36. Future panels will be greatly assisted by the Supreme Court's suggestions about clarifying the Guidance (and no doubt the Guidance will soon be updated); however, I consider that in substance the panel's approach was correct, and I do not think that its reasoning was unfair or irrational.

37. I turn to the submission that the Applicant's drinking was not in itself a risk factor for serious harm. As noted above, the Applicant's many recalls were not for drinking in itself; the recalls were by reason of the violence, aggression and risky behaviour which presented itself when he relapsed into drinking. It is true that he was always recalled before his behaviour resulted in serious harm; but the panel must consider not only behaviour which has resulted in serious harm, but also behaviour which has the potential to do so. I see no error of law, irrationality, or unfairness in the panel's approach to his relapse and the recall allegations.

Ground two – risk of serious harm

38. This ground to a significant extent overlaps with the submission which I have addressed in the last paragraph. It is argued that it was irrational for the panel to accumulate the various relapses and recalls; none had resulted in serious harm; there was no evidence that the risk of serious harm could not be managed in the community because of the recalls; it was not right to regard the Applicant's behaviour as "*offence paralleling".*

39. I see nothing irrational about the panel's approach. It was entitled to look at the overall picture presented by the Applicant. This showed that, despite a variety of placement and interventions, he had been unable to control either his drinking or the violence, aggression and risky behaviour which accompanied it. The panel was entitled to find that this contributed to his risk of serious harm. The persistence of such behaviour after numerous interventions and placements was a matter to which the panel was entitled to have regard.

40. The phrase *"offence paralleling"*, sometimes found in professional reports and in decisions, indicates that the writer sees similarities between features of the index offence and some recent behaviour of a prisoner. It is not a term of art with a precise definition. The murder by the Applicant of his father took place in the home when he had a drink problem and after he had been drinking; and he used his father's credit card fraudulently to drink afterwards. Prior to recall the Applicant

again relapsed into drinking, there was again an altercation in the home where he was living, and he again drank heavily afterwards. I do not think it was irrational to say that there were parallels between the index offence and the circumstances of the current recall.

Ground 3 – core risk reduction work

41. On the Applicant's behalf it is argued that the panel was irrational in finding that there was core risk reduction work which had to be completed in custody when the matter which it sought to address was not linked to risk of serious harm and when the work could be undertaken in the community through the IIRMS service.

42. The phrase *"core risk reduction work"* is often found in reports and decisions. Again, it is not a term with a precise definition. It denotes work which, in the assessment of the report writer or panel, the prisoner must do if release or re-release is to be supported as safe. The phrase may refer to an accredited course appropriate to the prisoner's offending and risk factors; but it is also sometimes used where a specific placement is said to be necessary (such as a PIPE facility or a Therapeutic Community) or where one-to-one work is thought to be required.

43. The panel's view that the Applicant required work to address his risks in custody prior to release was supported both by the psychologist and the COM. It had a sound basis in the evidence; I do not think it can be said to be irrational. I do not accept that the work was to address risks which have not been linked to serious harm. There was ample evidence that his lapses into alcohol consumption led to behaviour with the potential to cause serious harm. The psychologist's view was that he needed to understand what drove him to resume drinking and to strengthen his skills for dealing with it. This was a rational view which it was open to the panel to accept.

44. The panel was entitled to conclude as it did (paragraph 4.08 of its reasons) that work with the IIRMS service in the community was not sufficient, especially given the propensity of the Applicant to begin drinking and disengage with professional services. Engagement with the IRRMS service is voluntary. Moreover, as the psychologist stated, it is not an equivalent for the kind of work which she envisaged in custody.

Decision

45. For these reasons I refuse the application for reconsideration.

David Richardson
2 May 2023