[2023] PBRA 9

the Parole Board
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Application for Reconsideration by Bucknor

Application

1. This is an application by Bucknor ('the Applicant') for reconsideration of the decision of a panel of the Board ('the panel') which on 11 November 2022, after an oral hearing on 3 November 2022, issued a decision not to direct his release on licence.

2. I am one of the members of the Board who are authorised to make decisions on reconsideration applications, and this case has been allocated to me.

Background and history of the case

3. The Applicant is aged 40. He is serving an extended determinate sentence ('EDS') for robbery ('the index offence'). This sentence was imposed on 18 August 2017. It comprised a custodial term of 9 years and a licence extension period of 3 years.

4. The Applicant became eligible for early release on licence on 14 February 2022. If not released early by direction of the Parole Board, he will be automatically released on licence on 13 February 2025. His sentence will not expire until 14 February 2028.

5. The Applicant comes from a respectable and pro-social family, but in his teens he became involved with anti-social young people and was a regular user of drugs. By time of the index offence he had accumulated convictions for 18 offences and had served three custodial sentences. His offences during that period included: - Assault with intent to rob at age 18 - Possession of cannabis with intent to supply at age 24 - Robbery and threats to kill at age 25 - Affray at age 28 - Possession of a firearm at age 28 and - Affray again at age 32.

6. The offences of robbery and threats to kill resulted from an incident between the Applicant and his estranged partner (Ms X). These offences will need to be examined in more detail below.

7. The index offence was committed in June 2015 when the Applicant was aged 33. It followed a road rage incident in which the Applicant was the aggressor. The victim was a member of the public who witnessed the incident and got out his mobile phone to take a photograph of the Applicant's number plate. The Applicant demanded the phone and assaulted the victim when he did not hand it over. He eventually got possession of the phone and drove off with it.

8. In January 2016, when on bail for the index offence and subject to a suspended sentence for the latest affray, the Applicant committed another

serious offence. He and an associate were out drinking at night clubs. They were involved in a fight at one club and later moved to another club where there were further disturbances. They then went out to their car and collected a loaded firearm which they took back to the club. It was the Applicant who was carrying the firearm, and he fired it into the ceiling. A man who was standing at the bar was injured by the debris from the shot. The Applicant and his associate then left the scene. The Applicant was under the influence of drugs and alcohol at the time of the incident.

9. In due course, the Applicant pleaded guilty to the index offence, for which he received the EDS. He also pleaded guilty to two charges relating to the shooting incident in the club (ABH and possession of a firearm with intent to cause fear of violence). He received concurrent determinate sentences on those two charges.

10. His progress during his sentence has been generally good. He successfully completed the appropriate accredited risk reduction programme as well as work on substance abuse and various educational or vocational courses. His custodial behaviour has been described as exemplary. He has received only one proved adjudication, for fighting, which was dealt with by a caution (suggesting that there was significant mitigation).

11. In contrast to the uniformly positive reports of wing staff, praising his custodial behaviour, whilst at two establishments he attracted a large number of adverse security intelligence reports. He was moved to his present establishment in October 2021 and there have only been two security intelligence reports since then: one of those was positive and the other related to an unsubstantiated suspicion. None of the adverse intelligence reports, which will need to be discussed below, led to disciplinary charges.

12. A detailed psychological assessment was carried out in March 2022 by a Registered Forensic Psychologist (Ms S). She concluded that the Applicant had completed all core risk reduction work and recommended his release on licence.

13. The current review of the Applicant's case, which commenced in May 2021, has been long drawn out for reasons entirely outside his control. The oral hearing finally took place on 3 November 2022. Evidence was given by the following witnesses in addition to the Applicant himself: - The psychologist (Ms S) - The official responsible for supervising the Applicant in prison (Ms G) and - The official prospectively responsible for supervising him in the community (Ms B).

14. The evidence given by these professional witnesses was generally favourable to the Applicant. However, for reasons set out in its very detailed decision the panel decided that the Applicant did not meet the test for release on licence. The Applicant's solicitor on his behalf now submits that that decision should be reconsidered.

The Relevant Law

The test for release on licence

15. The test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public.

The rules relating to reconsideration of decisions

16. Under Rule 28(1) of the Parole Board Rules 2019 (as amended in 2022) a decision is eligible for reconsideration if (but only if)
    (1) It is a decision that the prisoner is or is not suitable for release on licence and
    (2) one of more of the following three grounds is established:
        a) It contains an error of law and/or
        b) It is irrational and/or
        c) It is procedurally unfair.

17. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by:
    (i) A paper panel (Rule 19(1)(a) or (b)); or
    (ii) An oral hearing panel after an oral hearing, as in this case, (Rule 25(1)); or
    (iii) An oral hearing panel which makes the decision on the papers (Rule 21(7)).

18. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. It is made on both grounds (irrationality and procedural unfairness).

The test for irrationality

19. In **R (DSD and others) v the Parole Board** [2018] EWHC 694 (Admin) (the "Worboys case"), the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It stated at paragraph 116 of its decision:
    "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."

20. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.

21. The Administrative 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 Board in making decisions relating to parole.

22. The Parole Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see, for example, **Preston [2019] PBRA 1**.

The test for procedural unfairness

23. 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 from the issue of irrationality which focuses on the actual decision.

24. The kind of things which might amount to procedural unfairness include:
    (a) A failure to follow established procedures;
    (b) A failure to conduct the hearing fairly;
    (c) A failure to allow one party to put its case properly;
    (d) A failure properly to inform the prisoner of the case against him or her; and/or
    (e) Lack of impartiality.

25. The overriding objective in any consideration of a prisoner's case is to ensure that the case is dealt with fairly.

The request for reconsideration in this case

26. The solicitor, in his admirably concise representations, advances a number of points in support of his request for reconsideration. In summary his submissions are as follows:
    (1) The panel gave undue weight to matters which had low relevance to the assessment of risk, and failed to give sufficient weight to the work undertaken by the Applicant to address his risk factors;
    (2) In particular the panel based its decision on an over-reliance on a perceived risk of intimate partner violence;
    (3) Much time was taken at the hearing by reference to the unproven allegations in security intelligence reports, which had no evidential value;
    (4) The panel failed to take into account a recent risk assessment by the prison service which resulted in the Applicant's recategorisation to the lowest security classification;
    (5) In questioning the Applicant the Panel Chair was '*overly robust'* and 'strayed into *adversarial territory'*; and
    (6) The recording system operated by the Panel Chair malfunctioned following his computer crashing, which resulted in the loss of about 40 minutes of the recording.

The Secretary of State's position

27. By e-mail dated 19 December 2022 the Public Protection Casework Section ('PPCS') on behalf of the Secretary of State stated that he offers no representations in response to the application.

Documents considered

28. I have considered the following documents for the purpose of this application:
    (i) The dossier provided by the Secretary of State for the Applicant's case, which now runs to page 441 and includes a copy of the panel's decision letter;

(ii) The representations submitted by the Applicant's solicitor in support of this application; and

(iii) The e-mail from PPCS stating that the Secretary of State offers no representations in response to the application.

Discussion

29. It is convenient to consider each of the solicitor's submissions in turn.

Submission 1: The panel gave undue weight to matters which had low relevance to the assessment of risk, and failed to give sufficient weight to the work undertaken by the Applicant to address his risk factors.

30. There is some force in this point. The panel certainly gave great weight to its assessment of the Applicant's risk of intimate partner violence ('IPV') and (as discussed in the next section below) there are reasonable grounds for criticism of that assessment. By contrast the panel does not appear to have given much weight to the Applicant's successful completion of the accredited programme designed to reduce his risk to the public or to the other positive factors in the case.

31. The panel suggested that there was evidence of minimisation in the Applicant's evidence. It stated in its decision: *'There is an element of minimisation in relation to his offending as shown by the fact that he fired the gun at the ceiling because he didn't intend to shoot anyone.'* It is difficult to understand that suggestion. It was not suggested by the prosecution that the Applicant intended to shoot anyone. The charge against him, which he admitted and continues to admit, was that he intended to cause fear of violence.

32. So far as I can see, his accounts to the panel of the index offence and of the shooting incident were quite frank and open. He admitted some things that did not appear in the dossier, and does not appear to have shirked from admitting the things which were adverse to him.

33. He clearly showed quite good insight into his offending and his risk factors. He told the panel that in all his offending the victims did not deserve what he had done. He said they would have been scared and in the nightclub the other people there would have been scared and maybe scared to go back out again. He realised he could have hurt people really badly and it could have been a lot worse. He identified his main risk factors as taking cocaine (which he said he only took after he had been drinking), his false pride, his anger, controlling his emotions, his negative attitudes, his being scared and his shame. He said that he had read books on mindsets and realised that he wasted a lot of time on negative thoughts and being around negative people and that he had to be a good example to his son. He said his mindset in the past had mostly been negative.

34. In relation to the index offence, he told the panel that he wished it had not happened and he had thought about it a lot. He was driving off so why did he reverse, he should have just driven away. He described how he did not control

his emotions, he did not have anyone to prove himself to, so it was his false pride and acting on his own impulses which led to the offence. He said he did not need to get out of the car, he should have just got on with his day. He said that at the time his emotions were something he struggled to control and they got the better of him when someone was aggressive or hostile towards him.

35. In relation to the shooting incident he told the panel that he had felt belittled by another man in the club and became angry: his associate took him to his car and gave him gloves and he thought he was going to give him a knife but it was in fact a gun. He felt he could not back down as he had said he was going to 'do this guy'. He had no intention of killing him but again it was his self-pride. They went back to the club looking for the man who had belittled him. When they saw him he ran off. The Applicant's associate said 'shoot him', but he just let the gun off in the air. He said he should not have had the gun, and that it was the cocaine and alcohol which was bad for him, he could not handle it. He said he did not get nasty on drink, he just became merry but drugs made him a different person especially once he had had a drink.

36. The panel appears to have attached significant weight to the fact that there were inconsistencies in the accounts which the Applicant gave, following the offences, to the police and probation and in CPS documents. It is of course not uncommon for offenders to give inconsistent accounts during the period after their arrests when they are anxious to minimise the consequences of their actions. Very often during their sentences (especially when their actions are explored in risk-reduction programmes or psychological assessments) they come to accept the full extent of their offending and take responsibility for what they did. There is plenty of evidence that that is what has happened in this case. There is therefore force in the view that very little weight should have been attached to the inconsistencies in the Applicant's earlier accounts.

Submission 2: In particular the panel based its decision on an over-reliance on a perceived risk of intimate partner violence.

37. This is perhaps the main point made by the solicitor. There was certainly evidence that the Applicant's long-term relationship with Ms X was a volatile one and some of his behaviour in the relationship (and after it ended) was regrettable. There is however force in the solicitor's submission that its relevance to the Applicant's current risk of serious harm to the public falls well short of being as great as the panel appears to have thought it was.

38. There are three sources of evidence on this part of the case: (1) a number of police callouts during the Applicant's relationship with Ms X (2) the conviction referred to in paragraph 6 above and (3) the Applicant's own evidence to the panel.

39. There were 10 domestic callouts logged on police systems between 2004-2011 in which the Applicant was referred to as the suspect and Ms X as the victim. Of note is the fact that none of these callouts involved allegations of assaults against Ms X: the reports were of such things as verbal disputes, threats or damage to property. There were another two call-outs within the same period which were recorded as relating to 'verbal disputes' between the

Applicant and Ms X, both of whom were referred to as 'subjects'. This pattern is typical of a volatile relationship but did not involve any actual physical harm (serious or otherwise) to Ms X.

40. There is relatively little evidence in the dossier about the incident or incidents in 2007 which resulted in the Applicant's conviction for robbery and two offences of threats to kill. There is little or nothing to contradict the Applicant's account of the circumstances. He told the panel that he suspected that Ms X was being unfaithful to him and grabbed her phone in order to check her calls/texts: in the course of getting the phone from her he pushed her and tripped her up (the robbery). The threats to kill, he says, were not to kill Ms X but to kill somebody he believed she was being unfaithful with. There is no suggestion that he made any attempt to carry his threats into effect.

41. These were of course serious offences of an all too familiar kind, which rightly attracted a 2-year sentence (robberies and threats to kill are always treated seriously by the courts) but it seems that the Applicant's relationship with Ms X continued (on and off) for several years after these offences and there is no evidence of any repetition.

42. The Applicant appears to have been quite frank in his evidence about his anti-social attitudes and lifestyle during the lengthy period of his offending and about his inappropriate behaviour in the course of his lengthy but volatile relationship with Ms X (which of course has to be seen in the context of the overall picture of his life at that time). He told the panel that he was an aggressive person at that time and often smashed things against the wall. He said that he never punched Ms X, though he did 'grab and restrain' her: she was violent to him and on one occasion threatened to hit him with a wooden bat.

43. Ms S in her assessment had of course been aware of the callouts and the 2007 convictions, but they did not affect her risk assessment or her recommendation that the Applicant should be released on licence. It is clear from a reading of the solicitor's representations alongside the panel's decision that the panel took Ms S to task for not attaching more weight to those matters in her assessment and not delving deeper into the facts. According to the solicitor Ms S attempted to justify her position but the panel 'only sought to undermine it'.

44. Ms S confirmed in evidence that she had been aware of all the information about the callouts and the 2007 convictions. She had not of course been aware of the Applicant's evidence about 'grabbing and restraining' Ms X, which was something which he does not seen to have mentioned before. I do not think he can be fairly criticised for that: he was obviously questioned more closely by the panel than he had been by others. Ms S was driven by the panel into accepting that this 'new information' meant there was a significant gap in the information on which she had based her assessment, which was therefore incomplete.

45. There are reasonable grounds for the view that in fact the 'new information' was not particularly significant and should not carry the weight which the panel clearly attached to it. The panel referred to it as evidence of IPV on the

Applicant's part. If that was a fair description it was certainly not a high level of IPV and there is force in the solicitor's submission that it did not afford evidence of an elevated current risk of serious harm to the public. There was clear evidence that the Applicant had benefited from the risk-reduction work which he had completed and that his attitudes and beliefs had changed significantly.

Submission 3: Much time was taken at the hearing by reference to the unproven allegations in security intelligence reports, which had no evidential value.

46. Allegations in security intelligence reports are just allegations like any others. At the time of this hearing the law relating to allegations was that laid down by the Court of Appeal in the case of **R (Pearce) v The Parole Board and the Secretary of State for Justice (2022) ECA Civil 4**. That case is now the subject of an appeal to the Supreme Court but the panel in this case was obliged to follow it and was therefore obliged to proceed on the basis that the allegations should be disregarded altogether unless it was possible to make a finding of fact that they were more likely than not to be true.

47. The panel made no such finding, and if it disregarded the allegations altogether it certainly did not make that clear. On the contrary it made extensive references to them in its decision and criticised Ms S for not speaking to staff at the establishment where most of the security intelligence reports had been generated, in order to obtain further information about them. It pointed out that her assessment had only been carried out within a few months of the Applicant's transfer from that establishment (the clear implication being that if she had made enquiries she might have unearthed evidence to support the allegations). In reality it is most unlikely that any such evidence would have been unearthed.

48. The effect of the way in which the panel dealt with the allegations does seem to have left the impression that there was something in them, and to that extent there is some force in the solicitor's complaint about it. If the panel attached no weight to the security intelligence, as it should have done, it is unfortunate that it did not say so in clear terms.

Submission 4: The panel failed to take into account a recent risk assessment by the prison service which resulted in the Applicant's recategorization to the lowest security classification.

49. The panel's point about this is that the prison authorities felt he was ready for a move to an open prison and did not need to remain in a closed prison to complete any further risk reduction work. The authorities no doubt had regard to Ms S's assessment that he had completed all core risk reduction work and did not need to remain in prison at all.

50. Whilst this is an understandable point it is difficult to attach much weight to it for the purposes of this appeal. If the panel was justified in rejecting Ms S's recommendation the basis for the prison authorities' decision would be

removed. The real question is whether the panel's view of the Applicant's current risk to the public was reasonable and defensible.

Submission 5: In questioning the Applicant the Panel Chair was 'overly robust' and 'strayed into adversarial territory'.

51. This is always a difficult type of issue to resolve. In this case I am not in a position, on the evidence which I have seen, to resolve it. I would need to listen to the recording of the hearing to come to any conclusion. I might not even then be able to come to a conclusion as the recording is apparently incomplete. However, in view of my conclusions on the other issues raised by the solicitor, it is not necessary for me to reach any decision on this one.

52. I should perhaps make reference to one point made by the panel in its decision. It stated: '*When [the Applicant] was giving evidence the panel noted occasional changes of mood and presentation. At times [he] was fully engaged and was very detailed in his responses and explanations, and then at other times he appeared disengaged, gave one word answers and appeared downcast.' This might well, of course, be explained by the panel's 'robust' questioning (whether it was 'overly robust' or not) and the effect which it had on the Applicant. Giving evidence at a parole hearing is a stressful experience and, if the prisoner feels (rightly or wrongly) that he is being unfairly treated, that is bound to have an effect on his presentation*.

Submission 6: The recording system operated by the Panel Chair malfunctioned following his computer crashing, which resulted in the loss of about 40 minutes of the recording.

53. This is not in itself a ground for reconsideration, though it is relevant to my difficulty in reaching a conclusion on Submission 5 (see paragraph 50 above).

Decision and directions

54. I have given long and careful consideration to this case. At the end of the day, I am satisfied that the solicitor has made out a sound case for reconsideration based on his first three submissions. For the reasons explained above, I cannot find that Submission 4 or Submission 6 is made out, and as I am allowing this application on other grounds I do not need to make any finding on Submission 5.

55. This decision is made on the ground of irrationality. In particular, I am satisfied that the panel's approach to the Applicant's risk of IPV can fairly be described as irrational. Given that I have not been able to make any finding on the solicitor's Submission 5, I cannot find that any procedural unfairness has been established.

Jeremy Roberts
11 January 2023