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[2024] PBRA 114

Application for Reconsideration by Barnett

Application

1. This is an application by Barnett (the Applicant) for reconsideration of a decision of the panel dated 1 May 2024 (the Decision) not to direct the release of the Applicant following an oral hearing on 11 January 2024.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair. This is an eligible case, and the application was made in time.

3. I have considered the application on the papers. These are the Decision, the application for reconsideration dated 21 May 2024, the statement from Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) dated 21 May 2024 stating that no representations will be submitted in response to the application for reconsideration and the dossier totalling 431 pages.

Request for Reconsideration

4. The application for reconsideration is dated 21 May 2024

5. The grounds for seeking a reconsideration are as follows:

   i. It was irrational for the panel to refuse to release the Applicant because the Prison Offender Manager (POM) and the Community Offender Manager (COM) gave assured recommendations for the Applicant's release on the basis that he has engaged well and had been compliant since recall, that he was willing and motivated to work with probation, that there was no recent or current evidence of any negative attitude to women, that this risk would not be imminent on release and that he would benefit from some work on intimate partner violence, this could be done in the community (Ground 1).

   ii. It was procedurally unfair of the panel not to have directed a Programme Needs Assessment (PNA) of the Applicant and, if required, it could have adjourned the hearing for this purpose. It is contended that not to have done so was procedurally unfair (Ground 2).

Background

Index Offences

6. On 27 June 2001, the Applicant, who was then 33 years old, was sentenced to life imprisonment for the murder with a minimum term of 15 years. On the same day, he was also sentenced to 3 years' imprisonment for kidnapping as well as a term of 3 years' imprisonment and 1 year's imprisonment for false imprisonment. Such sentences were to be consecutive to each other, making 7 years' imprisonment but to be concurrent with the life sentence.

7. The victim of the kidnapping offence was dragged from his girlfriend's car and placed in the footwell of another car during which he was struck by a hammer. In this other car, the victim was stabbed by another man before he was taken to an address where he was bound and gagged before being punched, kicked, urinated on and burnt with candles. The Applicant did not participate in the attack, but he directed it.

8. On 30 June 2000, the Applicant attacked the victim of the murder offence at the flat in which he was living. The Applicant had moved there two and a half weeks earlier. The victim had been heard shouting and it was found that he had been struck by the Applicant using a screwdriver. The Applicant was seen to withdraw a screwdriver from the victim stomach before the victim was taken to hospital where he died.

9. The trial judge stated that the Applicant had shown no remorse for his offending and that he was a highly dangerous man who needed to control others so that he was a danger to anyone who thwarted him. The background to the murder offence as well as the kidnapping and false imprisonment offences was that the Applicant dealt in Class A drugs, and he disciplined anyone who stepped out of line. Both victims suffered the consequences of stepping out of line. The Applicant later disclosed that at the time of the offences, he was using crack cocaine.

10. The Applicant had also had issues with the use of domestic violence, and he accepted being verbally abusive and unfaithful to his 2 partners.

Release and Recall

11. The Applicant was released on licence on 16 October 2018 after a Parole Board hearing and after release, he found steady work as well as attending supervision appointments, but he was arrested on 5 December 2022 and his licence was revoked on that day which was the day on which he was returned to custody.

12. The background to the Applicant's arrest on 5 December 2022 was that he was charged with 4 offences, namely malicious communications, theft from a dwelling, criminal damage under £5000 and possession of class B drugs, namely cannabis. He was convicted of the malicious communications charge, and he received a conditional discharge. He admitted that he had made threats towards his partner and her son to the effect that he would kill her and that he would stab her son. The COM was unclear why the theft and criminal damage charges were discontinued.

13. The Applicant accepted making the malicious communications as reported and he explained that he was frustrated as he had seen his partner kick his van and he had demanded money for the repairs. He also accepted using cannabis from the point of release, but that he had gradually reduced his consumption and since his recall he had not used any substances.

14. In 2013 the Applicant had completed Phases 1,2 and 3 of the Violence Reduction Programme (VRP) and in 2014 he completed Relapse and Prevention Programme (RAPT), the Integrated Drug Treatment System programme (IDTS), CALM, a training course addressing the tendency to use violence, and engaged with the Counseling, Assessment, Referral, Advice and Throughcare (CARATS) part of the drug treatment programmes within prison.

Current Parole Review

15. On 11 January 2024, a two-member panel of the Board comprising an independent member and a psychologist member, heard oral evidence from the Applicant's COM and the Applicant's POM as well as from the Applicant. The Applicant was represented by his legal representative at the hearing.

16. The Applicant's POM was of the opinion that the Applicant's risk factors were general and intimate partner violence and included *"poor emotional management, level of aggression, perspective taking, maintaining reputation, threatening behaviour, attitudes to violence, coercive and controlling behaviour and seeking revenge".*

17. The POM considered that work on relationships was considered to be necessary risk reduction work which could be completed in custody or in the community. The POM did not consider that any outstanding work had to be completed before progression of the Applicant could be considered and that was because his risk to a partner was not imminent on release.

18. To complete the Building Better Relationship (BBR) course the Applicant moved prison, but completion of this programme was discussed between the professionals and the COM indicated that she would explore the availability of this programme in the community. As a consequence, the prison has not taken any action for placing the Applicant on any programme whether that be BBR or KAIZEN.

19. The POM, who has held that position in relation to the Applicant since May 2023, did not consider that the Applicant had any specific learning difficulties that would exclude him from mainstream programmes. There were no current concerns that the Applicant was involved in the drug culture or in taking substances. He regained his enhanced status on 3 January 2024.

20. The Applicant's COM had held that position since early 2022 and she considered that when in the community, the Applicant had been open about his substance misuse. Her view was that any risk posed by the Applicant's substance misuse could be managed in the community. The Applicant told the COM that he was using cannabis because being in the community was a shock.

21. She was concerned about the Applicant's emotional management and his attitudes in intimate relationships. Her plan was for the Applicant to complete BBR in the community as it would be more effective if completed in the community because he would be able to put his learning into practice. The COM was of the view that it did not have to be completed in custody and she considered that the Applicant was *"treatment ready"* as he was motivated to complete this work.

22. The Applicant had been in a relationship with his partner for 19 months at the time when he was recalled. He accepts that he made all the threats described by the police explaining that he acted out of frustration when he committed the domestic violence although he could not remember some violence due to his drug misuse. His evidence was that he accepted that he was not "*a nice person*" when he was using drugs and he agreed with the sentencing judge who said to him "*your need to control others is so great you are at risk to anyone who thwarts you".* The Applicant accepts that "*he needs to do a programme on relationships".*

23. The panel had insufficient evidence to make findings of fact regarding the allegations of criminal damage and theft, but *"the threats which led to the new conviction are still concerning, evidence poor emotional management and difficulties in behaving appropriately in relationships*".

24. On the subject of his drug use, the Applicant explained that he was using cannabis because his work was sometimes stressful and *"he could not explain why he did not go to the doctor to get help".* The panel noted that *"drug supply was a key factor in the index offences and are concerned about [the Applicant's] Cannabis use which brings him into contact with the drug culture".*

25. The POM and the COM recommended release as he has been compliant, engaged well as well as being motivated to work well. There was core risk reduction work for him to do and his risk was not considered to be imminent on release. The POM considered the risk management plan (RMP) to be *"robust and she did not recommend any additional risk management measures or licence conditions".* The COM also considered *"the [RMP] capable of managing the risk posed by [the Applicant]."*

26. The Applicant accepted that there had been some physical abuse in his marriage and in his relationships after that he said he was cheating all the time and wanted to get his own way. He said he was manipulative to his second long term partner who he coerced into bringing drugs into prison. He said all he was interested in was taking drugs and he only cared about himself.

27. The evidence of the Applicant was that he did not consider he was in a proper relationship with his partner because they did not live together.

28. The Applicant said that he occasionally used cannabis and he did not consider using it to be "*serious and indicated it was not as serious as alcohol use".* The panel was concerned that "*the default setting for [the Applicant] is to return to drug use and not address any mental health problems via other means"* and that *"at the time of recall [he] was still using drugs".*

29. According to the Applicant *"following recall he was so upset by the recall that he was concerned about taking drugs: any drugs that he could get his hands on".*

Analysis of Manageability of Risk in the Current Parole Review

30. The panel noted that the E-SARA assessment Spousal Assault Risk Assessment assesses that the Applicant poses a high risk of intimate partner violence, while the COM considers the risk to his partner to be low on release while the panel considers his risk on release to intimate partners to be high "*given the historical offending and the behaviour that led to recall".*

31. The Panel considered that the likelihood of violent reoffending to be *"medium until [the Applicant] has evidenced a further period [of] offence free [conduct] in the community".* It also did not consider the Applicant's release address to his daughter's home to be "*appropriate given the drug use, the circumstances of recall and the proximity to [his partner] home*".

32. The Panel considered that the RMP was "*no different to [the plan in place at] the time of his last release and that [the Applicant] cannot be safely managed in the community while there is still necessary risk reduction work that must be completed".*

The Panel's Conclusions on the Current Parole Review

33. The Panel was concerned that:

(a) The Applicant "*was used to being in control and would use violence or threat of violence to those who thwarted him*".
(b) The threats and language used by the Applicant to his erstwhile partner were "*serious and indicate poor emotional management"* and an inability "*to manage his responses when he experiences difficulties in a relationship".*
(c) The Applicant "*had not disclosed this relationship to at the earliest opportunity"* as he was obliged to do.
(d) Although the professional witnesses agreed that the Applicant *"must complete an accredited programme to address his risk of intimate partner violence"* which was "*high risk*". It was "*not confident [that the Applicant] would be treatment ready if released at this time and there is no guarantee a programme would be completed in the community*".
(e) The Applicant "*must complete the work identified in custody".*
(f) *"The risk of intimate partner violence is high and the risk of [the Applicant] causing serious harm remains high while there is still outstanding risk reduction work to be completed*".
(g) *"The [RMP] is no different to the time of his last release and that [the Applicant] cannot be safely managed in the community while there is still risk reduction work that must be completed".*

(These matters will hereinafter be referred to as "the Panel's concerns").

34. In the light of the panel's concerns, it concluded that:

(a) it remained necessary for the protection of the public that the Applicant remains confined, release was not directed; and that
(b) it could not recommend that the Applicant should be transferred to open conditions while there "*was outstanding risk reduction work"* to be completed.

The Relevant Law

35. The panel correctly sets out in its decision letter dated 1 May 2024 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

36. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

37. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

38. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined in **Associated Provincial Houses ltd -v- Wednesbury Corporation** 1948 1 KB 223 by Lord Greene in these words "*if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere".* The same test applies to a reconsideration panel when determining an application on the basis of irrationality.

39. In **R(DSD and others) -v-the Parole Board** 2018 EWHC 694 (Admin) a Divisional Court applied this test to Parole Board hearings in these words 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."*

40. In **R(on the application of Wells) -v- Parole Board** 2019 EWHC 2710 (Admin) set out what he described as a more nuanced approach in modern public law which was *"to test the decision maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied)".* This test was adopted by a Divisional Court in the case of **R(on the application of the Secretary of State for Justice) -v- the Parole Board** 2022 EWHC 1282(Admin).

41. As was made clear by Saini J, this is not a different test to the Wednesbury test. The interpretation of and application of the Wednesbury test in Parole hearings as explained in **DSD** was binding on Saini J.

Procedural unfairness

42. 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 to the issue of irrationality which focusses on the actual decision.

43. In summary an Applicant seeking to complain of procedural unfairness under rule 28 must satisfy me that either:

(a) express procedures laid down by law were not followed in the making of the relevant decision;
(b) they were not given a fair hearing;
(c) they were not properly informed of the case against them;
(d) they were prevented from putting their case properly;
(e) the panel did not properly record the reasons for any findings or conclusion; and/or
(f) the panel was not impartial.

44. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Reconsideration as a discretionary remedy

45. In considering whether a decision of a panel should be reconsidered, there are five matters of importance. First, panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that.

46. Second, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions (**R (Wells) v Parole Board** 2019 EWHC 2710).

47. Third, where a panel arrives at a conclusion, 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. Fourth, the Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism

where I should be expected to substitute my view of the facts as 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.

49. Fifth, reconsideration is a discretionary remedy. That means that, even if an error of law, irrationality, or procedural unfairness is established, the Reconsideration Member considering the case is not obliged to direct reconsideration of the panel's decision. The Reconsideration Member can decline to make such a direction having taken into account the particular circumstances of the case, the potential for a different decision to be reached by a new panel, and any delay caused by a grant of reconsideration. That discretion must of course be exercised in a way which is fair to both parties.

The reply on behalf of the Respondent

50. PPCS on behalf of the Respondent informed the Parole Board in a communication dated 21 May 2023 that no representations will be submitted in response to the Application for Reconsideration.

Discussion

Ground 1

51. This ground is that it was irrational for the Panel to refuse to release the Applicant until he had completed the specified risk reduction work in custody, because the POM and the COM gave assured recommendations for the Applicant's release on the basis that he has engaged well and had been compliant since recall, that he was willing and motivated to work with probation, that there was no recent or current evidence of any negative attitudes to women, that the risk posed by the Applicant would not be imminent on release and that he would benefit from the specified risk reduction work on intimate partner violence and that this could be done in the community.

52. It is common ground that the Applicant has to complete the risk reduction work and the issue is whether the panel were irrational in requiring the Applicant to complete the risk reduction work in custody before release or whether he could be released so that he could do this work in the community as the POM and COM recommended.

53. My starting point is to bear in mind the matters relied on by the Applicant such as that since his recall, the Applicant had been compliant, that he had engaged well and that there was no recent or current evidence of any negative attitude to women.

54. It is, however, significant that that the panel concluded first, that the Applicant's risk on release to intimate partners to be high "*given the historical offending and the behaviour that led to [the Applicant's] recall*" and second, that the proposed RMP was "*no different to [the plan in place at] the time of his last release and that [the Applicant] cannot be safely managed in the community while there is still necessary risk reduction work that must be completed.*"

55. Nothing has been put forward to show that these conclusions were irrational or not open to the panel. In compliance with its duties, the panel had explained clearly and cogently why it made its decision not to follow the recommendation of the POM and the COM to order the release of the Applicant and then to carry out and complete the risk reduction work in the community. It follows that the decision to refuse to release the Applicant until he had completed the necessary risk reduction work was not irrational.

56. A further or alternative reason why the decision to refuse to release the Applicant was not irrational was that it certainly is not "*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".* That means that it is not established that the decision to refuse to release the Applicant was irrational.

57. If, which is not the case, I had concerns about the decision of the panel to refuse to release the Applicant, then deference is owed to the panel, who unlike me, had seen and heard the witnesses, including the Applicant, and had then come to its decision to refuse to release the Applicant in the light of the danger he poses in the community without having completed the requisite risk reduction work. I must accept those conclusions as it is not manifestly obvious that there are compelling reasons for interfering with the conclusion of the panel that the Applicant cannot be safely released without first completing this requisite reduction work.

58. For those reasons, I reject the contention that the decision of the panel was irrational.

Ground 2

59. This ground is that it was procedurally unfair of the Panel not to have directed a PNA of the Applicant and, if required, it could have adjourned the hearing for this purpose.

60. The panel raised the issue of whether a PNA of the Applicant was required. The Decision records that a PNA "*could take up to 6 months to complete [and] the POM could not comment on whether a PNA was needed to exclude the need for a high intensity programme".* The Applicant's Grounds for Reconsideration state that "*the panel was extremely focussed on this issue (whether a PNA was needed) and kept returning to it during the POM's evidence*".

61. A PNA was not carried out. In deciding if the Panel acted in a procedurally unfair manner in not carrying out a PNA, the crucial issue is whether the Applicant was dealt with unjustly in that a PNA was not ordered to be carried out.

62. I have concluded that this ground fails.

63. First, the attention of the Applicant was drawn at the latest during the hearing to the possibility of having a PNA conducted on him. This occurred when the POM was asked whether a PNA was needed to exclude the need for the Applicant to undergo a high intensity programme and the POM could not comment on it. At that time, the Applicant was represented by a different legal representative than his present one

and (according to the Grounds for Reconsideration) the panel was extremely focussed on whether a PNA was needed.

64. It is clear that the Applicant could then have requested a PNA to be conducted during the hearing or indeed after it, but he did not do so perhaps because it would take 6 months to complete or perhaps he was content with the proposed treatment. In any event, I do not consider that the Applicant was dealt with unjustly as he of his own free will and with access to advice from his legal representative had decided not to request a PNA as he could have done. So, this ground has to be rejected especially as no reason has been put forward to explain why the Applicant did not ask for a PNA to be completed.

65. Second, a further or alternative reason why this ground has to be rejected is nothing has been put forward to show that the Applicant would be released or might have been more speedily released if a PNA had been ordered. It was pointed out in the Decision that a PNA could take up to 6 months to complete and there would then be a need to obtain updated reports to be followed by a panel hearing. Not surprisingly when the POM was asked whether a PNA was needed to exclude the need for the Applicant to undergo a high intensity programme, he could not comment on it.

Decision

66. For the reasons set out, reconsideration is not ordered. The Applicant was sentenced in 2001 and his tariff expired almost 8 years ago. I hope that if the Applicant now completes the requisite risk reduction work, arrangements can then be made for a speedy expedited parole hearing.

67. The application is dismissed.

Sir Stephen Silber
07 June 2024