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[2024] PBRA 237

Application for Reconsideration by Freeman

Application

1. This is an application by Freeman (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 28 October 2024. The hearing took place on the 10 October 2024. The decision was not to direct release.

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 dossier, now consisting of 450 pages, the application for reconsideration dated 14th November 2024, the panel's decision dated 28 October 2024 and the representations of the Secretary of State (the Respondent).

Request for Reconsideration

4. The application for reconsideration is dated 14 November 2024.

5. The grounds for seeking a reconsideration are set out below.

Background

6. The Applicant is serving a sentence of imprisonment for public protection. He was sentenced in December 2008. This tariff expired in February 2012. He was aged 26 at the time of sentence. He was aged 42, at the time of the panel decision. The index offences were assault occasioning actual bodily harm x 3 and kidnapping.

7. The assault matter related to a former partner. The Applicant drove the partner along a motorway and whilst in the car, initially punched her to the face. The car was then stopped in a car park and the Applicant and others took the victim from the car and struck her with a wooden bat to the arms and legs. The Applicant was later described as kicking the victim to her body and threatening to place her in the boot of the car. The background to the assaults were apparently an allegation of infidelity.
8. The second element of the index offence was a further assault against a female friend of the Applicant's former partner. The Applicant attended the lodgings of the

female friend and punched her to the face. The assault was apparently concerned, again with allegations of infidelity by the Applicant's former partner.

9. The third element of the index offence was a conviction for kidnapping. The Applicant kidnapped a male person by taking him from his home and bundling him into a sheet and then into the boot of a car. The Applicant's explanation for this offence was that the male who was kidnapped had owed him money for drugs.

10. Allegations (although no convictions) had arisen in relation to an allegation of striking a partner and breaking her nose and detaining her in the boot of a car.

11. There had also been earlier police information from a second complainant who said that she was being harassed by the Applicant. Again, no court action was taken in relation to this allegation.

12. The current panel were considering the Applicant's case following recall. This had been the second recall. The Applicant was recalled in circumstances where there had been an incident in the street where the Applicant was alleged to have approached a driver and had become involved in an altercation. He had then used a knife to puncture two of the other driver's car tyres and had been aggressive and hostile towards the other driver.

Current parole review

13. The current panel were requested to review the Applicant's case, following the recall mentioned above.

14. The panel consisted of an independent chair and a further independent member. Evidence was given at the panel hearing by a Prison Offender Manager (POM) and a Community Offender Manager (COM). The panel considered a dossier at that time consisting of 430 pages. The Applicant was legally represented and also gave evidence.

The Relevant Law

15. The panel correctly sets out in its decision letter dated 28 October 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)

16. 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)).
17. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial

release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

18. 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

19. 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.

20. 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*."

21. In **R(on the application of Wells) -v- Parole Board 2019 EWHC 2710 (Admin)** Saini J 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)**.

22. 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.

23. It follows from those principles that in considering an application for reconsideration the reconsideration panel will not substitute its view of the evidence for that of the panel who heard the witnesses.

24. Further while the views of the professional witnesses must be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. The panel must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.

Procedural unfairness

25. 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.

26. 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.

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

Error of law

28. An administrative decision is unlawful under the broad heading of illegality if the panel:
    a) misinterprets a legal instrument relevant to the function being performed;
    b) has no legal authority to make the decision;
    c) fails to fulfil a legal duty;
    d) exercises discretionary power for an extraneous purpose;
    e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
    f) improperly delegates decision-making power.

29. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Other

30. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning*." See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

31. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged*

by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship."

32. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

Reconsideration as a discretionary remedy

33. 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 Secretary of State

34. The Respondent offered no representations.

Grounds and Discussion

Ground 1

35. The Applicant's legal adviser submits that the panel failed to order the full disclosure of a document which was prepared by the prison psychology department and which indicated that the Applicant would be eligible for a high-intensity treatment programme. The argument submitted indicates that the Applicant and his legal advisers should have had the opportunity to challenge the suggestion that the Applicant was eligible for a programme.

Discussion

36. The document challenged by the Applicant was one prepared by the psychology department of the prison and which is entitled Programme Needs Identifier (PNI). A note on the dossier indicates that the psychology department at the prison had noted that the Applicant met the "*automatic suitability criteria for high-intensity intervention*". This was because of the Applicant's ratings in scores which are based on static risk factors, predominantly: age at first offence; nature and frequency of

offending; and number of custodial sentences. The PNI is not a risk assessment, but is a tool used to assess suitability and eligibility for treatment. The panel in it's decision took the view that the PNI was evidence of a viable sentence plan. Because the document is clearly not a risk assessment, I am not persuaded that the panel had a duty to delay the decision to await a fuller explanation of the PNI document. As indicated above the criteria used to indicate eligibility was set out in the note on the dossier. Eligibility was dependant upon static risk calculations. The Applicant had a full opportunity at the hearing to challenge any view that his risk could not be managed in the community and to challenge the static risk calculations within the probation services' documents and reports. The PNI in my view was an indication that behavioural work was available and that the Applicant would be eligible to undertake that work (if he chose to), rather than an indication that the tool was used to assess risk. Risk had been measured by the static assessment tools (known by their acronyms of OGRS (Offender Group Reconviction Scale) and (SARA) Spousal Assault Risk Assessment; details of which were included on the dossier and available at the hearing. I am not therefore persuaded that any procedural irregularity is evidenced by the fact that the panel did not adjourn for further information (a fuller report of the PNI) as requested.

Ground 2

37. The panel were wrong to assess allegations arising from an incident (which triggered recall) where the Applicant had been involved in an altercation in the street involving a knife and had been charged with causing criminal damage. The submission is that the panel should have ascertained further information about the reason why the Crown Prosecution Service (CPS) had offered no evidence in the criminal damage case. It is submitted that the panel were wrong to proceed on the evidence which was contained in the dossier and wrong to make assumptions about the reason for the CPS not proceeding with the matter at court.

Discussion

38. The law and rules relating to the assessment of allegations in parole hearings was comprehensively analysed in the case of **Pearce [2023] UKSC 13 on appeal from [2022] EWCA Civ 4** and is included in guidance within the Parole Board known as "**Guidance on Allegations v2**".

39. Paragraph 2 (of the Guidance) notes that panels are required to make objective decisions based upon all the evidence provided to them. This will include information as a result of their own enquiries; matters that are undisputed by the parties; and matters which are disputed, but in respect of which the panel has made a finding of fact; and relevant allegations upon which the panel has not been able to make a finding of fact.

40. In Paragraph 2.7. the guidance notes that allegations should only be considered when relevant to the panel's assessment of risk.

41. It is noted in the guidance that the standard of proof that must be applied is the civil standard, namely the balance of probabilities. The panel must be satisfied that it is more likely than not that the fact occurred. This is a lower standard than the proof required in a criminal court.

42. In this case the panel had before it an allegation of the possession of a knife and the use of the knife to puncture the tyres of a motor vehicle after an alleged "*road rage*" incident. The panel considered a signed statement made by a witness (complainant) regarding the incident. In brief the incident described by the complainant was that two cars were attempting to negotiate through a gap. Words were initially exchanged by the two parties. The complainant then alleged that a man (later identified as the Applicant) alighted from his vehicle and became aggressive and was screaming and shouting. The man then used a knife and stabbed the front and rear tyres of the complainant's vehicle. The Applicant was identified because photographs had been taken at the scene and the photograph showed a person who was clearly wearing a GPS tag on his ankle. The photographs also showed the face of the man. The Applicant was required to wear a GPS tag at that time. The Applicant accepted he was present. The incident was independently witnessed by a second person who was said to be a former special constable. The Applicant was initially charged with criminal damage, however, the prosecution eventually withdrew the matter from court as the complainant was said to have withdrawn his statement regarding the criminal damage.

43. The panel assessed the evidence. The panel had before it two photographs. The Applicant agreed that he was the male in both the photographs. As noted one of the photographs showed the GPS tag. When the Applicant was asked by the panel about this matter, the Applicant agreed that he was the male in both photographs. He told the panel, however, that he understood that other photographs were taken by other people at the scene. He was asked if he could offer any response or explanation for the fact that the independent witness linked the man with the tag directly to the damage. The Applicant indicated that he could not. Within the dossier the Applicant had said, in earlier comments upon the altercation, that his brother may have been the person identified by the witness.

44. The panel assessed this evidence and found that the independent witnesses' evidence was persuasive. They found a direct link between the Applicant and the damage caused with the knife. The evidence was supported by the two statements and the photographic evidence. The panel found on the balance of probabilities that the Applicant had been directly involved in the road rage incident puncturing two tyres with a knife.

45. I have considered the approach by the panel to the allegations. The panel followed the law in **Pearce** and the guidance set out by the Parole Board. In my determination, the panel had sufficient evidence upon which to reach a conclusion, on the balance of probabilities, that the Applicant had been involved in the incident and was the person who had used a knife to damage the tyres and who had been involved in generally aggressive behaviour.

46. The panel noted in its decision that it was this finding of fact in relation to the recall incident, which led them to conclude that the Applicant continued to demonstrate a propensity for impulsive aggression when experiencing emotional dysregulation or feelings of being disrespected. The panel found that the incident could have resulted in serious harm and arose entirely without warning. The panel gave this finding significant weight.

47. It is further submitted on behalf of the Applicant that the panel should have requested that the CPS provide reasoning as to why the case did not proceed, particularly as there was an eye witness. I am not convinced by this argument because the role of the panel was not to assess whether or not the offence of criminal damage had taken place or whether there was sufficient evidence to support a criminal prosecution before a jury. The panel's role was to assess whether or not the Applicant was present, and whether there were facts which indicated that he had acted in a way which seriously elevated risk to the public and whether that finding also related to future risk.

48. I accept the submission by the solicitor acting on behalf of the Applicant that the panel were wrong to suggest that there existed a "*standard procedure*" of the prosecution service discontinuing cases once a complainant's statement relating to the damage was withdrawn. A decision by the CPS not to proceed in any particular case is often governed by a myriad of factors. Those factors include the overall strength of the evidence, the availability or otherwise of witnesses, the public interest in proceeding in the case and individual circumstances which might arise on the day of the hearing. For this reason, it was inappropriate for the panel to give the impression that some form of "*standard procedure*" existed.

49. However, as I have indicated the panel correctly approached the law relating to allegations, which they had a duty to do. The issue for the panel was not whether or not the CPS could prove a criminal damage allegation to the criminal standard, but whether there was sufficient credible evidence, on the balance of probabilities, to support the risk related findings set out by the panel. In my determination there was sufficient evidence for the panel to reach its conclusion upon risk.

Ground 3

50. It is submitted on behalf of the Applicant that the panel did not set out in its decision, why it concluded that the statutory test for release was not met and why it disagreed with the COM and POM, both of whom were recommending release.

Discussion

51. At paragraph 4.4 of the decision the panel indicated that they were well aware of the recommendations offered by both the COM and POM, namely that the Applicants risk could be managed in the community. However, the panel set out the reasons why it had concluded that the risk could not be managed and that the Applicant had not, in their determination, met the statutory test.

52. The primary reason for the panel's decision was based upon its findings in relation to the incident in the street. The panel gave significant weight to this incident and concluded that it was evidence of the Applicants propensity for impulsive and dangerous aggression.

53. The panel accepted that the Applicant had achieved a positive status in prison and had maintained employment, but also noted that there had been incidents (in prison) of threats and verbal aggression used by the Applicant as a problem-solving tactic. The panel also indicated that although the Applicant had undertaken various interventions to do with behaviour in the past, these had been insufficient (in their

determination) to provide the Applicant with the internal controls needed to manage his aggressive behaviour.

54. The panel also indicated that they were concerned that, because of the impulsivity of the Applicant's aggressive behaviour, his risk of serious harm could not be managed in the community. For these reasons, the panel took the view that the risk management plan, which was suggested by the COM would not be sufficiently robust to manage the possibility of impulsive violence and aggression similar to that which occurred in the incident in the road.

55. The panel therefore set out clearly the reasons why it had concluded that the Applicants risk could not be managed safely in the community. The panel were entitled to take a differing view to the professionals. The panel were also legally entitled (as a Parole Board panel) to reach a finding of fact in relation to the street allegations, a factor which was not available to the other professional witnesses.

56. I am therefore satisfied that the panel appropriately explained the basis of their decision in the decision letter and that they addressed the reasons that they were not following the recommendations of the other witnesses in the case. I do not find that their reasoning was irrational although it is understandable that the Applicant might feel disappointed by the decision.

Ground 4

57. The Applicant's legal adviser submits that the panel made a mistake in submitting that the Applicant had "*never completed any direct work on his significant propensity for violence*.". The Applicant's legal adviser points out that the Applicant had in the past completed an intervention called Self Change Programme (SCP). This was a programme aimed at reducing violence in high-risk adult male offenders. The programme was accredited and has now been superseded by other programmes.

Discussion

58. The panel were incorrect in recording that the Applicant had not completed direct work in relation to violence in the light of the fact that he had completed SCP. I have considered whether this comment played a material part in the panel's findings. The panel also indicated that they had taken account of the fact that the Applicant had completed programmes in the past, including a thinking skills programme and SCP.

59. The panel's overall assessment was that the programme work that the Applicant had completed in the past was insufficient to provide him with the necessary internal controls to reduce his significant propensity for violence. It is clear that the basis for the panel's decision was that the Applicant continued to demonstrate a propensity for potentially serious violence and that whatever work he had completed in the past had not been sufficient to enable him to manage that propensity. The panel were therefore inaccurate in failing to acknowledge that SCP was a violence intervention programme, however, in the light of the fact that the panel made findings in this hearing relating to potential violence and the use of a knife, I am not persuaded that the error in relation to SCP played a material part in the decision. I do not therefore find that this mistake amounts to irrationality in the sense set out above.

Decision

60. For the reasons I have given, I do not consider that the decision was irrational/procedurally unfair and accordingly the application for reconsideration is refused.

HH Stephen Dawson
29 November 2024