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[2024] PBRA 43

Application for Reconsideration by Davies

Application

1. This is an application by Davies (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 18 January 2024. The decision of the panel 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, and/or (b) that it is irrational and/or (c) that it is procedurally unfair.

3. I have considered the application on the papers. These are the dossier consisting of 378 pages; the Application for Reconsideration submitted by the Applicant's legal representative; and the response by the Secretary of State (the Respondent).

Background

4. On the 9 December 2010 the Applicant was sentenced in relation to an offence of causing grievous bodily harm with intent (S18). Applicant was sentenced to an indeterminate sentence for public protection with a minimum tariff of 2 years and 169 days. His tariff expired in 2013.

5. The Applicant, after a night out drinking alcohol with the male victim (whom he had not known prior to the evening of the offence) punched and kicked the victim until he was unconscious. He then stamped on his head. The victim's injuries were serious and life threatening.

6. The Applicant was noted to have an extensive history of criminal offending and a substantial number of offences preceding the index offence. There were previous convictions for threatening behaviour, affray, s.47 and s.20 wounding. In 2002 he was sentenced by a military court for an assault which resulted in the victim receiving a broken jaw. In 2008 he had also been convicted of an assault which fractured the victim's skull.

Request for Reconsideration

7. The application for reconsideration is dated the 6 February 2024.

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

Current parole review

9. The Applicant was released initially in 2014. He was recalled in 2019 due to poor compliance and released again in 2020. He was recalled again in 2022. The current panel were therefore considering release following a second recall.

Oral Hearing

10. The review was conducted by an independent Chair and two additional independent members of the Parole Board. Oral evidence was given by the Prison Offender Manager (POM), a prison instructed psychologist, a charity support worker, and a Community Offender Manager (COM). The Applicant was represented by a solicitor.

11. A dossier consisting of 351 pages was considered.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 18 January 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

13. Pursuant to Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is 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)).

14. 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

15. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para. 116,

    "the issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

16. This test was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. The Divisional 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 Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the

same high standard for establishing 'irrationality'. The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.

17. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

Procedural unfairness

18. 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.

19. 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; and/or
    (e) the panel was not impartial.

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

21. 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.*"

22. 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. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

The reply on behalf of the Secretary of State

23. The Secretary of State offered no representations.

Reconsideration grounds and discussion

Note

24. I have set out below, in numbered order, the grounds for this reconsideration application as they appear to me from the narrative submissions by the Applicant's legal adviser. The format of an application for reconsideration is not prescribed by the rules. A narrative format is permissible. However, it is of advantage to both Applicants and others to set out each individual ground separately and add the arguments in support of that ground applying the test for reconsideration in each case. This allows both the Applicant and readers to focus upon the issue being raised by the particular ground. Legal advisers are therefore encouraged, if at all possible, to set out individual grounds in short focused numbered submissions, followed by arguments supporting the individual numbered ground.

Ground 1

25. Irrationality- The risk management plan on this occasion was more robust than on the last occasion.

26. The submission on behalf of the Applicant is that the panel failed to take account of the fact that the risk management plan that they were considering on this occasion was more robust than the risk management plan on the last occasion that the Applicant was released from prison. In particular the new risk management plan involved a specialised probation hostel, and he would be supported by a charity dealing with trauma. By inference therefore the panel failed to acknowledge that this more robust plan would manage the Applicant's risk in the community.

Discussion

27. The panel in this case set out in their conclusion paragraph (4.3) a number of factors both positive and negative which supported their conclusion that the Applicant did not meet the test for release. The panel acknowledged that the Applicant had positive feedback from the charity supporting him in relation to trauma. The panel also acknowledged that the Applicant would initially be accommodated in a specialist probation hostel. The panel also acknowledged a number of other positive factors including the fact that the Applicant had behaved well in custody and had completed substance misuse work in custody.

28. However the panel also listed the factors which led them to the conclusion that the Applicant's risk could not be managed in the community. This included the fact that on his last release the Applicant had indicated to a panel that he had learned from past mistakes. The panel determined. however, that in fact he had repeated a number of the mistakes in connection with employment, relationships and substance misuse which had led to him being recalled in the past. The panel also took account of the fact that despite undertaking interventions prior to the last release, the Applicant had not shown consistency in applying the skills, when he was in the community, that he was said to have learnt in prison. The panel also identified patterns of abuse in relation to relationships and emotional instability. In particular, there were concerns about entering into relationships very quickly and those relationships breaking down equally quickly. The panel also took account of the views of the reporting prison instructed psychologist indicating that the Applicant had outstanding treatment needs, which could only be addressed in custody.

29. I am not therefore persuaded that the panel failed to take account of both the positive factors and the negative factors when reaching a conclusion about risk. The

panel were in the best position to analyse the evidence and to make an assessment of risk. They had heard the witnesses and the Applicant giving evidence and had fully considered the dossier. For these reasons I am not persuaded that the panel failed to take account of the fresh items which were contained within the proposed risk management plan. The panel's ultimate conclusion was that despite those extra matters of support the Applicant's risk could not be safely managed in the community at the time of the hearing.

Ground 2

30. Irrationality-All the professional witnesses confirmed that risk would not be imminent.

31. The Applicant's legal adviser submits that the panel failed to take proper account of the fact that all the professional witnesses accepted that the risk of serious harm would not be imminent should the Applicant be released.

Discussion

32. This ground can be dealt with fairly shortly. The test for release does not involve an issue relating to imminence. The test for release is that as set out by the panel in the decision letter. Clearly an imminent risk of serious harm would be less likely to attract a release, however the fact that the risk of harm might occur over a longer period remains a matter which a panel is bound to take into account in assessing risk. The panel were bound to take account of the risk of serious harm for the foreseeable future. The test for release clearly envisages a situation where the risk of serious harm is reduced to a level appropriate to protect the public. Whilst the panel no doubt took account of the views of professionals that risk was not imminent, this could not be a determining factor in directing release. For that reason, I do not find that the fact that the Applicant's risk was not considered to be imminent was an overriding factor in terms of the decision to release. I do not find therefore that the panel acted irrationally by declining to release the Applicant because his risk of harm was not imminent.

Ground 3

33. Irrationality-The panel failed to take account of the additional factors which were contained in the proposed risk management plan which were additional to those which were contained in the risk management plan which was in place on the Applicant's last release from prison and before his recall.

34. This ground addresses similar issues as our alluded to in ground 1 above. The Applicant's legal adviser indicates that the panel failed to give sufficient weight to the fact that the Applicant would have a device to monitor alcohol intake, would be living in a specialist probation hostel, would not be self-employed, and would have the support of a charity specialising in trauma.

Discussion

35. As indicated above the panel clearly set out in bullet points the matters which they took into account in considering their final decision. The panel listed both the positive factors which they had taken into account, and also the issues which led them to their decision that the Applicant's risk could not be managed in the community. Whilst it is understandable that the Applicant takes the view that the panel underestimated the effectiveness of the new proposed risk management plan,

it was a matter for the panel to consider the entirety of the evidence and to make an assessment as to risk. In this case the panel was supported by the views of the prison instructed psychologist and the COM both of whom took the view that the Applicant's risk could not be safely managed in the community. For these reasons I do not find that the panel failed to take account of the positive factors which had been addressed in the dossier.

Ground 4

36. Irrationality-all witnesses confirmed that there would be identifiable warning signs indicating an elevation of risk.

37. The Applicant's legal adviser submits that before risk began to rise there would be warning signs, by implication, that would enable those supervising the Applicant to intervene and presumably recall to prison if appropriate.

Discussion

38. The likelihood of identifying risk in advance of potential harm to the public is clearly an issue frequently addressed by parole Board panels. The likelihood of identifying risk is an important factor in a general assessment of risk and decision making in regard to release from prison. However, as indicated above, it is not an overriding factor. Clearly a panel will be less likely to be persuaded to direct release in circumstances where no warning signs were likely to be identified, however the purpose of the risk management plan involving both external and internal controls is to protect the public and to ensure that risk does not elevate and create a necessity to intervene and possibly recall. The panel acknowledged that warning signs may be identifiable, however the panel were also conscious of the fact that in advance of the last recall of the Applicant there had been injuries suffered by a partner during an altercation. It is clear therefore that relying upon identifiable warning signs would not be the overriding factor in directing release and applying the statutory test. Accordingly, I do not find that the fact that warning signs may be identifiable led to the panel making an irrational decision in this case.

Ground 5

39. Irrational - The Applicant was not convicted of any domestic related offences.

40. The Applicant's legal adviser confirms that there was an assessment of an incident where allegations of violence towards a former partner were involved. It is acknowledged that the panel concluded that it was "*more likely than not*" that the incidents happened in the way there were alleged. This finding was based upon the accounts in the dossier from the police, medical reports and the Applicant's evidence and explanation of what occurred. The Applicant's legal adviser submits that this assessment was "*not only unfair but unreasonable*". It is submitted by the legal adviser that a "*fact finding was not held*" and that "*full disclosure*" was not available within the dossier and that the reason for the decision (relating to the allegations of violence) was not adequately explored by the panel.

Discussion

41. The background to the Applicant's recall in this case were allegations of domestic violence. The Applicant became involved in an altercation with his then partner. The partner alleged that during the course of the altercation the Applicant used several forms of applied violence. The police were called, and the partner repeated the

allegations to the police who recorded the allegations and the injuries on a body worn camera. The contemporaneous allegations were repeated by the partner to nursing and support staff at a hospital. The Applicant decamped from the scene and attempted to resist arrest when detected. The Applicant admitted that he had taken alcohol before the incident.

42. At the panel hearing the Applicant gave evidence and described that force was used by his partner towards him. The Applicant described to the panel his physical response to the use of force by his partner and told the panel that all his actions were "*within the law*". The matter was not pursued to a court hearing by the police as the partner declined to support a prosecution. The partner later wrote a letter supportive of the Applicant, which was contained within the dossier.

43. The panel assessed the evidence relating to this allegation. Allegations are governed by the decision in **Pearce [2023] UKSC 13 on appeal from [2022] EWCA Civ 4** the parole Board have also published detailed guidance entitled **Guidance on Allegations September 2023 V 2.0.**

44. Paragraph 87 of the case of Pearce indicates as follows at sub headings vi-vii:

> *"87. We summarise our conclusions as follows:*
> *(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."*

45. The panel having assessed the evidence and the representations and evidence from the Applicant came to the conclusion that they were not able to make a finding of fact but concluded that it was more likely than not that the incidents happened in the way that were alleged. This finding was clearly based on the accounts in the dossier from the police and the hospital, both being contemporaneous and consistent.

46. The panel had therefore conducted a fact-finding investigation as contemplated by the case of **Pearce** and the parole board guidance. The panel had clearly reached conclusions as set out in paragraph 87 (Vii) of **Pearce** cited above. In the circumstances therefore I do not find that it was either unreasonable or unfair for the panel to reach an appropriate conclusion in this case. Indeed, it might be thought surprising that the panel, in the light of the strength of the evidence relating to the domestic dispute and the historical pattern of violent offending demonstrated within the dossier, did not in fact reach a conclusion that on the balance of probabilities the Applicant had been violent towards his partner as described by the partner. However, it was for the panel to reach a conclusion. They were entitled to reach the conclusion that they did and therefore to take into account the violent behaviour in reaching a decision about risk. I do not therefore find that their decision was irrational or procedurally unfair in the sense set out above.

Ground 6

47. The Applicant argues that the robust risk management plan suggested in this case would allow for testing within the community with stringent supervision.

48. The Applicant submits through his legal adviser that interventions are available in the community and that remaining in custody would "*serve no further purpose*".

Discussion

49. As indicated in various grounds above, the concerns of both the panel and professionals in this case were that there were risk factors which had not been addressed and which therefore led to the conclusion that the test for release had not been met. The concept of testing in the community is clearly not appropriate in circumstances where a risk cannot be managed. The panel were obliged to be satisfied that the statutory test for release had been met and would not have been applying the test correctly if they had directed release on the basis of some form of testing within the community. The Applicant also repeats the submission that the Applicant's risk was not imminent and therefore release should have been directed. As indicated above the test for release is not dependent upon whether the risk is imminent but is dependent upon the wording of the statutory test as set out in the panel's decision in this case. Again, I find no evidence that the decision was irrational or procedurally unfair in the meaning set out above.

Decision

50. In all the circumstances therefore I conclude that the decision in this case was not irrational in the legal sense set out above and that the decision was not procedurally unfair. I refuse the application for Reconsideration.

HH S Dawson
22 February 2024