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[2024] PBRA 51

Application for Reconsideration by Mote

Application

1. This is an application by Mote (the Applicant) for reconsideration of a decision of single member panel (the Panel) dated 16 January 2024 not to direct his release from custody.

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 consist of the written application and representations made on behalf of the Applicant by his legal team dated 21 February 2024 and an amended version along with additional evidence on 23 February 2024 (the Representations) including an appended handwritten note or letter from a fellow prisoner dated 20 December 2023 (upon which nothing turns for present purposes), the paper decision dated 15 January 2024 and released on 16 January 2024 (the Decision), an email dated 29 February 2024 from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) offering no representations and the Applicant's dossier now consisting of 396 pages (the Dossier).

Background

4. On 10 February 2017 the Applicant, then aged 31 (and now aged 38), was sentenced to an extended determinate sentence of 10 years comprising a 6-year custodial period plus a 4-year extension for two offences of robbery and one offence of attempted robbery. The Applicant's conditional release date (CRD), when he could expect automatic release, is in June 2024 and his sentence expiry date is in June 2030.

5. The details of the index offences (all fully noted in the Decision) were, briefly, as follows:

    a. On 10 October 2015 the Applicant robbed a betting shop by stealing from the cash register during which he violently assaulted a lone female member of

staff who suffered bruising and, as the trial judge noted, caused the victim severe psychological harm.

b. On 17 December 2015 the Applicant, armed with a screwdriver robbed another betting shop threatening to kill the male victim engaged in the shop who also suffered significant psychological harm.

c. On 29 January 2016 the Applicant attempted to rob another betting shop when two females were on duty.

6. The trial judge found the Applicant to be dangerous given the nature and gravity of his offending.

7. At the time of his conviction for the index offences the Applicant had two previous convictions, the first, on 8 January 2016, for burglary and theft committed on 24 December 2015 for which he received a custodial sentence of 16 months, the second, on 13 July 2016, for an offence of robbery and false imprisonment committed on 30 January 2016, for which he received a custodial sentence of three years consecutive to the previous offence. This offence involved the Applicant, armed with a kitchen knife, jumping into the male victim's car, and subsequently placing the victim in the boot of his car for some three hours.

8. The above offences were committed within a period of four months and at least two were committed while on bail. The index offences, the circumstances of which were fully acknowledged by the Applicant, in particular arose out of a desire by the Applicant to obtain money to repay his supplier of cocaine to whom he had accumulated a debt of £3,000 but which he was unable to pay. The Applicant explained that his goal was to obtain money to repay his supplier and carry on with a lifestyle of cocaine addiction.

Request for Reconsideration

9. The application for reconsideration was dated 21 February 2024.

10. The grounds for seeking a reconsideration are that the decision of the Panel not to direct the release of the Applicant was irrational.

11. A significant background to the application was (as properly accepted by the Representations) to the effect that the Panel was asked on behalf of the Applicant to direct his release on the papers, but that if this could not be achieved on the papers alone, then an oral hearing should be directed. This was duly noted in the Decision. The conclusion was that, whilst a psychological case note in the Dossier did not recommend a further psychological risk assessment (PRA), such, the Panel decided, would be needed to assess the impact of the Applicant's then current and on-going one-to-one work on his triggers to further violent offending. Hence a further oral hearing would indeed be needed to consider such a report and also to explore the Applicant's risk of violent reoffending in the community and the robustness of the risk management plan (RMP) since the Panel was not satisfied the current plan was robust enough to mitigate his risk in the community. However, having regard to the Applicant's CRD of June 2024, to the fact that PRA reports were taking up to 4 months to produce, to the likely time frame for the production of the necessary further reports and to the current listing priorities of the Parole Board, there would simply not be sufficient time to list the requested oral hearing

before the Applicant's release in June. Had there been time, the Panel duly noted, an oral hearing would have been listed as the Panel did not consider release on the papers to be a viable and safe option. In other words, as again expressly noted, the Panel was not satisfied that it was no longer necessary, for public protection, that the Applicant should remain confined in prison. Despite the request on behalf of the Applicant for an expedited oral hearing, the Panel felt that the proximity of the CRD was not a justifiable reason to prioritise the Applicant's oral hearing over other prisoners also waiting for a hearing. Hence release was not directed.

12. Against this background, it is submitted on behalf of the Applicant, that the Decision was "*wholly irrational*", essentially for the following reasons:

    a. The Panel failed to engage with the evidence as to risk in making its decision.
    b. In requiring a fresh PRA the Panel:
        i. failed to pay due regard to the fact that there had been numerous previous PRAs and psychological reports, and that the Applicant had worked with psychologist throughout his time in custody,
        ii. failed to make clear why a PRA was necessary (which, it was submitted, it was not since the risks presented by the Applicant were clear enough and, in any event, there was no need for the Applicant's continued detention for the purpose of public protection),
        iii. overlooked the Applicant's completion or compliance with the courses and programmes required of him or which could be completed in the community (below).
    c. While the Applicant was undergoing, but had not completed, and was unlikely to complete his one-to-one work in addressing violence and his own internal controls prior to his CRD, this could be completed in the community with his Community Offender Manager (COM).
    d. The Applicant had demonstrated:
        i. his recognition that he had acted in the wrong, that this was due to poor thinking skills and lack of victim empathy and other concerns surrounding his mental health (all of which had been fully addressed by completion or undergoing the requisite programmes),
        ii. his stability and absence of violence for a prolonged period in custody.
    e. The Panel (in effect) failed to pay due regard to the COM's recommendations for release and that the RMP was sufficiently robust (which, it was submitted, it was).
    f. Whilst it was accepted that there was insufficient time for an oral hearing to take place, this did not mean that the Applicant had not met the test for release.
    g. If it was felt that further information was needed, then such information should be obtained, and the matter determined on the papers.

Current parole review

13. The Decision under review was the Applicant's second Parole Board hearing. The previous hearing had been in March 2023 and the panel on that occasion were of the view that they were not satisfied the Applicant had fully addressed the triggers to the index offences, that the assessment of probability of risk of violent reoffending in the community had been underestimated, and that his coping

strategies in respect of managing his risks were underdeveloped. Release was refused.

14. The Panel in the present case agreed with the views expressed by the previous panel set out above and that risk factors previously identified had not changed and included: chaotic lifestyle, negative associates, drug and alcohol misuse, willingness to offend for financial gain, poor emotional well-being and control, impulsivity, poor thinking, coping, and problem-solving skills, pro-criminal attitudes, difficulties with relationships, a willingness to condone the use of violence and weapons, gambling addiction. The Panel also noted and analysed the Applicant's history of offending and further noted up to the last couple of years a poor record in prison.

15. The Panel noted many positive factors: the Applicant's remorse and shame, his receiving weekly counselling, his acceptance of measures to address his anxiety and depression, his engagement in one-to-one work on violence reduction and completion of previous interventions, the absence of further adjudications or warnings, his enhanced IEP status, and his engagement and work with professionals to address and reduce his risk and mental health problems. In short, the Panel concluded "*by all accounts he is now doing very well with some support for release*" (including, it was noted, from his COM).

16. Nevertheless, on the present evidence, the Panel was unable to be satisfied that the RMP would be robust enough to mitigate his risk in the community going forwards and, accordingly, made no direction for release.

17. Plainly, the Panel had concerns about the underestimation of the Applicant's risk of serious harm to the public in the community and his so far incomplete one-to-one work in addressing violence all of which would ideally, had there been time, need to be explored at an oral hearing with the assistance of the further PRA.

The Relevant Law

Parole Board Rules 2019 (as amended)

18. 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)).

19. 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)). I have previously stated this case is eligible for reconsideration.

Irrationality

20. The grounds on which the present application is sought rest on irrationality as set out above. The relevant principles to bear in mind are as follows.

21. 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 was 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."

22. 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 "i*rrationality*". The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.

23. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: see **Preston [2019] PBRA 1** and others. This test is accepted here on behalf of the Applicant.

24. It is also worth bearing in mind that 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.*"

The Reply on behalf of the Respondent

25. I have previously mentioned that the PPCS declined to make any representations on behalf of the Respondent.

Discussion

26. In my judgment there was nothing irrational (in the sense described above) in the conclusions and decisions reached by the Panel. It has to be remembered that due deference must be paid to the expertise of the panel in making the decisions relating to parole (above), albeit the decision was one made here on the papers. From a fair reading of the Decision, it is clear that all the relevant considerations were born in mind and summarised.

27. I entirely accept that there had been a number of previous psychological assessments and other psychological reports. The Representations helpfully listed at least seven, the last being a year previously to the Decision in January 2023. In light of the background and circumstances of the Applicant's offending and

attitudes, the identified risks, the comment of the trial judge regarding the Applicant as being dangerous, the mental health issues, the comment on underestimation of the risk of violent reoffending in the community, the fact that the one-to-one work was still incomplete, the fact that the Panel was not satisfied as to the robustness of the RMP, the length of time since the previous psychological report, and despite, as the Panel noted, the lack of recommendation for a further PRA and the support for release from the COM, it does not seem to me at all irrational to want to explore the risks and the RMP further in light of up-to-date reports and further consideration at an oral hearing. After all, this is what the Applicant's own representatives had themselves sought if release could not be directed in the papers. Moreover, in my judgment the decision to require a further PRA as being necessary was far from irrational and not at all surprising.

28. What prevented that further contemplated hearing was quite simply the lack of available time. The Panel clearly gave anxious thought to that problem. The Decision clearly stated that had there been time an oral hearing would have been listed but the Panel felt that the Applicant's case could not be prioritised in the time available over other prisoners before his CRD (now just over 3 months away). This lack of time and its impact on the possibility of any hearing was fairly and properly recognised by the Applicant's representatives in the Representations (which is of course why release on the papers was now sought). Again, in the circumstances thus prevailing and, in the time then available before the CRD I see nothing irrational in refusing to direct that further hearing.

29. Thus, the only real issue was whether release could then and there be directed on the papers; that the Panel felt was not a viable and safe option without further consideration. As I say, there seems to me nothing irrational in that conclusion.

30. As to the specific matters complained of as set out above, I can deal with these quite briefly:

    a. The Panel plainly engaged with the evidence before it as to risk and both as to negative and positive aspects relating to the Applicant.
    b. That a further PRA was necessary and the reasons for it in the circumstances (summarised above) was clear from a fair reading of the Decision as a whole.
    c. The Panel did not overlook the Applicant's many positive achievements including his cooperation and engagement with professionals, his completion of interventions and programmes (save as indicated as regards the one-to-one course work), all again as summarised above. As the Panel noted "*he is now doing very well*".
    d. The fact that the one-to-one work could be completed in the community does not, of itself, remove or eliminate risk. The Panel wanted (not unreasonably) the most up-to-date evidence it could obtain before deciding that issue in the context of the RMP. The fact that the COM supported it and his release was taken into account and clearly stated in the Decision. It was a matter for the Panel to decide whether to accept or reject it. A panel does not have to blindly follow what a COM (or anyone else for that matter) recommends. The Parole Board panel must obviously weigh all the relevant and material factors for and against (including such recommendations) in reaching its independent decision. There is nothing on the face of it to suggest this was not properly done in this case.

e. Having identified concerns over the assessment of risk (and its underestimation – see above), I see nothing irrational in the conclusion of the need to explore the issue as to the robustness or otherwise of the RMP.

31. In short, I see nothing irrational in the Decision to refuse to direct release on the papers. Nor (although I entirely accept these were not advanced as reasons for reconsideration) did I detect any error of law or anything unfair in the circumstances in the decision to refuse a direction for release or a further hearing having regard to the lack of time available before the Applicant's CRD.

Decision

32. Accordingly, for the reasons I have given, the application for reconsideration is refused.

HH Roger Kaye KC
05 March 2024