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[2024] PBRA 52

Application for Reconsideration by Truman

Application

1. This is an application by Truman (the Applicant) for reconsideration of a decision of an oral hearing dated 6 February 2024 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.

3. I have considered the application on the papers. These are:

   - The Decision Letter dated 6 February 2024;
   - The Grounds for Reconsideration Application dated 26 February 2024 (The Grounds); and
   - The Dossier, which consists of 464 numbered pages, the last document being the Decision Letter.

4. I have also listened to the recording of the hearing from the close of the evidence to the end.

Background

5. The Applicant, who is now 49 years old, received a sentence of imprisonment for public protection in 2009, when he was 34, for wounding with intent to cause grievous bodily harm. The victim was a family member, whom he stabbed in the stomach. He was on bail at the time, for assaults on two other family members. He had been drinking heavily and using drugs.

6. The tariff expiry date was 5 September 2011. The Applicant was released for the first time in May 2014, and recalled in October 2014. He was released again in July 2015, and recalled in December of that year. He was released again in September 2017, and recalled in December 2021.

7. The Applicant's last recall followed from his arrest on suspicion of possession of an offensive weapon and affray. The arrest arose from an incident on 16 December 2021 at his family home. The offensive weapon alleged was a screwdriver, and the

initial complaint to the police was that the Applicant had threatened a family member with it. The Applicant was arrested hiding behind a car nearby.

8. The Crown Prosecution Service discontinued the proceedings after the witnesses (both family members) withdrew their complaint. When they did so they maintained that what they had said in their initial statements was true.

Request for Reconsideration

9. The application for reconsideration is dated 26 February 2024.

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

(1) Irrationality

i. The panel failed to give any or adequate regard or credit to the Applicant for the length of time he had spent in the community before his recall in December 2021.

ii. The panel failed to give any or adequate regard to the fact that the allegations against the Applicant did not lead to his conviction, and to the Applicant's denials of intending to use the screwdriver as an offensive weapon and of threatening his stepfather.

iii. The panel failed to give any or adequate regard to the Applicant's good conduct since recall.

iv. The panel placed disproportionate weight on recent incidents of self-harm.

v. The panel failed to give any or adequate weight to the absence of violence or violent ideation since recall.

vi. The panel failed to give any or adequate regard to the opinions of the professional witnesses that there was no further core risk reduction work needed in the custodial setting. There was no evidential basis for the panel's conclusion that there was core risk reduction work for the Applicant to complete and this should take place in closed conditions.

vii. The panel failed properly to apply the test for re-release. The professional witnesses felt that the risk was not imminent, and there was evidence that risk in the longer term could be safely managed by one-to-one work in the community and increased support in the community post-Covid. This assertion of irrationality overlaps, the Applicant suggests, with an error of law.

viii. In considering the test for a recommendation for open conditions, the panel erred in finding that the Applicant did not present a low risk of absconding. This too overlaps, the Applicant suggests, with an error of law.

ix. While it is accepted that as a general principle the Parole Board is not obliged to follow the recommendations of professional witnesses, the wholesale rejection by the panel of a unanimous recommendation for re-re-release was irrational, applying the test set out in **DSD** (below).

(2) Procedural unfairness

The panel chair curtailed the ability of the Applicant's representative fully to develop his closing submissions by insisting he did not want the submissions to rehearse the evidence which had been given by the witnesses during the hearing. This contrasted with the latitude the chair showed to one of the panel who asked discursive questions.

Current parole review

11. The Secretary of State for Justice (the Respondent) referred the Applicant's case to the Parole Board for consideration of release or a recommendation for open conditions. The application was for release. The case was listed for hearing on 17 January 2023, but was adjourned for witness-related issues.

12. The panel consisted of one independent member and two psychologist members of the Parole Board. The panel heard evidence from the Applicant's Community Offender Manager (COM) and Prison Offender Manager (POM), and from a psychologist based at the prison. The Applicant was represented by a solicitor throughout.

The Relevant Law

13. The panel correctly sets out in its decision letter 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.

14. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

15. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

> *"The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."*

Parole Board Rules 2019 (as amended)

16. Under Rule 28(1) of the Parole Board Rules 2019, the only types of decisions which are eligible for reconsideration are those concerning whether the prisoner is or is not suitable for release on licence.

17. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. This case concerns an indeterminate sentence and this case is therefore eligible.

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**.

Illegality

19. 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.

20. 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.

Irrationality

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 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 '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.

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

24. In **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"A more nuanced approach in modern public law is 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 respect 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. … [T]his approach is simply another way of applying Lord Greene MR's famous dictum in* Wednesbury *… but it is preferable in my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion."*

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

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

The reply on behalf of the Secretary of State (the Respondent)

28. The Respondent has indicated that he does not wish to respond to this application.

Discussion

29. Most of the issues raised under the head of Irrationality amount to no more than disagreement with the decisions of the panel. For example, (1)(i): it is plain from the Decision Letter (for example, Paragraph 4.2.) that the panel was aware of the length of time that the Applicant had spent on licence in the community. The weight the panel attached to that fact was a matter for the panel. Much more is needed to establish, or indeed to begin to establish, irrationality to the high standard set out above than a mere assertion such as this.

30. Similarly, as to (1)(ii), the panel was fully aware that no conviction followed from the arrest that led to recall. Interestingly, no complaint is made, nor should one have been made, about the panel's finding of fact "*that this was a violent offence with a weapon, which, had it escalated, could have resulted in serious injury*." There was ample evidence before the panel, including the Applicant's own account, to justify that finding.

31. Good behaviour in custody (Grounds 1(iii) and (v)) is by no means necessarily a compelling indicator of compliance or low risk in the community. Many prisoners, especially long-term prisoners, manage well in custody, but find life in the community more challenging.

32. Again, it was for the panel to assess the significance of the acts of self-harm. In fact, it does not appear from the Decision Letter that these played any significant part in the panel's decision-making process.

33. The panel carefully explained the reasoning behind its conclusion that there was further core risk reduction work needed: "*unless he addresses the underlying mechanisms that truly underpin his offending alongside his alcohol abuse and thinking skills, further work in the community was unlikely to succeed in the longer*

term and the risk of offending would remain." That was a conclusion to which the panel was entitled to come on the evidence.

34. I can find no basis for the suggestion that the panel applied the wrong test for release.

35. Ground (1)(viii) refers to the decision not to recommend a transfer to open conditions, which cannot be the subject of a reconsideration application.

36. In Ground (1)(ix) the Applicant correctly states that the panel is not obliged to follow the recommendations of the professional witnesses and must undertake its own assessment of risk, but goes on to say that the wholesale rejection of the unanimous recommendations of the professional witnesses was irrational. If the first part of that sentence is correct, as it is, then the second part makes no sense.

37. The true position is that 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.

38. However, 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, per **R (Wells) v Parole Board** 2019 EWHC 2710. Here the panel fully explained its reasoning, and there is no suggestion to the contrary.

39. As to the question of procedural unfairness, the panel chair had every right to draw to the Applicant's representative's attention to the necessity for closing submissions not to amount to a repetition or rehearsal of the evidence at the hearing, but to focus on arguments that would assist his client and the panel.

40. I have listened with care to the relevant part of the recording. The Applicant's representative started his closing submissions at (recording time) 5.06.42. Before he did so, the panel chair invited him to put his submissions into writing for the panel to consider in due course if he so wished, and when the representative said he wanted to address the panel orally, the panel chair reminded him that there was no need to rehearse the evidence.

41. At 5.18 approximately the representative was repeating to the panel the recommendations of the Prison Offender Manager, saying that she believed the RMP was robust. At that point the panel chair said "*Excuse me, I don't want to interrupt unnecessarily, Mr [X], but you are straying into rehearsing evidence. We have heard all the evidence, perhaps you should just confine yourself to closing submissions*."

42. The representative replied "*I am highlighting important parts that the panel should consider when deciding on the test for re-release and whether it's met*." The panel

chair said "*That doesn't necessarily involve going into what other people recommended, but carry on*."

43. The representative then went on to point out that the Community Offender Manager also recommended release, and continued to address the panel for 5 more minutes, with no discernible difficulty.

44. There can be no valid complaint about that sequence of events.

45. The argument that the panel chair should have taken a different approach to the representative's closing submissions because of the (allegedly discursive) questioning style of a member of the panel is wholly without logic or merit.

Decision

46. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair. I cannot find any basis for a suggestion of an error of law. Accordingly, the application for reconsideration is refused.

HH Patrick Thomas KC
05 March 2024