the Parole Board
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[2024] PBRA 94

Application for Reconsideration by Tonnar

Application

1. This is an application by Tonnar (the Applicant) for reconsideration of a decision of a panel dated 3 April 2024 (the Panel Decision) making no direction for his 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. A failure to make a recommendation for progression to open conditions is not eligible for reconsideration under Rule 28.

3. I have considered the application on the papers. These are the Panel Decision, the Application for Reconsideration dated 23 April 2024, the email dated 25 April 2024 from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) stating that no representations will be made in response to the Application for Reconsideration, and the Applicant's dossier containing 367 pages.

4. The grounds for seeking reconsideration are that:

(a) The decision not to release the Applicant was procedurally unfair because when considering the index offence, the panel attached significance to the inability of the Applicant "*to offer any explanation as to how the brake cable on the victim's car was damaged".* The panel then went on to state its full analysis of the index offence was inhibited "*because of [the Applicant's] maintenance of innocence".* It is contended that the Applicant was not asked either directly or indirectly how the brake cable on the victim's car was damaged. It is contended that it was not a fair process if questions were not put to the Applicant which the panel consider essential for the assessment of his risk (Ground 1);

(b) The decision was irrational as it refers to a need for core risk reduction work to be undertaken but he is in open conditions where there is no accredited work available. It is said that "*it is irrational to consider that*

a Prison Offender Manager (POM) can facilitate a small amount of sessions on cognitive behaviour when they are unqualified to do so". It questions how important and in depth any such work could be in reducing risk of serious harm (Ground 2).

Background

5. On 13 April 2021, the Applicant, who was then 53 years old, received an extended sentence of eight years' comprising a custodial term of five years' imprisonment and an extension period of 3 years' imprisonment for offences of (a) destroying or damaging property being reckless as to whether life was endangered (the property damage index offence); and of (b) intimidating a witness or juror with intent to obstruct, pervert or interfere with justice (the witness intimidation index offence).

6. The background to these index offences is that the victim was a professional decorator and the Applicant's father was dissatisfied with the quality of the victim's work in late spring/early summer 2019. Although the victim returned the cost of the disputed work, the Applicant remained increasingly angry with the victim.

7. In September 2019, the Applicant cut the brake cable of the victim's van. On the first occasion on which, the victim used the van after its brake cable had been cut, he was driving his son to school when he attempted to brake when he saw pedestrians, but the foot pedal went to the floor without causing the car to slow down. The victim was fortunately able to stop the car by using his hand brake.

8. The trial of the Applicant for the property damage index offence of cutting the brake cable was delayed because of COVID and in the period leading up to his trial, the Applicant sent a series of messages to the victim threatening him over a period of approximately two months. The messages, which were not sent every day, included threats to break the arms and legs of the victim as well as threats to set a gang on the victim. When police attended the Applicant's premises to arrest him in June 2020, they discovered he was growing cannabis.

9. The Applicant was convicted by a jury of the property damage index offence and the sentencing judge described that offence as *"a revenge attack for what you [the Applicant] perceived to be the slight or the disrespect shown to your family for the painting and decorating job".* The judge was satisfied that the property damage index offence was premeditated, and he concluded that the subsequent offence of which the Applicant was convicted, namely the witness intimidation index offence was an attempt to intimidate the victim into not giving evidence.

The Applicant's Conduct in Custody

10. When the Applicant was detained in closed conditions, the EDS custody report and PAROM 1 were written. According to the custody report, the Applicant had maintained enhanced status under the Incentives and Earned Privileges Scheme, and he had no proven adjudications. He has also maintained employment mainly in the gardens. In various positive entries, he has been described as hard working, helpful and polite but that on occasions he could be domineering and verbally aggressive.

11. While in closed conditions, the Applicant maintained that he did not commit the index offences but that he was the victim of a conspiracy by the justice system. On occasions, he could be abusive to his Prison Offender Manager (POM) and staff within the offender management unit. He was aggrieved that he had been assessed as suitable for the Resolve programme which is a cognitive-behavioural therapy-informed behaviour programme, rather than the Thinking Skills Programme which is an accredited offending behaviour programme designed to address problem solving skills and self-control while also developing positive relationships. But he undertook this programme when RESOLVE was discontinued. He did well on TSP but at the post programme review, he acknowledged that both his physical presence and his loud voice could appear to be aggressive.

12. The Applicant was keen to move to open conditions. On 22 May 2022, he threatened to assault an officer if he was not progressed, but no action was taken because it was considered that he made the comment *'off the cuff'* During 2022, he was subject to 2 ACCTs which is a support plan for prisoners identified as a high risk to themselves as concerns had been raised by the mental health In Reach Team and because of his threats to end his life.

13. In November 2022, the Applicant sat a reclassification Board in November 2022 when his POM was recommending reclassification to Category D, that Board was satisfied that the Applicant remained a significant risk to others and required a period of consolidation before his transfer to open conditions could be considered. When the Applicant sat a second Board in February 2023, he was successful, and he transferred to open conditions. At the time of the panel hearing, the Applicant had been in open conditions for about one year and he had progressed to 19 periods of day release on temporary licence, 5 unaccompanied special-purpose leaves and 6 periods of overnight resettlement leave in Approved Premises (AP) culminating in stays of 5 days and 4 nights. He also obtained paid employment outside the prison for six days per week and he had received confirmation that if he was released, this employment would remain open to him.

14. The Applicant received a proven adjudication for breaching the terms of his temporary release and received 14 days' loss of earnings and a 28-day suspension of temporary leave because he went to a televised FA Cup match. He was adjudicated for having contact with the media and being in

breach of a restriction on him being in a place associated with broadcasting or publication.

15. The Applicant challenged the restrictions on his periods of overnight resettlement leave contending they were disproportionate, but he has complied with them. When he was on a period of temporary release in December 2023, the Applicant was reported to have been rude and dismissive to a member of staff at the AP and to have sworn at them. The Applicant denied that he had behaved in this way.

The Panel Hearing

16. A two-member panel of the Board held an oral hearing by video link on 25 March 2024 at which the panel heard oral evidence from:

    (a) the Prison Offender Manager (POM).
    (b) the Community Offender Manager (COM);
    (c) the Psychologist commissioned by HMPPS and from
    (d) the Applicant.

17. The Applicant was represented at the oral hearing by his solicitor. The Respondent was not represented by an advocate. No victim impact statement was provided. There was no evidence which could not be disclosed to the Applicant.

18. The Applicant's POM considered that the Applicant was likely to engage with supervision in the community, but he expressed concerns because of the level of distrust the Applicant has for the probation service and the criminal justice system in general. She noted that there had been 2 failures in periods of temporary release and she considered his attitude at the AP to have been problematic and does not think that he should be released as she had witnessed him being rude and dismissive within the prison. The Applicant's POM considered that grievance thinking could escalate the Applicant's risks as could his complacency.

19. There had been a time when the Applicant had difficulty in contacting his COM as she had been off ill and there were then some concerns that the Applicant was sending too many emails to her and contacting her too frequently. The COM told the panel that she had been allocated the Applicant's case in November 2023 and that she accepted responsibility for some of the difficulties the Applicant experienced. She thought that it could be difficult for the Applicant to undertake offending behaviour work on licence. The COM also reported that she had contacted the Applicant's wife, who considered that the partnership between her and the Applicant was good, but she expressed a concern that if their relationship broke down, he could then pose a high risk of serious harm to her. The COM recommended that the Applicant should stay in open conditions.

20. The psychologist commissioned by HMPPS spoke of an occasion in October 2023 when she met the Applicant and his wife. Her conclusion after the meeting was that she was unclear whether the Applicant had sufficient internal resources to manage stressful situations and it subsequently became apparent he could not do so. She considered that an example of this was the Applicant's behaviour in the AP before Christmas 2023 which she considered showed grievance thinking. She told the panel that she did not think that the Applicant had sufficient understanding of his risk factors.

21. The Applicant gave evidence and he confirmed that he did not commit either of the index offences *"being unable to offer any explanation as to how the brake cable of the victim's car was damaged"* and claiming the extent of his involvement in the witness intimidation index offence was that he was coerced by a gang into purchasing 2 sim cards. He said that they used one of the cards to intimidate the victim and the other for general criminal activity. The panel found this explanation to be "*somewhat implausible".*

Manageability of Risk

22. The panel noted that the property damage index offence was relatively unusual and a full analysis of it was "*inhibited*" in the light of the Applicant's maintenance of innocence. So, the panel considered that it was not possible to determine "*whether there was a significant degree of premeditation or whether [the Applicant] formed an intention to damage the brake cables and immediately acted upon it*". The panel considered "*the fact that nobody sustained a physical injury [did] not reduce the gravity of the offence, because [the Applicant's] actions could have resulted in serious injury to many people and possibly loss of life".* The panel concluded that "*what does appear clear is that the offence was committed after [the Applicant] developed a grievance against the victim over a relatively insignificant matter and could not control his feelings [and] he then acted in a disproportionate manner".* The panel did, however, consider that the Applicant committed the property damage index offence of damaging the brake cable "*within the context of [him] having a history of domestic abuse as well as previous engagement in behaviour that could be described as stalking with little regard for court-imposed sanctions*".

23. The panel considered that the Applicant had "*little insight into his personality traits which had contributed to him acting as he did when he committed the index offences"* and these traits had "*contributed to him being refused Category "D" status on the first occasion when he was considered*" as well having "*surfaced in open conditions in the way he interacted with members of staff at [the AP] and prison staff and in the way he expressed frustration he naturally felt when he was having difficulty in contacting his [COM]".* The panel noted that "*in contrast the Applicant has an extremely good work ethic, is not a physically violent man"* and does not have alcohol or drugs as "*significant risk factors".*

24. The three professionals who gave evidence did not support release as they all considered that "*he should remain in open conditions to undertake the work identified for him [which] in brief .. is cognitive behavioural therapy to assist [him] to develop perspective taking and a better understanding of other people's intentions with the aim of reducing his propensity for rumination and fixation*".

25. The panel accepted "*the concerns of the professionals were valid and that the proposed work could not easily be accessed in the community and should be done prior to release".*

26. It was noted that "*the crucial issue for the panel [was] whether, notwithstanding there is identified offence focussed work available for [the Applicant], whether he would pose an unacceptably high risk to public safety if he were released without the work having been undertaken*". The panel noted that "*the difficulty with the risk assessment is that although the background to the index offence is well understood, the actual trigger that caused [the Applicant] to make the decision to cut the brake pipe is not known, because [the Applicant] maintains his innocence and in consequence, that trigger cannot be explored with him".*

27. The panel considered that *"if [the Applicant] is faced with a situation in the future where he develops a grievance, it will not be possible to identify the imminence of risk of [the Applicant] committing an offence that causes serious harm".* So, the panel concluded that *"on balance [it] was satisfied that it was necessary for the [the Applicant] to undertake the identified work before he is released".*

Conclusion of the Panel

28. The panel noted that the index offences caused them concern as the criminal damage index offence could have resulted in serious injury or death and the gravity of that offence was "*significantly exacerbated by the commission of the [witness intimidation index offence] after [he] had been charged with [the criminal damage matter]*". It was noted that although the Applicant had undertaken an offending behaviour programme in the form of TSP prior to his transfer to open conditions, "*the panel notes a concerning theme that was present in closed conditions and has continued in open conditions. He continues to express traits of self-entitlement".* The psychological risk assessment "*described it in terms of 'vulnerable narcissism', a condition characterised by oscillation between feelings of superiority and inferiority and fragile self-confidence which may be demanding displays of entitlement to others, in response to threats to the ego".*

29. The panel explained that it was concerned that if the Applicant finds himself in a position similar to that of the criminal damage index offence, namely feeling aggrieved that another person has wronged him, "*he will seek*

retribution against the perceived offending party and commit a further serious offence". Therefore *"based on the written and oral evidence, the panel is satisfied it remains necessary for the protection of the public for [the Applicant] to remain detained".*

The Relevant Law

Parole Board Rules 2019 (as amended)

Irrationality

30. 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."

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

Other

32. 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.

33. 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 craftsmanship."*

Procedural unfairness

34. Procedural unfairness means that there was some procedural impropriety. 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) he was not given a fair hearing;
(c) he was not properly informed of the case against them;
(d) he was prevented from putting the case against him; and/or
(e) the panel was not impartial.

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

The reply on behalf of the Respondent

36. By an email dated 25 April 2024 PPCS on behalf of the Respondent stated that no representations will be made in response to the Application for Reconsideration.

Discussion

37. In dealing with the grounds for reconsideration, it is necessary to stress five matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgment of the Panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those 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.

38. The second matter of material importance is that when deciding whether a decision of the panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole.

39. Third, where a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact 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.

40. Fourth, when considering whether to order reconsideration, appropriate weight must be given to the views of the professional witnesses, but reconsideration cannot be ordered if the panel has put forward adequate reasons for not following the views of the professional witnesses.

41. Fifth, in many cases, there can be more than one decision that a panel can be entitled to arrive at depending on its view of the facts.

Ground 1

42. As I have stated, this ground is that the decision not to release the Applicant was procedurally unfair because when considering the index offence, the panel attached significance to the inability of the Applicant "*to offer any explanation as to how the brake cable on the victim's car was damaged".* The panel then went on to state its full analysis of the index offence was inhibited "*because of [the Applicant's] maintenance of innocence".* It was contended that the Applicant was not asked either directly or indirectly how the brake cable on the victim's car was damaged. It is contended that it was not a fair process if questions were not put to the Applicant which the panel consider essential for the assessment of his risk.

43. I am unable to accept this ground for four alternative reasons. First, the assessment of the risk posed by the Applicant depended on the crucial issue of whether he committed the criminal damage index offence. There was powerful evidence that he did so as he was convicted after a trial by a jury who must therefore have been satisfied beyond a reasonable doubt that he had committed that offence. In sentencing the Applicant, the trial judge described that offence as premeditated and concluded that it was "*a revenge attack for what [the Applicant] perceived to be the slight or the disrespect shown to [his] family for the painting and decorating job*". In giving evidence to the panel, the Applicant confirmed his stance that he did not commit either of the offences. In the light of that powerful evidence, I cannot understand why it was necessary for the Applicant to be asked at the panel hearing either directly or indirectly how the brake cable on the victim's case came to be damaged when there was powerful evidence that he had committed it.

44. Second, the Applicant gave evidence to the panel in which according to its written decision (with emphasis added) "*he confirmed his stance that he did not commit either of the index offences, being* ***unable to offer any explanation as to how the brake cable of the victim's car was damaged***". This statement in the Panel Decision, the accuracy of which has not been challenged, indicates that when giving evidence, the Applicant was "*unable*" to explain how the brake cable was damaged and that indicates that it would have been pointless asking him how the cable came to be damaged. This shows that it was unnecessary for the Applicant to be asked

how the brake cable on the victim's case came to be damaged. This is a second or an alternative reason why this ground must fail.

45. A third reason why this ground cannot be accepted is that no reason has been put forward to show why if the Applicant had been asked how the brake came to be broken, he would then have produced an answer which might have been in any way relevant to the issue for the panel which was whether it was no longer necessary for the protection of the public that the Applicant should be confined. It is very surprising at the least that it has not been contended (let alone shown) that if the Applicant had been asked how the brake came to be broken, he would have been able to point to some evidence which would or might support his claim that he should be released, but no such evidence has been adduced. Indeed, it has not been possible to adduce such evidence, and this shows that there would have been no point in asking the Applicant how the brake came to be broken.

46. A fourth reason why this ground fails is that this is a claim for procedural unfairness, and it can only succeed if the Applicant had been dealt with unjustly. I consider that there is no basis for contending that the Applicant was dealt with unjustly when the panel did not ask him a question about how the brake came to be broken in a case when his very experienced and very competent lawyer had not asked it. The panel was quite entitled to assume that any relevant question helpful or relevant to the Applicant's cause could and would have been posed by his experienced legal team. The panel was therefore entitled to assume that there was no need for them to ask the Applicant about how the brake came to be broken. I should add that I do not consider that the Applicant's legal team can be criticised in any way for not asking it.

Ground 2

47. This ground is that the decsion was irrational as it refers to a need for core risk reduction work to be undertaken, but he is in open conditions where there is no accredited work available, and he cannot be returned to closed conditions. It is said that *"it is irrational to consider that a Prison Offender Manager (POM) can facilitate a small amount of sessions on cognitive behaviour when they are unqualified to do so"*. It questions how important and in depth any such work could be in reducing risk of serious harm.

48. I am unable to uphold this ground for each of the following reasons. First, the crucial task for the panel was to determine the referral to it which was to consider the release of the Applicant and that was the outcome sought and achieved. Crucially, the test to be applied by the Board in determining if the Applicant could be released was as stated at the start of the Panel Decision that the Board "*will direct release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined".* This was the test applied by the panel and it is not contended, let alone established that it was irrational to apply that test for release or that it was applied irrationally.

49. Second, it has not been suggested, let alone proved that it was irrational for the panel to require the Applicant to complete before release *"cognitive behavioural therapy to assist [him] to develop perspective taking and a better understanding of other people's intentions with the aim of reducing his propensity for rumination and fixation".*

50. Third, there are no grounds for contending that it was irrational to require the Applicant to undertake core accredited work in open conditions even when it was impossible for him to do so in his present open prison. The panel was only obliged to ascertain what conditions had to be satisfied before it would be no longer necessary for the protection of the public that the Applicant to be confined. It was not obliged to ascertain or to investigate in what prison or under which POM those conditions could be satisfied, and it was not irrational for the panel not to do so.

51. Fourth, due deference has to be given to the expertise of the panel in making its decisions under challenge including in deciding what type of core risk reduction work the Applicant has to complete before release.

Conclusion

52. For all these reasons, this application for reconsideration must be refused.

Sir Stephen Silber
10 May 2024