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[2024] PBRA 95

Application for Reconsideration by Sufi

Application

1. This is an application by Sufi (the Applicant) for reconsideration of a decision of an oral hearing dated 21 March 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:

   (a) The Decision Letter.
   (b) Reconsideration Representations, undated and unsigned.
   (c) The dossier, consisting of 543 numbered pages, the last document being the Decision Letter.

4. I have also, because of the nature of the challenge to the procedural fairness of the decision, listened to the whole of the recording of the proceedings.

5. The initial Reconsideration Representations, undated but received by me on 24 April 2024, were defective, in that they sought to introduce fresh evidence, consisting of statements from witnesses contained within the document, rather than to invite the Parole Board to reconsider the rationality and procedural fairness of the decision reached by the Oral Hearing Panel (the panel) on the proceedings as they were and the evidence the panel received.

6. It is therefore somewhat surprising that the response of the Secretary of State for Justice (the Respondent) to these original Representations was to inform the Board that he had no representations to make.

7. I notified the Applicant's legal representative that I could not consider Representations in this form, and asked that further, acceptable, Representations be submitted. The amended Representations reached me on 1 May 2024. I have not read the passages in the original Representations that should not have been there. I noted their presence and stopped reading that document. This Reconsideration Decision is based solely on the amended Representations, the Decision Letter, the dossier and the record of the hearing.

Background

8. The Applicant is 44 years old (not 40 as the Representations assert). In 2010, when he was 30, he received a sentence of imprisonment for public protection (IPP) for the index offences: an offence of robbery, and further offences of burglary and false imprisonment. The Tariff Expiry Date for that sentence was in February 2019. He was on licence at the time of those offences, as he was at the time of an earlier (2001) conviction for 2 offences of robbery, 1 offence of s18 wounding, 1 offence of possession of a bladed article, 2 offences of assault with intent to resist arrest and possession of an imitation firearm with intent to resist arrest. For the 2001 offences he received a sentence of 10 years' imprisonment.

9. In 2019, following a Parole Board decision not to release him, the Applicant absconded from an open prison. While unlawfully at large he committed further offences, mostly by way of a campaign of dwelling-house burglary, for which he received sentences totalling 5 years' imprisonment concurrent with his IPP sentence.

Request for Reconsideration

10. I have set out the history of the application for reconsideration above.

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

(1) The Applicant's hearing was not listed for a sufficient time for it to be completed. The result of this, the application asserts, was that during his evidence he was rushed, cut off, spoken over and told to answer questions more directly. The interruptions are described as oppressive: he was only able to give incomplete answers, impeding his ability to give his best evidence and effectively communicate. It is submitted that that this led to appeared [*sic*] hostility on the part of the panel at times during the hearing. The hearing was one of those filmed by the BBC. The Parole Board had not factored in that more time might be considered for this case considering the logistics of it being filmed and the impact of the filming on the Applicant, due to his personality function and PTSD. This, it is asserted, was therefore not a fair hearing: the lack of time impacted on the hearing and on the time allocated for the Applicant to give evidence and then on the quality of his evidence.

(2) No reasonable adjustments were made by the panel for the Applicant. He has a diagnosis of PTSD. The Decision Letter wrongly recorded that the psychologist told the panel that there was no formal diagnosis of PTSD. It became clear that during the panel questions for the Applicant, the panel chair was concerned with the time allocated to this hearing due to the communication style of the Applicant and how he was answering questions. His PTSD as the hearing unfolded clearly impacted his communication and his ability to answer questions in a manner that the panel wanted. The panel were clearly becoming frustrated with the way in which the Applicant answered questions and started to interrupt him asking him to answer the questions he was asked. These interruptions became more frequent and disruptive to the answers the Applicant was trying to give. The panel frequently cut him off and did not allow him to fully verbalise his answers or

what he was trying to communicate. He stated "*I'm scared of answering questions, you don't like the way I'm answering them*." Nothing was done to put him at his ease or assist him to participate in a meaningful way. The panel did not give due regard to areas where the Applicant's PTSD might be triggered. There are several inaccuracies in the decision:

(i) Question over the PTSD diagnosis.
(ii) Repeated mention of his deselecting himself from the progressive regime at his previous prison, when his evidence was that he left by agreement, having completed all that was asked of him.
(iii) Not being allowed to explain what he meant by saying he was heavily invested in the system, which was interpreted by the panel as him saying he had had all the treatments.
(iv) He was stopped from giving a full explanation of his view of a programme he had undertaken, which was not that it did not work.
(v) The panel did not record that his self-isolation at his previous prison was in order to detox from Subutex.
(vi) He was not given a fair chance to explain why he said that he had planned to serve 10 years on this sentence.
(vii) It was factually incorrect for the panel to assert that he absconded from Approved Premises (AP) while on release on temporary licence (RoTL), when in fact he walked out of an open prison.

(3) The panel did not offer the Applicant the opportunity to address it at the end of the evidence. The Prison Offender Manager (POM), who was present with him during the hearing drew the attention of the panel to his wish to do so. "*He was given a matter of seconds before he was cut off*."

(4) The panel said it did not have sufficient information about the Progressive Regime and the PTSD diagnosis. At no point in the hearing did it raise these as lacking or a cause for concern. The panel should have case managed the case to request this information as part of an adjournment.

(5) Irrationality. The panel has not accurately recorded the views of the witnesses, all of whom knew the Applicant well and recommended release. The panel disregarded the evidence that the Applicant had successfully reached stage 3 at the Progressive Regime. The panel stated that change was only apparent over 4 months, when in fact it took place over 18 months. "*The panel have given no explanation or reasons in the decision why they have reached a different conclusion to the evidence taken and recommendations given by the experts*." This has led to procedural unfairness in the case.

12. The Representations conclude by stressing that this is a case where the stakes are high. All Parole Board decisions involve the liberty of the subject: the stakes are always high. If it is suggested that the panel did not appreciate this fact, no basis is advanced for the suggestion.

13. The grounds advanced for reconsideration are extensive and overlap. I have summarised them, but I have taken into account all the matters raised, even if I have not specifically set them out above.

Current parole review

14. The Respondent referred the Applicant's case to the Parole Board for consideration of a direction for release or a recommendation for a transfer to open conditions. This was the 4th review of the Applicant's sentence. The Applicant sought release.

15. The panel heard the case by video link on 8 March 2024. The panel consisted of a judicial member of the Parole Board as chair, a psychologist member, and an independent member. The panel considered a dossier then containing 525 pages.

16. The witnesses who gave evidence were the POM, the Community Offender Manager (COM), a psychologist based at the prison, and the Applicant. The POM was present in the room with the Applicant. The Applicant was represented by a solicitor, who asked questions of all the witnesses and made submissions at the end of the hearing.

The Relevant Law

17. 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 Respondent for a progressive move to open conditions.

18. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.

19. 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)

20. 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.

21. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. This is an eligible sentence.

Irrationality

22. 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."

23. 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.

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

25. 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

26. 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.

27. 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.

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

29. 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.

30. 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

31. As mentioned above, the Respondent has indicated that he does not wish to make any submissions in this case.

Discussion

32. I have listened to the recording of the hearing, which is the official record, with great attention. The Applicant is serving an IPP sentence and is post-tariff. The allegations made about the conduct of the hearing are extremely serious, including as they do, oppression and apparent bias.

33. A salient feature of the case is that the Applicant had the benefit of representation by an experienced specialist solicitor. At no stage during the hearing did she intervene or raise any of the issues now advanced as amounting to procedural unfairness. Of course it is the responsibility of the panel to conduct a fair hearing. However, a prisoner's representative also has responsibilities. The lack of intervention or objection in this case is an indication that the hearing did not appear at the time to be an unfair one.

34. Cases in which the party to Parole Board cases has been represented by a lawyer are highly unlikely to generate a successful appeal if there was no challenge made to the alleged irregularity by or on behalf of the Applicant at the time, save in the event for instance of a failure by the other party (for example, a failure to disclose material relevant to the ultimate decision to the Applicant). No such failure is suggested here.

35. Furthermore, the representative had presumably had the opportunity for full and proper consultation with her client. Had she not had that opportunity, that would undoubtedly, and properly, have been raised as a head of unfairness. The Parole Board is entitled to the assistance of a prisoner's representative in approaching what can be the difficult problem of how best to deal fairly and considerately with the

prisoner during the invariably stressful experience of an oral hearing. This is, perhaps, particularly relevant to the fact, mentioned in the Representations, that this was a hearing filmed by the BBC. I have no information about this specific case, but it is my understanding that such filming can only take place with the informed consent of the prisoner. If the fact of filming might prospectively, or seemed during the hearing actually, to impair the Applicant's ability to put his case forward, the representative could and should have said so. She could have withdrawn his consent at any stage.

36. Nor is the account of the hearing in the Representations to be wholly relied on. I entirely accept that the representative, who presumably drafted the unsigned Representations, has not had the advantage which I have had, of listening to the recording. However, the assertion that the Applicant was cut off from addressing the panel at the end, after the POM had drawn attention to his wanting to say something more, is incorrect. What happened was the Applicant said he wanted to say one thing. He told the panel that he had self-isolated for 18 days. The panel chair told him the panel was fully aware of that. The Applicant continued to say what he wanted to say about the detailed dates relevant to that period, without interruption. To assert that he was "*cut off*" does not represent what actually happened.

37. It is not accurate to say that the panel chair (or anyone else) rushed, cut off or spoke over the Applicant during his evidence. The independent member who first asked questions of the Applicant asked very open questions, to which the Applicant had every opportunity to give open, discursive answers, covering a lot of ground, if he so wished, as he did. The Applicant's evidence occupied the largest part of the hearing. At no stage did the panel chair, or anyone else, refer to any time pressure due to a case being listed later in the day. The chair directed, by email, that that case be adjourned well before the Applicant concluded his evidence. This direction was not mentioned in the hearing.

38. At one stage the panel chair said to the Applicant "*I don't think you've answered the question*." The Applicant continued with the answer he wished to give without any apparent hesitation or discomfort. Just under an hour into the Applicant's evidence the panel chair said *"You're not answering the question you're asked. What would be different this time?"* The issue under discussion was obviously crucial: the Applicant had breached his licence twice before, with very serious offences, and had offended, again seriously, during his period unlawfully at large. The Applicant continued with his answer, again without any apparent hesitation or discomfort.

39. Ten minutes later the panel chair told the Applicant "*We don't need a lecture on drug use in prison.*" At this stage the Applicant was indeed telling the panel about the prevalence and availability of drugs in prison.

40. These were perfectly proper interventions. They had no apparent suppressive effect on the Applicant. No doubt if they had the Applicant's representative would have said so at the time. If she felt his answers had not done him justice, the representative asked him questions after the panel had done so, and had every opportunity therefore to ensure that he had said what she knew he wished to say.

41. When the Applicant's representative asked him questions, she found it necessary, on one occasion just under 2 hours into his evidence, to remind him that *"You have to let me ask the questions and keep you on track".*

42. Taking the broadest view, and the most favourable approach to the Applicant, I cannot find that the way he was questioned was oppressive, unfair, or deprived him of the opportunity fully to explain himself and his case to the panel. I stress that I have taken the approach that I need to be satisfied by the recording that the Applicant had the opportunity to advance his case, not that the Applicant had to persuade me that he did not. I have also taken into account the Applicant's PTSD and his Personality Disorder. I am satisfied that there was no unfairness in the way in which the panel treated the Applicant and his evidence.

43. Alleging actual bias is a serious allegation and to establish it would require compelling evidence which does not exist here. If apparent bias is established, then that would render the hearing unfair. The test for apparent bias is set out in **Porter -v- Magill [2001] UKHL**, namely that a fair-minded observer who was aware of all the relevant facts would conclude that there was a real possibility that the tribunal was biased. In my judgement, the test is not met in this case.

44. Specifically, I am satisfied that time pressure played no unfair part in the hearing. Panels, and panel chairs, are well used to the possibility that a morning case will overrun and jeopardise an afternoon case. They do not, and this panel did not, allow such considerations to interfere with the fair hearing of the case in front of them. At no point did the chair, or anyone else, say anything about the need to keep within a time frame.

45. It is true that the Applicant at one point said he was scared of answering questions, because the panel did not like the way he answered them. I have listened to the recording: there is no other indication that the Applicant experienced any difficulty in saying what he wanted to say, nor did his representative take any issue, then or later, with the fairness of the proceedings. Throughout his evidence, before and after that comment, the Applicant appeared to be expressing himself freely and fluently.

46. I turn now to the issue of the Applicant's PTSD. The suggestion (at paragraph 29 of the Representations) is that the panel did not wholly accept the PTSD diagnosis, believing that the psychologist in her evidence stated that this diagnosis had not been made. The position is that the psychologist panel member asked a question with a number of elements, which included the assertion that there was no PTSD diagnosis. In answering the question, the psychologist witness did not dissent from that proposition. No doubt that was something that the witness would have done had the issue been raised other than in the course of a somewhat complex question. The Decision Letter therefore reflects the oral evidence, but not, perhaps, entirely the reality on this point.

47. The panel was fully aware of the psychological issues, including the Applicant's PTSD symptoms and the question of Personality Disorder. The Decision Letter comments that there was no documentary evidence of the work the Applicant had undertaken on the Progressive Regime at his previous prison, or regarding his PTSD. This is accurate. The complaint is that, in those circumstances, the panel should have

adjourned the case for such material to be supplied. At no stage did the Applicant or his representative seek an adjournment of the case or that further evidence should be obtained.

48. 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 it.

49. Complaint is made that the panel said that change had only occurred over 4 months. What the panel said (at Paragraph 4.3 of the Decision Letter) was that any change had been over a relatively short period, and it was not satisfied that that there had been any sufficiently compelling evidence of change provided. The panel commented that the Applicant had only come back to his current prison from the Progressive Regime at his previous prison approximately 4 months ago, which is too short a time for any conclusions to be drawn as to his positive progress and likely compliance in the community. The panel commented on the Applicant's past substantial history of absconding and entrenched serious offending. These are accurate statements of fact, and the conclusion that there was insufficient evidence of change was one open to the panel.

50. The evidence about the Applicant's return from the prison where he had taken part in the Progressive Regime is set out in the Decision Letter at Paragraph 2.1. The Applicant told the POM that he had been at risk from some other prisoners, had self-isolated for a period, and then requested a transfer. His representative suggested to the POM on his behalf that he self-isolated to protect himself from other prisoners. She did not suggest that the staff at the Progressive Regime agreed with his decision to return to his former prison, nor that he self-isolated to wean himself off Subutex. The Representations refer to p232 of the dossier as reflecting this version of events: there is nothing on p232 that relates to his time on the Progressive Regime.

51. It is correct that throughout the Decision Letter the panel refers to the Applicant absconding from Approved Premises while on leave from an open prison, when in fact he absconded from the open prison itself: see p150 of the dossier. The error seems to have come from an earlier Decision Letter. This mistake makes no difference whatsoever to the final decision.

52. The Applicant did say that the programme he undertook in 2016 to reduce his risk of offending didn't work. He was right to say so: it was after completing that programme that he absconded and carried out a series of offences while unlawfully at large. The panel did not stop him from explaining himself further if he wished to do so.

53. Complaint is made that the panel says that the Applicant was deselected from the Progressive Regime. The panel noted that he had reached Stage 3. The evidence

was (as mentioned above) that he chose to leave the prison for the reasons he explained. The Representations suggest that he left with the agreement of all staff having completed the Progressive Regime. The panel did not say he was deselected: the panel said, accurately so far as I can see, that he deselected himself.

54. None of the alleged errors of fact in the Decision Letter was of significance, leave alone fundamental.

55. The Representations complain that the panel disagreed with the recommendations of the professionals, while conceding that the panel was entitled to do so.

56. 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.

57. However, if a panel makes 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**.

58. This panel fully explained its reasons for departing from the conclusions of the witnesses. They are sufficient to justify its conclusions.

59. In brief, then, the complaints about the panel's conduct of the hearing are unfounded. The Applicant had every opportunity, if necessary with the assistance of his representative, to say what he wished to say. The panel's reasons for not releasing the Applicant are valid (see for example Paragraph 48 above), and open to the panel on the evidence it heard, notwithstanding some errors of fact in the Decision Letter. Those errors of fact are irrelevant to the decision. There is nothing either procedurally unfair or irrational in the panel's approach to the case or its decision.

Decision

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

HH Patrick Thomas KC
14 May 2024