

[2020] PBRA 21

Application for Reconsideration by CAVANAGH

Application

1. This is an application by Cavanagh ("the Applicant") for reconsideration of a decision of the Panel dated 17th January 2020.
2. Rule 28(1) of the Parole Board Rules 2019 ("the 2019 rules") provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.
3. I have considered the application on the papers. These are the dossier comprising of 630 pages, the Decision Letter of 17th January 2020, and the Reconsideration Application.

Background

4. The Applicant pleaded guilty to offences of attempted robbery, possessing a firearm when committing an indictable offence and possessing a firearm when he was a prohibited person.
5. The Applicant was sentenced on 23rd January 2016; for the first and second offences, the Applicant received indeterminate sentences for public protection with minimum specified terms based on notional determinate sentences of 10 years. It does not appear that the Applicant received an additional sentence for the third offence.
6. The offences were committed when the Applicant entered a crowded betting shop with a loaded firearm. The Applicant was under the influence of drugs at the time of the offence and he stated that he committed the offences to repay a drug debt.
7. The Applicant was released on licence on 15th September 2014, but he failed to attend a supervision appointment in December 2015 and his licence was duly revoked on 30th December 2015. He was transferred to open conditions on 5th July 2016.
8. On 5th April 2018, the Applicant was transferred to another prison. On 25th April 2018, there was an incident in his cell in relation to which there are different accounts. One account was that the Applicant lunged towards the senior officer before he grabbed her hand and bit it. The Applicant was charged with assault and the Applicant entered a basis of plea which was accepted by the court in which the Applicant accepted that he had made contact with the officer who suffered no injury



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and that there was no biting by him. The Applicant was sentenced to 56 days' imprisonment.

Request for Reconsideration

9. This application for reconsideration is dated 22nd January 2020.
10. The grounds for seeking a reconsideration are that the decision was procedurally unfair because:
 - (a) the panel failed to make a finding of fact as to whether the Applicant bit the officer;
 - (b) the panel failed to comply with its public law duty to obtain and consider evidence of great relevance to the issue of whether the Applicant bit the officer, namely the witness statements relating to this issue which were obtained for the purpose of the criminal proceedings specified in paragraph 5 above;
 - (c) the panel proceeded to make findings of fact on alleged domestic violence committed by the Applicant notwithstanding that the panel had previously informed the Applicant's representative prior to the hearing and the Applicant himself at the start of the hearing that the panel would not be seeking to review the circumstances of his behaviour on licence prior to recall; and because
 - (d) the panel did not question the Applicant about the allegations of domestic abuse and in the light of the panel's earlier comments that the panel would not be seeking to review his behaviour on licence before recall, the Applicant did not go into any details about his denial of the allegations.

Current parole review

11. In July 2018, the Secretary of State referred the Applicant's case to the Parole Board to consider whether it was appropriate to direct the Applicant's release. In its decision letter of 17th January 2020, the panel concluded that having concluded all the written and oral evidence, it was satisfied that the Applicant had not reduced his risk to a level that can be managed in the community and that if he was to be released, he is likely to present an unacceptably high risk of committing a further offence that could cause serious harm. In consequence, the panel did not direct the Applicant's release.

The Relevant Law

12. Under Rule 28(1) of the 2019 Rules the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).
13. Rule 28(1) of the 2019 Rules, a party may apply to the Board for its case to be reconsidered on the grounds that the decision is (a) irrational, or (b) procedurally unfair.

Procedural unfairness

14. 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.

The reply on behalf of the Secretary of State

15. PPCS on behalf of the Secretary of State has stated that they are offering no representations.

Discussion

16. In determining whether the Applicant was suitable for release, a crucial issue for the panel was whether the allegations that he had bitten the prison officer and that he had committed domestic violence were correct. Indeed, at page 7 of the decision letter, the panel observed that the psychologist had *"stated that if various allegations and concerns about [the Applicant's] use of violence [in biting a prison officer and in the domestic context] are not true then her risk assessment would be different and she would be satisfied that [the Applicant's] risk could be safely managed in the community"*. The panel's approach to the allegations of the Applicant's alleged misconduct in biting a prison officer and his alleged use of violence in the domestic context will be considered separately.

The allegation of biting a prison officer

17. The Applicant had been charged with the assault, but significantly, his basis of plea which was accepted by the prosecution and by the court was that he had made contact with the officer who suffered no injury and there had been no biting.
18. The complaint of the Applicant relates to the panel's conclusion that it *"can think of no reason why the officer would lie by stating that she had been bitten when she had not"*. The panel was under a public law duty to consider all available relevant evidence especially where they were departing from a conclusion arrived at by a Court and by the prosecution in the form of the basis of plea.
19. The panel failed to comply with its obligation set out in paragraph 11 b of the Guidance which provides that:

"Panels will only be in a position to make a finding of fact when it has a reasonably sufficient body of evidence on which it can properly make a finding of fact on the balance of probabilities"
20. The panel erred in law by not availing itself of the opportunity to obtain *"a reasonably sufficient body of evidence"* by making orders for the production of the witness statements which were available at the previous court hearing in order to resolve the critical issue of whether the basis of plea was correct or whether the Applicant had

bitten the officer. Those witness statements were required by the panel before it could determine whether the Applicant had bitten the officer and it could not properly accept the officer's evidence in the way it did without this evidence.

The allegations of violence in the domestic context

21. The panel on page 8 of the decision letter informed the Applicant that:

"although you deny that during your time on licence you had engaged in domestic abuse, the panel is satisfied on balance that the information received by your offender manager from a variety of sources is more likely to be accurate than not and in consequence that domestic abuse is an ongoing risk factor that is likely to be activated if you are released and revert to substance abuse."

22. The panel did not question the Applicant about these significant allegations of domestic abuse and this omission constitutes a breach of paragraph 11c of the Guidance which provides that *"the prisoner must have a fair opportunity to contest the allegations"*. This omission would require an order for reconsideration to be made.

23. In addition, the Applicant's grounds note that the panel made the findings on domestic abuse set out in paragraph 22 above even though the panel had advised both the Applicant's legal representatives before the hearing and the Applicant at the start of the hearing that the panel would not seek to review the circumstances of his conduct on licence prior to recall. The Applicant had a legitimate expectation that allegations of domestic abuse would not be the subject of the panel's inquiry or its decision.

24. The fact that the panel then made findings on domestic abuse constitutes procedural unfairness as a breach of its public law duty and the Applicant's legitimate expectation. This error would also require an order for reconsideration.

Decision

25. Accordingly, I have found, applying the test as defined in case law, that the panel's decision of 17th January 2020 to be procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted.

26. I have given careful consideration to whether this case should be reconsidered by the original panel or whether it should be considered afresh by another panel.

27. I have no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, the question of justice being seen to be done arises again. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was wrong. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh panel.

28. The following further directions are now made:

(a) The re-hearing should be expedited.

- (b) The original decision and this Applicant's grounds of appeal from the panel's decision must be removed from the dossier and must not be seen by the new panel.
- (c) The new panel should be told that this was a reconsideration but it should not be made aware of the reasons why it was ordered.
- (d) The new panel should also be advised that the fact that this is a reconsideration should not in any way affect their decision. It is a complete re-hearing.
- (e) The Secretary of State should obtain as soon as possible the witness statements in the court proceedings referred to in paragraph 8 above in which there was a basis of plea which was accepted by the court that the Applicant had accepted that he had made contact with the officer who suffered no injury and that there was no biting by him

Stephen Silber
31st January 2020