[2021] PBRA 31

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Application for Reconsideration by Talbot

Application

1. This is an application by Talbot (the Applicant) for reconsideration of a decision of an oral hearing panel, dated 18 January 2021 not to direct release or recommend progression to open conditions.

2. Rule 28(1) of the Parole Board Rules 2019 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 amounting to 620 pages (including the submissions to the panel from the Secretary of State and the Applicant's legal representatives and the decision letter) and the legal submissions in respect of this application.

Background

4. On the 13 March 2007, when aged 29, the Applicant was sentenced to imprisonment for public protection, with a tariff of 4 years 29 days for conspiracy to cause burglaries and robberies. The tariff expired on 10 April 2011.

5. On the 23 March 2011, when aged 33 and whilst a serving prisoner, the Applicant was sentenced to 12 years' imprisonment for corrupt activity in prison and conspiracy to defraud.

Request for Reconsideration

6. The application for reconsideration is dated 16 February 2021.

7. The grounds for seeking a reconsideration are based on procedural irregularity and irrationality.

8. The grounds for procedural irregularity are:

- The submissions made on behalf of the Secretary of State were never served on the Applicant.

- During the hearing, the Applicant's legal representative was under pressure of time and was not able to confer with the Applicant for as long as she would have wished.

- The Community Offender Manager disclosed in her evidence information that ought to have been made subject to a non-disclosure application and which the panel took into account notwithstanding it had indicated it would not place any weight on the evidence

- The panel failed to call the author of a psychological report to give oral evidence.

9. The grounds for irrationality are:

- The panel was not entitled on the evidence before it to say it had no confidence that the Applicant would comply with conditions on temporary release.

- The panel was not entitled to say that the Applicant had been involved in "numerous instances" of violence.

Current parole review

10. The Secretary of State referred the case to the Parole Board on 25 October 2019.

11. The oral hearing took place on 21 December 2020. The panel comprised an independent member, a psychologist member and a judicial member. It heard from a police officer conducting a criminal investigation into the Applicant's activities, his Prison Offender Manager from open prison, his Prison Offender Manager from his closed prison and his Community Offender Manager. The Applicant was legally represented and both the legal representative and the representative for the Secretary of State filed written submissions to the panel following the oral evidence.

The Relevant Law

12. 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.

Parole Board Rules 2019

13. Under Rule 28(1) of the Parole Board Rules 2019 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)).

14. 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**.

Irrationality

15. 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."

16. 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.

Procedural unfairness

17. 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.

18. 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.

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

The reply on behalf of the Secretary of State

19. The Secretary of State made submissions to the panel at the oral hearing but made no representations in response to this application.

Discussion

20. On the 23 March 2011, whilst a serving prisoner, the Applicant had been sentenced to 12 years' imprisonment for corrupt activity in prison and conspiracy to defraud. The smuggled items had included various drugs to a total value of approximately £22,000.

21. On the 5 January 2019, the Parole Board recommended the Applicant should progress to open conditions and on the 12 August 2019, he moved to an open prison. He began temporary releases on the 20 November 2019; all the releases proceeded without incident.

22. On the 17 August 2020, the Parole Board directed that the present application should be listed for oral hearing.

23. On the 16 August 2020, prison officers intercepted an attempt to smuggle into the prison a large number of contraband items. Suspicion fell on the Applicant and two others. The Applicant was returned to close conditions.

24. The adjudication procedure was commenced but eventually not proceed with on the basis it was out of time. The matter was also reported to the police, who lacked the necessary resources to investigate the allegation.

25. The Applicant's parole hearing was listed on the 19 November 2020, with a time estimate of 2 hours 45 minutes hours. This was regarded as inadequate and the case was adjourned on the day to the 21 December 2020, with a revised time estimate of 5 hours.

26. Prior to the hearing, the Applicant and his legal representative had had the opportunity to view two CCTV clips.

27. At the adjourned hearing, and during the evidence of the officer in charge of the criminal investigation, it became clear she had seen a third clip. Arrangements were made for both the Applicant and the panel to watch the third clip.

28. The panel took the view that what was shown on the clip was sufficiently clear that it did not need to rely on the officer's explanatory commentary.

29. The Applicant's legal representative sought release. The Prison Offender Manager from the open prison did not consider the Applicant to be ready for release and suggested a lengthy period of testing in open conditions. The Prison Offender Manager at the Applicant's present prison did not feel able to make a recommendation. The Applicant's Community Offender Manager recommended a return to open conditions.

30. The panel placed no reliance on recent intelligence, on the basis its provenance and reliability were uncertain.

31. The panel decided the key to the Applicant's case was the CCTV evidence, which was of a good quality and covered the relevant parts of the incident.

32. The panel decided the evidence shown on the clip comprehensively undermined the Applicant's account to the panel, demonstrated his much earlier account to the governor was incorrect and established the Applicant had been involved in a relatively sophisticated conspiracy to bring in prohibited articles for onward supply within the prison.

33. The panel said the finding was not necessarily determinative of the outcome of the hearing, but it did show the Applicant's risk factors were very much active and he had no commitment to lead a law-abiding life.

34. The panel took the view the recommendation for progression to open conditions did not consider fully the significance of the August 2020 incident.

35. My reading of the case is that, somewhat unusually, the recommendations were not based on the conventional test the Applicant had reduced his risk sufficiently for progression, but on the basis his risk was so active, it required extensive testing.

36. What is clear is that the panel's decision not to direct release and not to recommend open conditions was based on a single, highly significant factor, namely the finding the Applicant had yet again been involved in smuggling.

37. Turning to the ground of procedural irregularity, I had asked for further details in support of the allegation the Applicant had not been served with the Secretary of State's representations. It now appears this allegation was made as the result of a misunderstanding and the ground has been withdrawn.

38. The second ground sets out the difficulty under which the legal representative says she was working. The *"plethora of concerns"* are set out to succinctly. Implicit in the allegation may be the suggestion the legal representative felt she was not able to represent the Applicant effectively in those circumstances. However, that is not stated explicitly.

39. It appears that no application for an adjournment was made during the hearing. More importantly, the written submissions, made after the Applicant and the legal representative had conferred, undoubtedly complained of the difficult circumstances but did not seek a further hearing.

40. It appears that only after the Applicant learnt that his application had failed, was a rehearing sought by way of this reconsideration process.

41. The written submissions speak, perhaps a little cryptically, of *"the conflicting position between representing her client's wishes and representing her client's interests"* and one can be sympathetic to the lawyer's position; however, the picture is of an Applicant who was determined to conclude the hearing that day.

42. By contrast, the panel was only too anxious to accommodate the legal representative's difficulties, if asked to. It is perhaps necessary to reproduce the whole of the relevant portion of the decision letter.

    "In the representations, various procedural issues were raised as to the way that hearing was conducted. The Panel invited further submissions from you and offered you the opportunity to apply for the same Panel to reconvene to take further evidence, or for a new Panel to rehear the case, if you had any concerns as to whether there had been any unfairness during the hearing. After you have spoken to your lawyers, you confirmed that there was no such application.

Notwithstanding that, the Panel was concerned to ensure that your hearing was a fair one, and gave consideration to whether fairness required the case to be re-panelled against your submissions. The hearing was a long one, but this was a consequence of the nature of the evidence that was called.

At various times during the hearing and at the end of the hearing day the Panel offered you the opportunity to adjourn the hearing part heard to allow you to consider the video footage that had been served and to ensure that you have sufficient time to give instruction to your lawyers and that there was no pressure of time and the questioning of any of the witnesses. When this was suggested you made submissions that this should not happen, and the case should be concluded on the day".

43. The abiding impression is the Applicant was determined the case should conclude; his legal representative would have preferred an adjournment; the panel was very willing to grant an adjournment if one was sought; none was sought; notwithstanding that, the panel considered whether or not it should adjourn, but decided there was sufficient time in which to hear the case fairly. After the decision had been issued, and when it was far too late, the Applicant changed his mind about an adjournment.

44. In the circumstances, this ground must fail.

45. The next ground is the Community Offender Manager gave evidence that ought to have been the subject of a non-disclosure application. It is not very clear what this evidence was: apparently, there had been a suggestion the Applicant had caused fear of violence to another prison.

46. It is conceded that the panel said it would not give any weight to the evidence and, as far as I can make out, there is no reference to this evidence in the decision letter. That should be the end of the matter.

47. However, it is submitted the panel may have taken it into account because the decision letter refers to the Applicant's propensity to violence. What the panel said was:

"You have a lengthy history of offending, including many instances of violent offending. You have previously shown a willingness to use violence to achieve your aims. In those circumstances, the Panel considered that any further offending may well be violent offending on your part".

48. The basis for that finding is the Applicant's previous convictions for violence and the fact he was serving an indeterminate sentence as a dangerous offender because he had played an important part in a conspiracy which had involved violence or at least, extensive threats of violence.

49. The external probation officer made the following observations, close to the time of the offences, in his post sentence report, dated the 5 July 2007:

"The victims were both male and female and in some cases, there were children present in the home. The offenders wore balaclavas, gloves and dark clothing,

breaking into the properties after midnight when the victims had gone to bed. They were bound, gagged, some were assaulted and they were threatened with violence to ensure compliance. [p.82]

"He has two previous violent convictions for Common Assault in 1993 and Assault on Police in 1995 which does indicate his propensity to behave violently, although over 10 years has elapsed since these offences were committed. [p.83]

"In assessing the risk of harm, I have used the [probation service assessment report]. In taking account of the nature and circumstances of the current offences, [the Applicant's] record of previous convictions which includes matters of domestic burglary, it is my assessment that [the Applicant] presents a high risk of harm. I understand that there is no evidence to suggest that the [Applicant] was involved in the use of violence himself. However, he was prepared to be involved in offences in which violence was used and threatened". [Page 84]

50. It follows that there was an evidential basis upon which the panel could make the finding.

51. The fourth ground was the failure to call the author of a psychological report.

52. First, there were several psychological reports in the dossier. I assume the legal representative may be referring to that dated the 9 May 2017, which contains a diagnosis of Dissocial Personality Disorder, described to have *"been there for a long time and can seem hard to change".*

53. Second, a report becomes evidence in the case, simply by its inclusion in the dossier.

54. Third, the MCA member of the Panel Chair will ask for the author of the document to give oral evidence if they think there is a need. If they do not direct oral evidence, it is open to the Applicant to request the witness gives oral evidence. As I understand the position, no such request was made.

55. Fourth, the diagnosis seems to be uncontroversial. It is set out in the decision letter as part of the Applicant's background, but it is plain it was not pivotal in the case. The case turned on what the panel had made of the CCTV evidence.

56. This ground must also fail.

57. Turning to the ground of irrationality, it is alleged that the panel said it had no confidence that the Applicant would comply with conditions on temporary release. That is not quite accurate. The panel said it "*did not have any confidence that you would comply with conditions on temporary releases, unless it suited you to do so at that particular time*".

58. There are two ways of looking at the problem of compliance. The first tends to support the Applicant's claim he would comply, namely, he had previously completed a number of temporary releases apparently without problem. The other approach is to consider the panel's finding that the August 2020 incident had

revealed the Applicant was still risky, that he had no commitment to leading a law-abiding life and would resort to crime if he felt that was advantageous. In those circumstances, the Applicant can scarcely complain if the panel regarded him as untrustworthy.

59. The second complaint is the panel was not entitled to say as it did *"you have a lengthy history of offending including many instances of violent offending. You have previously shown a willingness to use violence to achieve your aims. In those circumstances, the Panel considered that any further offending may well be violent offending on your part".*

60. This decision has already dealt with the evidential basis for finding that the Applicant had a potential for violent offending.

61. It is clear the panel was at pains to ensure the Applicant had a fair hearing; in my judgement, it succeeded. None of the above matters, whether taken individually or cumulatively, reaches the high test required to establish irrationality and, the hearing was, as a matter of fact, free of irregularity.

Decision

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

James Orrell
16 March 2021