[2019] PBRA 50

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Application for Reconsideration by Hunter

Application

1. This is an application by Hunter (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 25 September 2019 not to direct his release or recommend a transfer 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 or (b) that it is procedurally unfair.

Background

3. On the 20 November 2009, the Applicant was sentenced to Imprisonment for Public Protection (IPP) for the offence of causing death by dangerous driving with a minimum period to serve of 2 years 255 days before he was eligible to apply for parole. This minimum period expired on the 2 August 2012. On the second indictment in respect of offences of dangerous driving and wounding, the Applicant was given no separate penalty.

4. On the 6 June 2017, the Applicant was released on licence. On the 29 March 2018, he was recalled to custody following further offences of taking a vehicle without consent, dangerous driving and driving whilst disqualified for which on the 2 May 2018 he was sentenced to eighteen months imprisonment.

Request for Reconsideration

5. The application for reconsideration is dated 19 October 2019.

6. The application does not set out the grounds for the application and these have to be distilled from the written representations. The grounds for seeking reconsideration based on irrationality are substantially as follows:

   (i) <u>Protective Factors</u>: The panel was wrong to find there were no significant factors that were not present at the 2017 review. By 2019, a mentor and a counsellor were available and the Applicant had become a father for the first time.
   (ii) <u>Security</u>: the panel was unable to rely on the security information in the absence of evidence from the security department but it still maintained in the decision letter "Your custodial behaviour shows you to be someone who consistently breaks the rules"
   (iii) <u>Cannabis Use</u>: The panel failed to identify that the Applicant had engaged with a number of drugs agencies and it was not entitled to say that his abstinence for

weeks was to influence the panel. The panel should have taken into account the fact that the Offender Manager and the Offender Supervisor did not identify cannabis as relevant to his risk of serious harm.
(iv) Offender Behaviour Courses: The panel failed to refer to the TSP course completed by the Applicant since recall. The panel did not identify what further work could be completed in custody which put the onus on the Applicant to change his day to day behaviour.
(v) Victim Empathy: The panel was wrong to minimise the Applicant's victim empathy.
(vi) Risk: The panel was in error to find that the risk of reoffending in relation to motor vehicles was very high, unpredictable and thus imminent. The Applicant was on licence for 10 months prior to the offences of the 29 March 2018.

7. The ground for seeking reconsideration based on procedural unfairness is:

   (vii) The fact that the panel asked the Applicant's solicitor if the Applicant wanted a further psychiatric report indicated that the panel had already decided the outcome of the hearing in breach of the Applicant's Article 6 rights.

Current parole review

8. The Secretary of State referred the Applicant's case to the Board on the 16 September 2019.

9. The hearing took place on the 17 September 2019 and the panel heard evidence from the Applicant (who was legally represented), the Offender Supervisor and the Offender Manager.

The Relevant Law

10. In order to be "irrational" within the meaning of Rule 28 (1) (a), the decision in question must be so outrageous as to defy logic, accepted moral standards or one at which no sensible person could have arrived. Moreover, in considering the assessment of the decision, due deference is to be given to the expertise of the Parole Board in making decisions relating to parole. It will also be borne in mind that in the case of oral hearings it is the panel members who saw heard and assessed the evidence of witnesses before them: see **R (on the application of DSD and others) v the Parole Board [2018] EWHC 694 (Admin), CCSU v Minister for the Civil Service [1985] AC 374.**

Discussion

11. I shall deal with the grounds in the order they appear in paragraph 7.

12. The panel acknowledged the evidence of the Offender Supervisor that the Applicant would have access to additional protective factors through Intensive Intervention and Risk Management Services. However, in the wider context of the Applicant's offending, the panel did not consider these to be significant in the sense of being effective components of the risk management plan.

13. The panel also took the view that, as the very serious offence of driving dangerously took place when the Applicant was both in work and when the birth of his child was imminent (April), neither could be considered to be an effective protective factor. I can understand that the Applicant may feel this was a hard position to take but on the whole of the information before it, it was open to the panel to take that position.

14. The panel judged the security information to be of extremely poor quality and very fairly decided to ignore it unless it was corroborated or admitted. Having adopted this position, on page 6 of the decision letter, the panel set out the matters which it could and did take in to account and additionally they considered the two adjudications referred to on page 4. This was the basis for the view that the Applicant remained a person who consistently broke the rules.

15. In the decision letter, the panel acknowledged that neither the Offender Supervisor nor the Offender Manager connected cannabis misuse with the risk of serious harm. However, the Offender Supervisor regarded it as relevant to the risk of reoffending. The panel, perfectly reasonably, regarded the Applicant's cannabis habit as a central issue. The panel noted the Applicant referred himself to the Substance Misuse Services; it also noted the Applicant was using cannabis on a regular basis in prison. The panel also thought the Applicant's refusal to take part in the recommended programme was a further example of his poor thinking skills.

16. Having read the dossier and listened to the evidence, the panel was entitled to come to its view about the Applicant's abstinence from cannabis for 2 ½ weeks.

17. The decision letter did not specifically refer to a training course addressing decision making and better ways of thinking, but the report was in the dossier which the panel had considered. On page 4 the letter did refer to several of the positives in the case. At page 10, the panel said "There is no further risk reduction work in terms of offending behaviour courses to be completed. The risk areas outstanding can only be addressed by you taking personal responsibility for your behaviour and actively putting the skills that you have previously learnt into practice by changing your behaviour, attitude and day-to-day decision-making."

18. The written representations, although not completely clear on this point, seem to suggest this approach is in some way unfair to the Applicant. What the panel said was the realistic truth of the matter. The work has been done and it is now up to the Applicant to show he can apply what he has been taught. The fact that there is no further core risk reduction work to be completed within the prison estate is not the test the panel has to apply when considering referrals from the Secretary of State.

19. The panel was not impressed with the Applicant's empathy with his victims. The decision letter does not mention the fact he visited one of his victims whilst on licence. What is clear is that the panel took the view the Applicant did not have the safety of potential victims in mind when he chose to drive when pursued by the police at speeds of up to 90 miles an hour.

20. The panel set out its assessment of risk in section 6 of the decision letter; the assessment is evidence-based and in my view unassailable. It is perfectly plain that thereafter the panel was adversely impressed by the fact that after only 10 months

on licence the Applicant was driving a motor car, taken without consent, bearing false number plates and being driven in a way described by the pursuing police officer as "by far the worst act of dangerous driving" he had ever seen. The Offender Manager had spoken with the Applicant by telephone earlier in the day when he committed the recall offence; she said his offending had taken her by surprise. She also said the risk of violence or dangerous driving was not imminent but "the risk of imminence had the capacity to escalate very quickly." The suggestion the panel could not have come to the view it did about risk lacks realism.

21. The point is made that the Applicant's risk factor cannot be tested whilst in custody. I am not sure whether this submission has been thought through because its corollary is that risk factors that cannot be tested whilst in custody must be tested in open conditions. Many risks cannot be tested in open conditions without putting either individuals or the public in general at grave risk of serious harm. The Appellant's risk falls into this category.

22. The written representations, in respect of irrationality, put forward an alternative, arguable finding as a substitute for the finding in fact made by the panel. The correct approach of the reconsideration process is not to ask whether the panel might have come to a different decision; the correct approach is confined to asking whether the Applicant has established that the panel's finding was irrational within Lord Diplock's definition. In this instance, the Applicant has failed to do that.

23. Dealing with the suggestion of procedural unfairness, at the beginning of the hearing, the panel asked the legal representative if there was to be an application to adjourn for the completion of a psychological risk assessment. The panel gave as its reason the fact that the current psychological risk assessment was elderly.

24. Frequently judges and tribunals check whether a party wants a particular piece of evidence. The intention is to be helpful and to avoid applications for an adjournment after a case has commenced. The written representations use the expression "we would question": this is unduly tentative. The Applicant must demonstrate that there is evidence from which the inference has to be drawn there had been a breach of his Article 6 rights. The Applicant has failed even to start to do this.

Decision

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.

James Orrell
5 November 2019