[2021] PBRA 70

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Application for Reconsideration by PEARSON

Application

1. This is an application by PEARSON (the Applicant) for reconsideration of a decision made after an oral hearing and dated 27 April 2021 refusing to order the Applicant's release.

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 decision of 27 April 2021, the application for reconsideration, the written notification from the Secretary of State indicating that he did not seek to make any representations and the dossier consisting of 388 pages.

Background

4. On 17 April 2008, when the Applicant was 38 years old, he was sentenced to an indeterminate sentence for public protection following his conviction for possession of an imitation firearm with intent to cause fear or violence. No separate sentence was imposed for the offences of possession of a bladed article and cocaine. A minimum term of 2 years and 259 days was set which expired on 2 January 2011.

5. The Secretary of State had referred the Applicant's case to the Parole Board to consider whether it was appropriate to direct the Applicant's release. In deciding whether to direct the Applicant's release, the panel had to be satisfied that it was no longer necessary for the protection of the public that he remain confined. In the event that the panel did not direct the Applicant's release, it was invited to consider whether to make a recommendation that the Applicant be moved to open conditions.

6. The Applicant was released on licence on 4 November 2019 and recalled on 16 June 2020 and the Panel had a duty to consider the appropriateness of the recall decision.

7. The Applicant was required under the terms of his licence to live at an approved address and not to stay away from the address without the permission of his supervising probation officer. He also had a licence condition to advise his probation officer of any developing relationships with women.

8. The Applicant admits that when he left the approved address to stay for a weekend with his female friend (A), he acted in breach of his licence conditions first, by failing to disclose to his Offender Manager his developing relationship with A and second by failing to obtain his Offender Manager's permission to stay away from his designated accommodation.

9. This decision has not been challenged by the Applicant on this application for reconsideration. The panel was satisfied that the recall of the Applicant was justified.

10. The panel proceeded to consider whether the Applicant had been aggressive to A when he stayed with her. The evidence was that the police were called to an emergency incident by a friend of A and on arrival the police were told by a neighbour that a man had left the address on foot with a knife in the waistband of his trousers.

11. When the police met A, she was very upset and very intoxicated as well as appearing frightened. She explained to the police that she was a recovering alcoholic who had drunk a lot of cider on that evening. She reported to the police that the Applicant had punched her in the face on the previous Friday evening (which I will call "the Friday episode") while on that Monday evening he had head butted her (which I will call "the Monday episode") and threatened her with a knife just before she had called a friend to get help.

12. The police noted a red bruised area on the left cheek of A but could not see a visible injury on her forehead. The Applicant was found walking along the street drinking from a can of alcohol and appearing intoxicated. When he was searched, no knife was found. He was arrested on suspicion of committing two domestic assaults on A, (namely the Friday episode and the Monday episode) with one having taking place on the previous Friday and the other on that Monday. He was also arrested on suspicion of being in possession of a bladed knife in a public place before being cautioned and taken to the police station. In the police car, he stated *"I didn't even properly head-butt her-it was just a tap with our heads".*

13. A refused to make a statement to the police to support a prosecution as she was scared of the Applicant returning and she did not want to be a "grass". In the absence of a statement from A, the Crown Prosecution Service (CPS) decided that there was no realistic prospect of obtaining a conviction.

14. In his evidence to the panel, the Applicant stated again that there had been an accidental touching of heads when he was trying to calm A down, but that he had not head butted or attacked her. He explained that he did not have a knife and that there had been an argument when A wanted him to go and get her more alcohol, but he felt that she had drunk enough. The panel had to decide on whether to accept his evidence that he had not acted violently to A.

15. The panel concluded that it *"has reached the firm conclusion on the balance of probabilities that [the Applicant] did behave violently toward [A] when intoxicated".* In other words, the panel as the designated fact finder did not accept the Applicant's evidence which was the basis of the conclusion that the Applicant could not be safely released.

Request for Reconsideration

16. The application for reconsideration is dated 4 May 2021.

17. The grounds for seeking a reconsideration are that the panel acted irrationally in concluding that the Applicant did behave violently towards A because:

    (a) there was insufficient evidence to enable the panel to conclude that the Applicant did behave violently towards A bearing in mind that (i) the only witness to this alleged aggressive conduct was A; (ii) there was no witness statement from her; (iii) she did not give evidence to the panel; (iv) her evidence to the police officer was untested hearsay and (v) was inferior in quality to the consistent denial of violent behaviour by the Applicant (Ground 1); and because:

    (b) the panel failed to take into account matters showing that the Applicant did not behave violently towards A such as that the CPS decided not to prosecute the Applicant, that A was intoxicated and that the Applicant's evidence was consistent and should have been preferred to the statements of A (Ground 2).

The Relevant Law

18. The panel correctly sets out in its decision letter dated 27 April 2021 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

19. 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)).

Irrationality

20. 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."

21. 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.

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

23. 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.

The reply on behalf of the Secretary of State

24. The Secretary of State did not seek to make any representations when given the opportunity to do so.

Discussion

25. As a starting point, there are two important principles relevant to the present application which must be applied. First, it must be remembered that the present application is not an appeal but a reconsideration application and that the Reconsideration Mechanism is not a process whereby the judgment of a panel when assessing risk can be lightly interfered with at the reconsideration stage. Nor is it a mechanism where it should be expected to substitute its view of the facts for 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.

26. Second, where a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact that the panel saw and heard the witnesses, it would be inappropriate to direct the decision be reconsidered unless it is *manifestly obvious that there are compelling reasons* for interfering with the decision of the panel.

Ground 1

27. This ground seeks to undermine the value of the statements of A on the basis of the undisputed facts that she did not make a statement and did not give evidence, indeed her evidence in the form of her statements to the police officer that the Applicant punched her in the face in the Friday episode and head-butted her in the Monday episode was hearsay.

28. This raises the issue of how hearsay evidence should be treated in Parole Board proceedings. There are statutory provisions which explain that the rules on the admission of hearsay in the courts do not apply to Parole Board hearings. Thus, Rule 24(6) of the Parole Board Rules 2019 states that:

"(6) An oral panel may produce or receive in evidence any document or information whether or not it would be admissible in a court of law."

29. Indeed, there is clear authority that in proceedings before the Board that *"hearsay evidence can be taken into account even when it relates to matters which are disputed"* **R (Brooks) v Parole Board [2004] EWCA Civ 80** citing with approval **R (Sim) v Parole Board [2003] EWCA 1845**. The crucial test is one of fairness and a fact sensitive decision has to be made bearing in mind that the maker of the hearsay evidence cannot be questioned.

30. Keene LJ said in a passage in **Sim** recently approved by the Divisional Court in **R (Morris) v Parole Board [2020] EWHC 711** that:

"Merely because some factual matter is in dispute does not render hearsay about it in principle inadmissible or prevent the Parole Board taking such evidence into account. It should normally be sufficient for the Board to bear in mind that evidence is hearsay and to reflect that factor in the weight which is attached to it. However, like the judge below, I can envisage the possibility of circumstances where the evidence in question is so fundamental to the decision that fairness requires that the offender be given the opportunity to test it by cross-examination, before it is taken into account at all. As so often, what is or not fair will depend on the circumstances of the individual case."

31. In this case, the panel obviously appreciated that A had not given evidence or been cross-examined and so it was hearsay. The panel still reached *'the firm conclusion on the balance of probabilities that [the Applicant] did behave violently to [A] when intoxicated".* This was a conclusion open to the panel in the light of her account that the Applicant had punched her in the face in the Friday episode and very importantly that a *"red bruised area was observed by the police on her left cheek"* on the Monday. The panel was entitled to regard it as fair to accept the evidence of A that she was punched by the Applicant.

32. The panel explained that it *"had carefully considered [the Applicant's evidence]"* including his denials of attacking A but had rejected it as is apparent from its conclusion that he had *"behaved violently towards"* her. The panel, as the designated fact finder was entitled to reach that conclusion particularly bearing in mind the noticeable bruising on the face of A.

33. Thus, the Applicant's case in relating to the attack on A in the Friday episode falls a long way short of reaching the threshold for ordering reconsideration that 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".*

34. As for the allegation of head butting in the Monday episode, the panel as the designated fact finder was entitled to conclude that the Applicant head butted A bearing in mind that he admitted that *"it was just a tap with our heads"* and that he said at the hearing that such contact was accidental. Again, the panel was entitled to take the view that the contact between the Applicant's head and that of A was more than a tap and that he did behave violently towards A. The stark fact is that the Applicant was not believed.

35. So, Ground 1 has to be rejected in respect of both the Friday and the Monday episodes.

Ground 2

36. The Applicant seeks to challenge the finding that the Applicant was violent to A in both the Friday and the Monday episodes on the basis that the CPS had decided not to prosecute the Applicant, that A was intoxicated, that the Applicant's evidence was consistent and should have been preferred to the statements of A.

37. It is correct that the CPS decided not to prosecute the Applicant but the issue is whether this shows that he did not behave violently towards A in Parole Board proceedings. In deciding whether to prosecute the Applicant, the CPS was considering whether the case against the Applicant reached the high threshold required in criminal cases of being sure of the guilt of the Applicant. That high criminal threshold is a much higher standard of proof than the civil standard of proof required in civil cases (which include Parole Board hearings) of being satisfied on the balance of probabilities. In other words, there are many cases in which the fact finder was entitled to find a fact on the balance of probabilities but not entitled to reach that conclusion when applying the higher criminal standard. So the Applicant cannot derive any assistance from the decision of the CPS not to prosecute him.

38. The Applicant's other grounds for contending that the Board erred in holding that he *"did behave violently towards"* A faces the very substantial obstacle because this panel arrived at its conclusion having exercised its judgment based on the evidence before it and having regard to the fact that the panel saw and heard the Applicant.

39. In those circumstances, it would be inappropriate to direct the decision be reconsidered unless it is *"manifestly obvious that there were compelling reasons for interfering with the decision of the panel".* This is a very high threshold.

40. In this case, the Applicant can show that he disagrees with the decision of the panel but his reasons for disagreeing fall well short of establishing that it is manifestly obvious that there were compelling reasons for interfering with the decision of the panel.

Decision

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

Sir Stephen Silber
1 June 2021