[2022] PBRA 89

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Application for Reconsideration by Hussain

Application

1. This is an application by Hussain (the Applicant) for reconsideration of a decision of a panel of the Parole Board following an oral hearing on, initially, 15 December 2021 and then 27 May 2022. The panel decided not to direct the release of the Applicant or to recommend that he be transferred 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 include a scan of several handwritten pages from the Applicant (the Application), the dossier and the decision letter. I further asked for the recording of the hearing and listened to relevant sections of the hearing.

Background

4. The Applicant is serving a sentence of imprisonment for public protection (IPP). He was convicted in 2006 with a minimum term or tariff of one year, 11 months and 6 days. This tariff expired in November 2008. He was 28 at the time of sentence. Following a Parole Board hearing, he was released on licence in February 2018 but recalled in May 2018.

5. The Applicant's index offence is Kidnapping. The Applicant, along with co-defendants, took their victim to be interrogated about a matter, he was assaulted and later found dead. The Applicant was not judged to have been part of the violence that led to the victim's death.

6. Since the index offence, the Applicant has been convicted of further offences. I regret to say that the dossier has inconsistent information about the exact convictions, the following terms have been used: 2 or 3 counts of Battery; 1 or 2 counts of Battery and one of s.29 Assault, and 2 counts of Assault Occasioning Actual Bodily Harm. The decision letter says that on 20 June (presumably 2019) the Applicant was convicted of 2 counts of assault occasioning actual bodily harm for which he received a further 6-month sentence (which he has now served). I considered whether I needed to investigate this further, but decided it was neither necessary nor appropriate for this decision. What is clear are that the circumstances of the offences involved domestic violence where there were two victims, the Applicant's now ex-partner as well as one

of his minor sons. The Applicant has a previous conviction for domestic violence and the decision letter refers to a number of un-convicted domestic violence issues, one of them admitted by the Applicant.

Request for Reconsideration

7. The application for reconsideration is dated 16 June 2022.

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

(a) Irrationality

- The Applicant states the decision is irrational as his points were misconstrued by the Panel.
- Applicant also states he did not mention he would seek contact with his children through the courts.
- Applicant states it is irrational his drugs and alcohol misuse has been used when making a decision as he has not been reprimanded or convicted for it.

(b) Procedurally unfair

- Applicant states the comments regarding him having controlling behaviour are completely unsubstantiated.
- Applicant states the report does not mention him completing a victim awareness course.
- The COM did not provide the Applicant with a copy of her report before the hearing.

Current parole review

9. This is the Applicant's second review following his recall. The first review was considered by an oral hearing panel in November 2019. That panel declined to either release the Applicant or to recommend transfer to open conditions.

10. The current review, following The Secretary of State's referral dated March 2021, asked the Parole Board to consider release, failing that to advise the Secretary of State whether the Applicant should be transferred to open conditions and to advise on any continuing areas of risk. The case was first considered by a single member in August 2021 who directed an oral hearing. The hearing was first listed on 15 December 2021, but was adjourned on the day. The reason for the adjournment was so that the Applicant could get legal advice on recent developments in his case. The Applicant had been legally represented prior to the hearing and had discussed the dossier with the Applicant but the legal representative had not attended the hearing. It should be stated here that the adjournment notice in the dossier makes it clear that the Applicant asked to continue the hearing without the legal representative however the panel decided, in fairness to the Applicant, that he should have his legal representative at his hearing. Legal representations or personal representations as to how the review should continue were directed in the adjournment notice.

11. In a further adjournment on 28 January 2022 the panel chair noted that the Applicant no longer appeared to have legal representation despite attempts made by professionals to ask him to provide details of his representatives, and the panel chair stated that unless the Applicant made any submissions on that point, the hearing would now proceed whether or not a legal representative was at the hearing. No further submissions were made.

12. The oral hearing took place through a video link on 27 May 2022. The Applicant was 44 years old at the time of this hearing. He continued to be unrepresented, and the panel chair checked that he wished to continue without a legal representative. The panel of three independent members considered a dossier of 379 pages. It is understood that two documents had not been placed in the dossier before the hearing including a set of panel chair directions and a security report.

13. The panel took evidence from a senior probation officer based in the prison in the role of the Applicant's Prison Offender Manager (POM) and the Applicant's Community Offender Manager. As well as other information in the dossier the panel also had regard to the report of the forensic psychologist who had undertaken a psychological risk assessment dated October 2019; reports of completed and incomplete offence focused work undertaken by the Applicant and information about his custodial behaviour and engagement. Previous decisions of the Parole Board were also in the dossier.

The Relevant Law

14. The panel correctly sets out in its decision letter dated 6 June 2022 the test for release. The panel also correctly states what was at that time still the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions. These issues, or the 'test' for open conditions have since changed.

Parole Board Rules 2019

15. 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)).

16. 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

17. 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."

18. 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.

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

Procedural unfairness

20. 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.

21. 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.

Other

22. 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.

23. 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.*"

24. 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 them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

The Reply on behalf of the Secretary of State

25. On 8 July 2022 the Secretary of State responded to the Application. They made one submission with respect to the Applicant's complaint that he did not see the updated COM report until the day of the hearing. The SoS submissions state that the updated dossier, with the COM report, was sent via internal post to the Applicant on 24 May 2022. The same submission then state that the dossier was updated in March 2022 following that update, this clearly makes no sense. I have not put any weight on these submissions as even if the dossier was sent via internal post when the submissions indicate whether it was actually received by the Applicant shortly after or whether it took some time to get to him is unknown. Other than this comment the SoS made no further submissions on the Application.

Discussion

26. I will take each ground in turn.

27. Irrationality: I will address all the points under this ground in turn, there are some connections with all three points.

28. The Applicant is much exercised about what he considers to be the approach of the panel to his evidence. Indeed, he comments in his application that 'all the points' that he put forward were misconstrued. However, in my opinion none of the examples he gave go to the decision that the panel came to. This is the case even if I were to give him the benefit of the doubt on the examples he did give. I also listened carefully to parts of the hearing where he was giving evidence and noted that he was encouraged to provide his own account on the issues in hand and that the Applicant was articulate and able to explain himself very clearly.

For example, the Applicant complains that when he was asked by the panel if a child was his (this is one of the children of the Applicant's victim of domestic violence), he says in his application that he told the panel that *'he was not going to question his ex-partner's integrity'*. He points out that the decision letter states that the Applicant said that he is not sure that the child is his. I cannot find anywhere in the decision letter any findings or weight given to this issue or indeed any comment at all about this evidence, other than what has already been related, and certainly on listening to the recording the Applicant did raise the possibility that the child was not his. The Applicant has at least two children with his ex-partner, and perhaps this third. Any issues of concern raised in the letter about the children were in respect of safeguarding them as one of them has been a victim of violence of the Applicant, and also because the children may witness domestic violence because of the Applicant's history of the same. These concerns were relevant to the risk management plan and whether it was sufficient to manage the Applicant's risk, should he be released. Whether the child was his or not was moot. There is no merit in this part of the Application.

29. A second example provided by the Applicant is that he denies that he told the panel that he wished to seek contact with his children through the courts as stated in the decision letter, and that any concerns that the panel had were based on his past and not his current intentions. On reading the decision letter, I see no adverse point being made against him on seeking contact through the courts. Indeed, it is likely that if any weight was given to this, it would have been in his favour that he wished to go through the correct channels to have contact with his children. I note that the decision letter records that the Applicant had told professionals some time before the hearing that 'he had given up on his children' – indicating that he did not wish to have contact with them, something he asserts that he stated at the hearing in his Application. I also listened to his evidence at the hearing when he spoke at length about having sought contact through a court process, although he explained this was interrupted by his partner communicating with him and offering contact with the children. I therefore consider his evidence to be fairly represented. The concern expressed by the panel was not that he would seek contact in a legitimate fashion, but that he would do so in breach of any licence conditions prohibiting contact without the approval of a supervising officer. The decision letter explains very clearly why they have these concerns, citing previous domestic violence concerns; one former conviction for intimate partner violence; his admission of another previous un-convicted assault on his former partner and the more recent convictions for domestic violence where the victims were his former partner as well as one child when he was on licence on this sentence. The panel also takes into account previous failures of trust put in the Applicant in his offending history. Furthermore, the panel expresses concern over the Applicant's insight into his risk of intimate partner and familial violence having taken evidence from him and from the professional witnesses. I can see no merit in the Applicant's argument on this point.

30. The Applicant's third example is about misuse of drugs and alcohol being stated in the decision letter as risk factors. The Applicant states that misuse of drugs and alcohol as a risk factor was 'concocted' by report writers years ago and that there is neither any evidence nor convictions with respect to drugs and alcohol. I see that the decision letter refers once to drugs and alcohol; they refer to it as one of the Applicant's risk factors. Having perused the dossier I accept that there is little or no evidence of the Applicant misusing drugs or alcohol. There are concerns about him dealing drugs in prison, however these are pieces of intelligence and there is no evidence the panel explored this intelligence or made any findings in relation to them.

31. On occasion, a mistake, such as a panel stating that there is a risk factor when there is insufficient evidence of the same, can lead to irrationality where a panel puts weight on that mistaken assumption or finding. That is not the case here. Nowhere else in the decision letter are concerns raised about substance abuse. Concerns focused around the Applicant's likely risk of serious harm to his ex-partner and children and to certain other members of the public following his pattern of violent behaviour. It is not mentioned in the risk management plan as noted in the decision letter and plays no part in the panel's decision. The mistake is of course regrettable but, in my judgement, does not make the decision unsafe or irrational. In making my judgement I have considered the principles as provided in the relevant caselaw and summarised at paragraph 22 above. It would be useful in future if the professionals go through the dossier and correct any statements made in error, and a note placed in the dossier as to whether misuse of drugs and alcohol is a risk factor, and why.

32. The Applicant also complains about what is said about him by his COM (and presumably the panel, it is not always clear from his application) about the circumstances of the allegations of domestic violence while he was in the community. On reading this rather rambling part of the Application, I have come to the conclusion that the Applicant has failed to grasp the central issue that exercised the panel and led to their decision, as explained in the decision letter. This was not whether or not he had a licence condition prohibiting him from seeing his ex-partner and the children when he was on licence (he did not have such a condition) but the fact that he assaulted her and one of his children while on licence and was convicted to a 6-month term for these assaults. The panel noted that he maintained innocence of the assault on his child. The panel's concerns in respect to this area of possible risk is explained in the decision letter. The letter points out that the assaults took place after the Applicant had undertaken offence focused work which was supposed to assist him to gain insight into his risk factors in personal relationships. This was the Building Better Relationships Programme which he undertook while in the community on licence, prior to recall.

33. With respect to the point about not having a licence condition that prohibited him from seeing his former partner or the children, my reading of his complaint indicates he is implying that the panel should make no negative assessment about him with respect

to his attempts to see his children. This matter was discussed at the hearing, the decision letter records that the COM confirmed that no licence conditions were imposed on the Applicant regarding contact at that time. The COM also stated that, however, '*he did not have permission from Children's Services to have contact with his children whilst they were in the process of carrying out an assessment'.* The panel's concerns that he might not abide by future licence conditions are in my view reasonable given not just this point, but other circumstances of the Applicant's case.

34. There is nothing in this part of the Application that leads me to have concerns that the panel misunderstood or misconstrued the Applicant's position or those parts of the evidence that were relevant to the panel's decision.

35. Other complaints in the Application are in similar vein, and there was only one (the reference to drugs and alcohol as a risk factor) that I consider that the panel may have accepted material in the dossier that may not be accurate, although no weight was placed on this risk factor in the decision of the panel.

36. Unfairness:

37. The Applicant complains about comments made by one of the professional witnesses about controlling behaviour. The decision letter shows that this statement was made by the POM while they were giving evidence to the panel. The decision does not indicate that any particular weight was given to the comment. A professional is entitled to have an opinion as long as there is some evidence for it. A panel is entitled to take evidence from professionals and consider it alongside all other evidence, including that of the prisoner. A panel inevitably has to make a judgement about whose evidence they may prefer with respect to any contested issues. The decision letter evidences that the panel took full evidence from the professionals and the Applicant. I see no unfairness in this part of the Application.

38. On the issue of whether the Applicant completed a victim awareness course, I accept there is nothing in the letter that mentions this, and it may well be that professionals should correct any omission if the Applicant has completed this work. The omission would have been relevant to the matter of unfairness if the panel had relied on lack of completion of victim awareness programmes in its decision. There is no evidence in the decision letter that not completing a victim awareness course was in any way central to the panel's decision. Below I give a full explanation of my opinion on the lawfulness of the decision in a more generalised comment which will address the issue of core offence focused work.

39. If it is the case that the Applicant had not seen the COM report prior to the hearing, this is troubling, and this kind of omission can on occasion cause sufficient unfairness to make any decision unsafe. A prisoner should have before him or her any issues that they might need to respond to for a parole hearing, and they should have that material in a reasonable timeframe. I have considered this carefully. The Applicant indicates

that there could have been matters in the report that the panel could have misconstrued. I have perused this report carefully, it is very brief. The COM had taken over their role not long before the hearing and had only been able to speak to the Applicant on the telephone. Their recommendations relied heavily on former evidence and the opinion of the earlier COM (which the Applicant would have seen in good time), except for one new consideration. This was a comment about a discussion the COM had with the Applicant on the telephone about the allegations leading to recall (and later further convictions). In their report the COM indicates that in their view the Applicant minimised their involvement in the allegations. The risk scores had not changed from the previous report (which the Applicant would have had). The risk management plan was thoroughly explored at the hearing, where the Applicant would have had an opportunity to comment on any aspect of the plan or the recommended licence conditions. The COM's overall recommendation was not to release or for a transfer to open conditions because in their assessment core risk reduction work remained to be undertaken. They commented on the fact that the Applicant had yet to complete the programme Kaizen, which is a training course addressing the use of violence and was recommended core work for him. I am aware that this programme is only available in the closed prison estate. This work had been outstanding for over a year, so this information was not new to the Applicant.

40. I have considered very carefully whether there is any part of this brief report that could have led to a misunderstanding by the panel or whether the fact that the Applicant saw it shortly before or at the hearing is unfair. I also have to consider whether, had the Applicant challenged any part of this brief report, it would have altered the assessment of the panel. In this particular case, I do not believe that this is the case. The Applicant had time during the hearing to consider and comment on all aspects of the evidence that the panel considered, and I note that he agreed to abide by all licence conditions. The issues that the Applicant could have challenged included the COM's analysis of minimisation, and their recommendation. These issues were indeed explored at the hearing. The Applicant's own account of what happened during the circumstances that led to recall, his position about the convictions and his evidence about his future intentions with respect to his former partner and children were all fully explored at the hearing and, as I indicated earlier, he stated that should he be released he would abide by his licence conditions. I do not consider that the Applicant was put at a disadvantage sufficient to make the decision unsafe.

41. I will make a more general point here, which goes to the Applicant's overall approach to the Application for reconsideration. The decision of the panel is clear. It considered that the Applicant had yet to complete core offence focused work before progression. It noted he had completed some lower intensity work in the community, but this had not prevented him from re-offending in precisely the manner that the work should have been able to prevent. Following recall, the Applicant had commenced-but then had been de-selected from-the higher intensity programme Kaizen. The Applicant complains about the reasons given by the programme facilitators for the de-selection,

disagreeing that there was anything untoward in his behaviour that led to the decision. This is not the panel's business. The reason as to why the Applicant had not completed the programme is not material to their decision and could not be. Whether a prisoner has access to or can complete a programme is not in any way part of the panel's test for release.

42. The panel, in considering their test and assessment of risk, made the decision as clearly indicated in the decision letter, that the Applicant needed to complete relevant offence focused work before a future release or recommendation to open conditions. I note that this was the same decision that the 2019 panel came to, and nothing had substantially changed since that oral hearing. The panel stated in its conclusion that having taken evidence from the Applicant about the circumstances of the intimate partner violence in the past and more recently when he was convicted of domestic violence related assaults, it was concerned that the Applicant significantly minimised his offending. In making this decision they had regard to facts, not open to being misunderstood or misconstrued, which included previous and current convictions as well as accounts given by the Applicant. The decision letter is clear that the panel did not consider that the Applicant had sufficient internal strategies or insight to abide by the risk management plan and needed to engage with work to address risk factors prior to future release. The panel is entitled, taking into account all the evidence before it, to make decisions about current and future risk, and to ensure that they consider the test for release. This test includes a consideration of protection of the public. The Application misses these key aspects of the reasons for the panel's decision and focuses instead on matters that are either not relevant, or were not given weight, in the panel's decision.

Decision

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

Chitra Karve
22 July 2022