[2023] PBRA 61

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Application for Reconsideration by Razzaq

Application

1. This is an application by Razzaq (the Applicant) for reconsideration of a decision of an oral hearing panel not to direct release. The hearing took place on the 9 February 2023.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.

3. I have considered the application on the papers. These are the dossier of 907 pages, the application by the Applicant's solicitor dated 23 of March 2023, and an email from the Secretary of state.

Background

4. The Applicant was sentenced to an indeterminate sentence for public protection in March of 2008. The index offences were kidnapping, conspiracy to defraud, false imprisonment and possession of a prohibited weapon. The Applicant was involved in a sophisticated and planned fraud involving the securing of credit card and bank details from victims using covert cameras and subverting employees. Later some co-conspirators withdrew from the fraud. The Applicant believed he was owed monies. The Applicant and others then conspired to organise a kidnap. The victim of the kidnap being a former associate. The victim was severely beaten and assaulted and kept in a locked metal box for a number of days.

Request for Reconsideration

5. The application for reconsideration is dated the 23 March 2023.

6. There are a number of arguments and comments supporting the application for Reconsideration. I have set out the arguments and my comments below.

Current parole review

7. The hearing took place on 9 of February 2023. The reference from the Secretary of State requested the Parole Board to consider whether the Applicant met the test for release and if not whether a recommendation for open conditions should be made. The panel consisted of three independent members.

8. The Applicant's prison tariff expired in January of 2014.

9. The Applicant had been transferred to open prisons on two occasions and had subsequently been transferred back to closed prisons.

10. The Applicant is now aged 45. He was 30 at the time of sentence.

The Relevant Law

11. 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.

12. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

13. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)).Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A).

14. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

15. 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**.

Illegality

16. An administrative decision is unlawful under the broad heading of illegality if the panel:

(a) misinterprets a legal instrument relevant to the function being performed;
(b) has no legal authority to make the decision;
(c) fails to fulfil a legal duty;
(d) exercises discretionary power for an extraneous purpose;
(e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or

(f) improperly delegates decision-making power.

17. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Irrationality

18. 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."*

19. 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.

20. 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

21. 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.

22. 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.

23. The Applicant does not argue that the hearing was procedurally unfair.

The reply on behalf of the Secretary of State (the Respondent)

24. The Respondent offered no representations in an email dated 24 March 2023.

Discussion

25. The panel had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant as well as the witnesses. The Applicant was also legally represented throughout. Where there is a conflict of opinion, it was plainly a matter for the panel to determine the opinion they preferred, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above.

26. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

27. However, if a panel were to make a decision contrary to the perceived or actual opinions of professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board 2019 EWHC 2710**.

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

29. The Applicant's solicitor has, in his application, rehearsed a substantial number of issues, all of which were clearly issues within the oral hearing itself. The Reconsideration mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the assessment of the evidence for that of the panel, unless, of course, it is manifestly obvious that there was an error of an egregious nature "*so outrageous in its defiance of logic* "which can be shown to have directly contributed to the conclusion arrived at by the panel.

30. I have addressed below the issues which appear to be the fundamental arguments addressed on behalf of the Applicant. I remark that, although no particular format is demanded of Applicants pursuant to the Rules, and this application is properly made. Those advising Applicants may better serve their clients by addressing each ground of argument in a numbered sequence, briefly summarising the ground and thereafter setting out the argument supporting the ground, at all times ensuring that the ground is likely to meet the test set out in ***DSD*** above.

Ground 1

31. "*The risk of serious harm in this case would in fact be inextricably linked with the question of Class A drug misuse rather than Class B. This was especially the case given such evidence as existed, suggested the misuse of Class B rather than Class A substances by [the Applicant] in custody. ……. Indeed the trial judge's sentencing remarks in this case (see the dossier at page 37, paragraph 1) made specific reference to the misuse of Class A drugs rather than drugs in general."*

Discussion

32. I have considered with care the rationale of this argument adduced on behalf of the Applicant. The argument in simple terms appears to be that the historical serious offending behaviour by the Applicant was "inextricably *linked"* to misusing Class A drugs.

33. Although a broad comment of this sort has some attraction, the argument in my determination, has little substance as there is no clear explanation, historically, by the Applicant as to how or why Class A drug misuse could have led to the offending which underpins his risk factors and offending. The comment, (referenced above) by the sentencing judge, appears to be repeating a self-report. The judge said, "*you acknowledge your abuse of drugs as being a key factor in your offending behaviour*".

34. Extremely heavy use of heroin would not, in common sense terms, be compatible with accomplishing a highly sophisticated and internationally connected fraud which formed the first part of the index offence. Neither is it clear how a sophisticated criminal kidnap could be planned and executed under the umbrella of the heavy use of heroin. Further the Applicant himself consistently contended, in his response to questions about the original index offence, that it was committed, under duress, in response to a drug debt which he had not paid. The self-report of duress was clearly not seen by the Applicant or his legal advisers as sufficient an argument to place before the court (in the index offence proceedings) i.e. by way of a defence of duress. However, the explanation was adduced by the Applicant in the trial and in explanations to probation officers.

35. The background facts relating to the index offence were, however, carefully analysed by the sentencing judge. The Applicant had fallen out with a gang or group who were organising part of a sophisticated criminal fraud. The victim of the kidnap was taken and beaten because he was thought to have retained illegally acquired monies which the Applicant, and other members of the criminal group, wanted for themselves.

36. The panel in their analysis of risk factors were alive to this issue. The risk factors which they identify in their decision were:

    A criminal and drug related lifestyle and associates; a willingness to use extreme and sustained instrumental violence; a lack of victim empathy or insight; misuse of drugs; deficits in thinking skills; poor problem solving; poor attitude

towards authority and supervision; accommodation; and financial management.

37. In my determination the issue about which particular illicit drug was being used and taken by the Applicant (at the time of the index offence) was of minor, if any, relevance to the question of the Applicant's risk of serious harm. The listed risk factors were and would be applicable to the Applicant whether he had been misusing class A class or B drugs.

38. I therefore reject the argument that a lack of analysis of which particular drug the Applicant was dependent upon, whether at the time of the hearing, or in the future was a helpful or relevant factor in the broader assessment of risk.

39. The Applicant's solicitor also quotes a view expressed by an independent psychologist, which, it is said, was disregarded by the panel. Namely "*the use of cannabis and spice and [sic] itself is not necessarily indicative of an increased risk to the public unless he relapsed into crack cocaine and heroin use, resulting in significant financial pressures therefore providing motivation to commit further criminal acts which may involve violence.*"

40. The psychologist appears to be stating a series of, with respect to the professional, obvious points - namely that the use of cannabis and spice (and I would add crack cocaine and heroin) would not necessarily increase public risk unless there was financial pressure (presumably debts owed to criminals) thereby leading to crime. Also, that further crime may involve violence. Perhaps a clearer way of stating the point would be that those who buy or use illicit drugs and find themselves in debt to criminals, may become so pressured that they might act violently to satisfy demands. Indeed, this was the case put by the Applicant as to how he came to commit the index offences. However, the fundamental risk related point, in my estimation, is that the issue is the accumulation of debts owed to criminals, rather than the nature of the drug misused at any particular time.

41. I therefore reject the contention that an apparent failure to address the nature of the drug upon which the Applicant is dependent was an issue which would give rise to a finding of irrationality in the sense set out above.

Ground 2

42. *Failure to consider recommendations.*

Discussion

43. The panel were not obliged to follow any particular recommendations. The panel were, as the Applicant's solicitor indicates, obliged to consider the views of professionals and explain their decision whether agreeing or disagreeing with the view. In this case the panel made clear that the arguments for release were not persuasive. The reason for rejecting any such arguments were set out in the decision - namely that the panel determined that the Applicant's history of violence, combined with his suspected involvement in the prison drug subculture (as reinforced and evidenced by adjudications relating to possessing paper

embedded with spice and positive drug tests) were factors which they determined raised the Applicant's risk of serious harm in the community. Their decision was reinforced additionally by the fact that the Applicant had twice been returned from an open prison following concerns about his behaviour. The panel also indicated that their decision took account of the Applicant's historical poor record of compliance in the community.

44. The fact that other professionals took a differing view as to the importance of these considerations was not, in my determination, irrational in the sense set out above and does not therefore amount to a basis for reconsideration of the decision.

Ground 3

45. *Lack of violence in prison.*

Discussion

46. Within the decision the panel specifically note in its conclusion that there had not been reports of violence in custody perpetrated by the Applicant. However, the panel noted that violence was linked with a drug and criminal subculture. The serious use of violence in the index offence was clearly instrumental rather than reactive and associated with a disagreement between criminal associates and aimed specifically at extracting money from the victim. The panel determined that there was evidence of the Applicant's continued involvement in a criminal subculture a factor which the panel assessed as linked to potential future violence in the community. Again, I do not determine that this conclusion was irrational in the sense set out above.

Ground 4

47. *General criticisms.*

Discussion

48. The Applicant's solicitor, in the representations, rehearses a number of the issues which were clearly debated within the hearing itself. The Applicant's solicitor takes the view that the panel reached a decision "*which cannot stand"* and should be set aside.

49. The panel in their conclusions set out the rationale for their decision. The panel accepted that the Applicant had completed a number of behavioural interventions and had good reports from prison staff. As indicated above they also noted the seriousness of the violence associated with the index offending; the problems with poor compliance in the community; they noted a history of violence; they noted a relatively recent pattern of reports associated with the prison subculture which clearly indicated antisocial associations. These matters balanced against the Applicant's risk factors set out above, in my determination adequately and clearly explain the basis of the panel's decision and do not amount to an irrational decision within the meaning set out above.

Decision

50. 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.

HH S Dawson
6 April 2023