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[2020] PBRA 187

Application for Reconsideration by Trayfoot

Application

1. This is an application by Trayfoot (the Applicant) for reconsideration of a decision of an oral hearing dated the 11 of November 2020 not to direct his 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 dossier (including the decision letter) amounting to 466 pages and the representations on behalf of the Applicant.

Background

4. On the 9 December 2008, when aged 25, the Applicant pleaded guilty to an offence of sexual assault by penetration and was sentenced to an indeterminate sentence of imprisonment for public protection with a minimum tariff of 2 years 8 months (less time spent on remand). The minimum tariff expired on the 13 May 2011.

5. The Applicant's offending began as a juvenile with convictions for criminal damage followed by being drunk and disorderly. In 2007, he assaulted two women as they left a nightclub and approximately six months later, he assaulted a woman in the street. The prosecution case, which the Applicant has always denied, is that there had been a sexual element to all three offences.

6. The Applicant appeared before a Parole Board oral hearing panel on the 5 June 2017; on that occasion, he did not seek a direction for release. The panel recommended he should progress to open conditions and, after some delay, he moved to an open prison in June 2018.

Request for Reconsideration

7. The application for reconsideration is dated the 12 November 2020.

8. The application is brought under both irrationality and procedural unfairness. The written representations set out the five categories for procedural unfairness under Rule 28 but do not specify which is relied on. In fact, all the grounds pleaded come

within the complaint of irrationality. The grounds for seeking a reconsideration are as follows:

9. Ground 1: There was no or no sufficient evidence to support the panel's finding that:

   (a) The Applicant had outstanding treatment needs;

   (b) The Applicant had not been tested sufficiently in respect of his interactions with women;

   (c) The Applicant posed an increased risk or an outstanding risk which was not manageable in the community;

   (d) The Applicant evinced such a lack of openness with professionals as to cast doubt on their ability to manage his risk in the community; and

   (e) The Risk Management Plan was not sufficient to manage the Applicant's risk.

10. Ground 2: The panel, without justification, relied on an assessment of risk of reoffending and outstanding needs completed in 2015 in preference to a psychological assessment completed by a prison psychologist in 2017. In this decision the assessment made in 2015 will be referred to as the 2015 risk assessment.

11. Ground 3: Alternatively, the panel gave no reasons why it relied on an out of date 2015 risk assessment or an out of date psychological assessment and why it preferred one over the other.

12. Ground 4: The panel failed to give reasons for disagreeing with the recommendations for release of the Prison Offender Manager and the Community Offender Manager and failed even to summarise their evidence in the decision letter.

Current parole review

13. The Secretary of State referred the Applicant's case to the Parole Board on the 4 January 2019.

14. The oral hearing took place on the 14 May 2020. Due to the current Covid–19 restrictions, the hearing was held remotely by video link. The decision letter does not indicate how many members formed the panel but the Member Case Assessment Directions dated the 23 December 2019 provided for a panel of two members but directed the hearing did not require a psychologist member.

15. The panel heard from the Applicant and then adjourned the case for more information. A further 75 pages of documents were added to the dossier and the hearing resumed on the 14 October 2020, when the panel heard evidence from the Prison Offender Manager and the Community Offender Manager.

16. On the 11 November 2020, the panel concluded the hearing on the papers, having received written, closing submissions.

17. At the time of the hearing, the Applicant was aged 37 and this was his sixth parole review since 2011.

The Relevant Law

18. The panel correctly sets out in its decision letter the test for release.

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.

Procedural unfairness

23. 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.

24. 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

25. 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."

26. The point was developed by Pushpinder Saini J in **R (Wells) v The Parole Board [2019] EWHC 2710 (Admin):**

"I accept that the Panel was not bound by the expert evidence before it but I consider that the extent of the reasoning given by the Panel for coming to the conclusion that the risks posed by the Claimant could not be managed in the community fell below an acceptable standard in public law.

The duty to give reasons is heightened when the decision-maker is faced with expert evidence which the Panel appears, implicitly at least, to be rejecting. I also consider that departure from an earlier reasoned recent decision from another Panel required some explanation.

I accordingly concluded that the Panel's decision failed to reflect the evidence before it or to explain in more detail why such evidence was being rejected."

The reply on behalf of the Secretary of State

27. The Secretary of State confirmed by email dated 24 November 2020 that he did not wish to make representations in this case.

Discussion

28. At the time of the hearing, the Applicant was some 9 years over tariff so it was necessary to bear in mind what Lord Reed said in **Osborn (Appellant) v The Parole Board (Respondent) [2013] UKSC 61** *"When dealing with cases concerning post-tariff indeterminate sentence prisoners, it should scrutinise ever more anxiously whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff".*

29. It is helpful to consider briefly the history of the recommendations in this case.

30. The risk assessment completed on 27 February 2015 concluded that although the Applicant had completed the core offending behaviour work, a number of risk factors remained outstanding and needed addressing, preferably through his completion of a course at a therapeutic community. The Applicant attended a therapeutic community for approximately four weeks in March 2020.

31. The psychological assessment dated 18 May 2017 found that the Applicant had developed insight and an understanding of his areas of risk and no further work was considered necessary in closed conditions. The report said he would benefit from a staged return into the community (by way of open conditions) and could tackle any additional risks that might present themselves. Once in the community, he should engage in relapse prevention work.

32. The Applicant's Prison Offender Manager in a report dated the 17 May 2019 noted the difference in diagnosis between the 2015 risk assessment and the psychological assessment. She opined that the Applicant needed to be honest and open, and he had to do more successful temporary releases before *"a confident proposal of support for release is made".*

33. On the 25 October 2019, the Community Offender Manager recorded the Applicant's good conduct in prison but said the further work needed to be done to consolidate the learning already completed; this could be done by a programme that was available in the community. She agreed that the Applicant must do more temporary releases.

34. On the 12 May 2020, the Community Offender Manager noted the Applicant's positive progress and *"minimum concerns"*; she said that no further work was required in prison and that his risk could be managed in the community.

35. On the 16 April 2020, the Prison Offender Manager agreed that the Applicant did not need to do further work; he had managed himself in prison and in the community on releases very well; he had a grasp of his risk factors and she supported release into the community.

36. On the 26 June 2020, in a report specifically requested by the oral hearing panel, the Prison Offender Manager said:

"The pattern offending is concerning, and some questions have not been and possibly will not be answered to any degree of satisfaction due to his account of his behaviour. Nonetheless, from a standpoint of current risk assessment, in my explorations with [the Applicant] I have not seen, heard or experienced in either his behaviour or use of language the attitudes or beliefs that contributed to his offending. Therefore I consider that [the Applicant] either through the process of maturation, self- reflection, attendance on the programme and / or the one to one work has addressed the pertinent risk factors".

37. On the 13 October 2020, the Community Offender Manager updated the panel on certain difficulties in securing accommodation in the community for the Applicant but repeated her recommendation for release.

38. The recommendations of the two professional witnesses developed over time but at each stage, the recommendations have been consistent with each other.

39. I have distilled from the decision letter four reasons for the panel coming to the conclusion it did:

    (1) The Applicant has shown such a lack of openness with professionals as to cast doubt on their ability to manage his risk in the community.

    (2) The Community Offender Manager in her evidence to the panel, assessed the Applicant as needing to complete work around distorted sexual attitudes, his thinking and behaviour and his poor insight into the impact of his offending on the victim.

    (3) It was unclear how the Applicant had addressed the outstanding risks identified in the risk assessment carried out in February 2015.

    (4) The Applicant had been insufficiently tested since moving to open conditions; in particular, his interaction with women had not been sufficiently tested.

40. The decision letter gives one illustration to support the panel's first finding. On the 12 November 2019, following his return from an overnight release, the Applicant tested positive for alcohol. This was by no means insignificant because alcohol had played a part in his past offending. His explanation that he had used a mouthwash prior to the test was rejected by the panel.

41. The points made on behalf of the Applicant were that the incident had not stopped the Applicant being permitted further temporary releases and the hostel where he had stayed had accepted him back. Both the Prison Offender Manager and the Community Offender Manager had been aware of the result of the test but nevertheless continue to support release.

42. As to the second finding, the Applicant's solicitor disputes that the Community Offender Manager gave the evidence set out in the decision letter. The solicitor suggests that having been asked if there was any outstanding treatment, the witness said *"there's always room for improving learning situations and consequential thinking".*

43. I am not able to resolve completely this uncomfortable disagreement without listening to the recording of the hearing which in the circumstances I have decided is unnecessary.

44. If the Community Offender Manager's evidence was as stated in the decision letter, it would not only contradict her written statement but also that of the Prison Offender Manager.

45. Importantly, the decision letter does not indicate one way or the other, whether that work had to be done in prison or whether it could be done in the community, and so it is not explained whether such work was available in open conditions or whether the panel was suggesting that the Applicant should return to closed conditions in order to complete the work.

46. The panel's third finding is troubling. It has been seen that some of the findings of the 2015 risk assessment were not replicated in the psychological report of 2017 which found that the Applicant had made progress in addressing his risks. Again additionally, the letter does not deal with the opinion of the Prison Offender Manager set out in her statement dated the 26 June 2020 and quoted in paragraph 32. These documents purport to explain how the Applicant has addressed his risks and they do not accept that the risks are those set out in the 2015 risk assessment.

47. Again, the decision letter does not explain why the panel preferred to rely on the report dated 2015 rather than the report dated 2017. Perhaps more importantly, the panel did not explain why it felt able to rely on psychological assessments five and three years old, given the evidence from both professional witnesses that there had been some change in the Applicant's insight and attitudes.

48. The evidence suggests that the panel might have overlooked the Parole Board Guidance PBM 49 – 17, page 9:

"Directing updates to reports: It is important to be aware of time limitations in the validity of psychological and psychiatric assessments. If there is an assessment of the dossier that is over a year old and the prisoner has engaged in further treatment or there have been changes in their conduct then the assessment is unlikely to be valid; a member should consider directing an update".

49. The point is perhaps emphasised by section 9 of the decision letter, where it is recommended that there should be a new psychological assessment for the next panel.

50. The fourth finding is made without any reference to the evidence before the panel and no reference to what the Prison Offender Manager and the Community Offender Manager had to say on the topic.

51. This is significant because the legal representations in support of this application suggest that the Prison Offender Manager had given evidence consistent with her written statement that the temporary releases had provided sufficient testing and that, in any event, there were many female staff members in the prison and the Applicant's interaction with them had not given rise to concerns.

52. Grounds 1 and 4 pleaded on behalf of the Applicant and the panel's reasons 1 to 4 (as I have identified them) in paragraph 36, all depend for their validity on the panel either rejecting the relevant parts of the evidence of both professional witnesses or at the very least, placing little weight on the passages. In those circumstances, it was absolutely imperative to know, if only in outline, why the panel had exercised its judgement in that particular way.

53. The matters where that imperative does not apply are the panel's reliance on the 2015 risk assessment and its failure to explain why.

54. The panel dealt with the evidence and recommendations of the professional witnesses at page 5 of the decision letter in this way:

"Your Offender Manager and Offender Supervisor recommend release. Given the serious nature of your offending and the outstanding testing that is needed, the panel was not convinced that the proposed risk management plan was likely to be effective in managing your risks".

55. In the next section, the panel referred to the failure to address outstanding risks, that it was *"not convinced"* that the Applicant's interactions with women had been sufficiently tested and it noted that the Applicant could not be relied upon to be open with professionals. The section concluded *"having considered the oral and written evidence, the panel concluded that you needed to remain confined for the protection of the public and did not direct your release".*

56. The seriousness of the offence taken alone can never be a sufficient ground for refusing to direct release. In this case, the seriousness of the offence is combined with a number of factors, all of which were controversial and all of which contradicted the evidence of the professional witnesses.

57. As far as I read the decision letter, the only references to the Prison Offender Manager's evidence were first, the disputed evidence referred to in paragraph 39 of this decision and secondly, a reference to the witness having done some work with the Applicant which the panel said was *"not structured offence focused work"*.

58. Apart from a brief reference to the Community Offender Manager's efforts to obtain suitable accommodation for the Applicant, there is no record of what she said in her statements nor her oral evidence and no evaluation of her recommendations.

59. On the face of it, this case appears to have been relatively straightforward until the first oral hearing when, for some reason, the panel discovered it was more demanding. So much can be gleaned from the fact of the adjournment and the garnering of copious further information. I have huge sympathy for a panel apparently taken by surprise and having to grapple with new issues and new information and I do not lose sight of the difficulty in writing a comprehensive decision letter six months and one month respectively after the oral and written evidence had been given.

60. However, the defect in the decision-making can be put very simply: the panel made a series of important findings, all of which were in direct contradiction of the opinions and recommendations of both professional witnesses and, sadly, the decision letter did not even acknowledge those conflicts let alone address them.

61. It may be that the panel did consider the conflicts between the witnesses and itself and formulated perfectly good reasons for taking the course it did. The trouble is those reasons do not appear in the letter and accordingly the letter does not meet the standard set out in **Oyston** and **Wells**.

Decision

62. Accordingly, whilst I do not find there to have been a procedural irregularity, I do consider, applying the test as defined in case law, the decision not to direct release to be irrational. I do so solely for the reasons set out above. The application for

reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

James Orrell
7 December 2020