[2020] PBRA 196

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**Application for Reconsideration by Khan**

## Application

1. This is an application by Khan ('the Applicant') for reconsideration of a decision of an oral hearing panel of the Board ('the OHP'). On 23 October 2020, after a hearing on 13 October 2020, the OHP decided not to direct the Applicant's release on licence or to recommend that he should be transferred to an open prison establishment.

2. The case has been allocated to me as one of the members of the Board who are authorised to act as Reconsideration Assessment Panels to make decisions on applications for reconsideration.

3. The Applicant is serving a sentence of imprisonment for public protection which he received in November 1996 for an offence of wounding with intent to cause grievous bodily harm. He was aged 27 at the time of the offence and is now aged 43.

4. His tariff was set at 3 years less time served on remand. It expired in August 2008 so he is now more than 12 years over tariff. He has remained in closed conditions throughout his sentence. This is the sixth review of his case by the Board. It commenced in January 2017 and has been substantially delayed for reasons which will be explained below.

5. The principal bar to his progression has been his refusal for a long time now to have any contact with the officials responsible for managing his case in prison and prospectively in the community (if he is released on licence). He did engage in a psychological risk assessment in May 2019 but then made it clear that he was not going to engage in any further assessments or in supervision. Thereafter he refused to engage in a psychiatric assessment directed by the Board, and he has refused to speak to either of the officials currently responsible for the management of his case.

6. Because of the current COVID-19 restrictions the hearing of his case, which eventually took place on 13 October 2020, was conducted by video link. The Applicant was legally represented, and his representative agreed to that procedure.

7. For the purpose of this application I have considered the following documents:
   - the 641-page dossier provided by the Secretary of State and considered by the OHP:

- The OHP's decision letter;
-The representations submitted by the Applicant himself in support of the application
for reconsideration; and
- An e-mail from the Public Protection Casework Section of the Ministry of Justice (PPCS), which indicated that the Secretary of State did not wish to submit any representations in respect of the application.

**The Relevant Law**
***The rules relating to reconsideration of decisions***

8. Under **Rule 28(1)** of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence. A decision to recommend or not to recommend a move to an open prison is not eligible for reconsideration.

9. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by
- a paper panel (**Rule 19(1)(a)** or **(b))** or
- an oral hearing panel after an oral hearing, as in this case, **(Rule 25(1))** or
- an oral hearing panel which makes the decision on the papers **(Rule 21(7)).**

10. **Rule 28(1)** provides that applications for reconsideration may be made in eligible cases on either or both of two grounds: (a) that the decision is irrational or (b) that it is procedurally unfair.

11. The OHP's decision in this case not to direct release on licence is thus eligible for reconsideration. It is made on both of the available grounds. The OHP's decision not to recommend transfer to an open prison establishment is not eligible for reconsideration.

***The test for release on licence***

12. The test for release on licence is whether the Prisoner's continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the OHP at the start of its decision.

***Irrationality***

13. 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."*

This was the test set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. It applies to all applications for judicial review.

14. 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.

15. The Board, when deciding whether or not to direct a reconsideration, will adopt the same high standard as the Divisional Court for establishing 'irrationality'. The fact that **Rule 28** uses the same adjective as is used in judicial review shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see **Preston [2019] PBRA 1** and others.

***Procedural unfairness***

16. 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 from the issue of irrationality which focusses on the actual decision.

17. It has been established that the things which might amount to procedural unfairness include:
    (a) A failure to follow established procedures;
    (b) A failure to conduct the hearing fairly;
    (c) A failure to allow one party to put its case properly;
    (d) A failure properly to inform the prisoner of the case against him or her; and/or
    (e) Lack of impartiality.

18. The overriding objective is to ensure that the case was dealt with fairly.

**Request for Reconsideration**

19. The application for reconsideration was made by the Applicant in person in a letter to the Board. The Applicant's representations are articulate and well presented. They raise a number of points which I will consider separately below.

**Discussion**

20. I will discuss in turn each of the grounds advanced by the Applicant in support of his application.

**Ground 1 (Procedural Unfairness): The Applicant was denied the right to have a face-to-face hearing**

21. An offender does not have a right as such to a face-to-face hearing. It is a matter for the panel chair to decide whether the case is suitable for such a hearing. However, that decision must of course be made rationally and if a remote hearing is unfair to the offender that may amount to procedural unfairness.

22. I fully understand and sympathise with the Applicant's regret that he did not have a face-to-face hearing. However, on 13 October 2020 such a hearing would not

have been possible: the COVID-19 restrictions prevented it. If there was to be a face-to-face hearing, the case would have had to be adjourned until such time as such hearings are possible again. It is not known at present when that may be. The question which I now have to decide is whether it was unfair to conduct a video-link hearing at this stage rather than to adjourn the case until face-to-face hearings can take place again.

23. On 22 September 2017 a MCA Member of the Board conducted a paper review of this case and decided that there should be an oral hearing: in so doing she expressed the view that the case was not suitable for a video-link hearing. Her reasons were that*: "[the Applicant] has refused contact with professionals but has stated he is willing to take part in an oral hearing. It will be helpful for all parties to be in the same room."* There is no doubt that, for the reasons stated by the MCA Member, a face-to-face hearing would have been preferable.

24. In September 2017, of course, the Coronavirus pandemic had not yet arrived in this country. Its arrival (and the consequent COVID-19 restrictions) presented panel chairs with difficult decisions to make about whether hearings could fairly and effectively be conducted remotely or whether they would have to wait until face-to-face hearings were possible again.

25. On 14 September 2020 the chair of the OHP in this case considered that problem and concluded, subject to any objections by the Applicant's legal representative, that a video-link hearing world be fair and effective. He issued directions to that effect, stipulating that any objections by the Applicant's legal representative to that course should be provided no later than 28 September 2020. No such representations were received, and no request was made on the Applicant's behalf at the hearing for an adjournment so that there could be a face-to-face hearing.

26. That does not, of course, necessarily mean that the video hearing was fair. I have carefully considered the OHP's account of what happened at the hearing. It was as follows:

*"The hearing was a difficult one. From the outset, [the Applicant] seemed determined to dominate the proceedings. [The Applicant] spoke over people, launching into lengthy and often emotional diatribes, repeating [his] feelings about the injustice of [his] situation, without demonstrating any insight into the harm this attitude [was causing him]. At one stage, [the Applicant] became so emotionally aroused that the hearing had to be suspended for 20 minutes to enable [the Applicant's legal representative] to speak to [him] privately, after which when the hearing resumed [he] apologised and were much calmer. [The Applicant's] grievance feelings are clearly entrenched and sincerely held."*

27. I have considered whether the Applicant's presentation at the hearing (which was undoubtedly unhelpful to his case) might have been different if the hearing had been a face-to-face one. My conclusion is that it would not. It is abundantly clear from the dossier that the Applicant has problematic and deeply entrenched personality traits which account for his inability to understand what is in his best interests and what is not, and an obsession with his grievances. I believe that these grievances would have come to the fore in a face-to-face hearing just as they came to the fore at the video-link hearing.

28. The Applicant complains that he was not able to present his documentation and evidence. However, when there is a remote hearing it is always possible to submit copies of any documentation by e-mail before the hearing or to ask at the hearing to be allowed to submit them after the hearing for the panel's consideration. Neither of those steps was taken in this case. The Applicant had every opportunity to present his own evidence and did so (albeit not in a way that helped his case).

29. In the circumstances I am afraid I have not been persuaded that the video-link hearing was unfair in any way, and I cannot therefore uphold this ground for reconsideration.

**Ground 2 (Procedural Unfairness): There was systematic delay on the part of the Board**

30. This review has undoubtedly been long drawn-out. Examination of the dossier reveals that there were a number of reasons for the delay.

31. On 6 July 2017 the case was first reviewed by an MCA Member who very reasonably deferred the case and directed a psychiatric assessment. The Applicant declined to co-operate in that assessment.

32. On 22 September 2017 another MCA member agreed to a request by the Applicant's legal representative (in the light of the Applicant's refusal to engage in the psychiatric assessment) to revoke the direction for such an assessment and to direct an oral hearing.

33. The oral hearing was listed to take place on 19 March 2018 but on that day, there was a power cut at the prison and the panel members were unable to gain entry. The hearing therefore had to be deferred. The panel concluded, reasonably on the evidence, that a psychiatric assessment was after all required, and issued the necessary direction for production of the psychiatrist's report by 30 June 2018 (a reasonable timescale).

34. There was a delay, for reasons outside the control of the Board, in compliance by the Secretary of State with that direction, and on 9 July 2018 a Duty Member (entirely reasonably) extended the time limit to 3 August 2018. There was then a further delay in complying with that time limit.

35. On 28 September 2018, PPCS reported that arrangements had been made for a psychiatrist to attend to interview the Applicant for the purpose of the assessment, but that had refused to be interviewed or have anything to do with the process. PPCS therefore requested that the direction should be revoked. The Applicant's solicitors confirmed that he was not willing to engage in the assessment, and the direction was therefore revoked on 8 October 2018 by a Duty Member who (in view of the delays which had occurred) directed that the hearing should be given priority and the next panel should include a judicial chair.

36. A judicial chair was duly allocated to the OHP and in view of the complexity of the case a directions hearing was listed to take place on 18 February 2019.

37. The Applicant attended that directions hearing and told the OHP that he was now willing to engage in assessments by a Psychologist and a Psychiatrist. A realistic timetable was set, providing for the psychology report to be provided by 20 May 2019 and the psychiatric report by 20 July 2019 and for the hearing to be reconvened on 14 August 2019.

38. There was a slight delay in the provision of the psychology report, which was provided on 30 May 2019. The Applicant declined to be interviewed by the psychiatrist and refused permission for his prison medical records to be disclosed. On 18 November 2019 the panel chair issued directions revoking the direction for a psychiatric assessment and stating that the case should be listed for hearing.

39. The Board was then informed that the Applicant's solicitors had commissioned an independent psychiatric assessment which was expected to be completed by 20 March 2020. To accommodate that date the panel chair extended the deadline for other reports to 17 April 2020. So far as I can see the independent psychiatric report (if there was one) was never disclosed by the Applicant's solicitors.

40. By April 2020 the COVID-19 restrictions were in place, causing further disruption to the progress of parole hearings. Panel chairs were asked to review all their pending cases and to decide whether, even if oral hearings had originally been directed, remote hearings might after all be fair and effective. Members over a certain age (and therefore particularly vulnerable to COVID-19) were removed from panels but reinstated if remote hearings were thought to be appropriate.

41. As related above, on 14 September 2020 the chair of the OHP decided, subject to any objections by the Applicant's solicitors, that a video-link hearing would be fair and effective in this case. The hearing was listed to take place on 13 October 2020.

42. I cannot see that the above history of the progress of the case reveals any ground for saying that there was delay on the part of the Board amounting to procedural unfairness. On the contrary the Board made every effort to get the case on for hearing within a reasonable time: the delays were largely due to the refusal of the Applicant to engage in assessments which had been properly directed, and more recently to the onset of COVID-19.

43. In his representations the Applicant states that the reason why he refused to engage with the psychology department was the delay on the part of psychology and psychiatry in complying with time limits. I appreciate his irritation at those delays but the Board (which was doing its best to progress the case) was not responsible for them or for the delays caused by the Applicant's refusal to co-operate. I cannot therefore uphold this ground for reconsideration.

**Ground 3 (Irrationality): The OHP should not have considered the evidence of the psychologist who assessed the Applicant in May 2019 as her assessment was more than a year old at the time of the hearing**

44. It is correct that psychological risk assessments are normally regarded as being valid for one year and should be updated after that time. However, the Applicant had made it very clear that he would not engage in any further assessment.

45. In these circumstances the OHP were fully entitled to consider the Psychologist's evidence, taking into account the fact that she had not assessed the Applicant for more than a year. Her evidence was highly relevant to the OHP's risk assessment, and it would have been irrational to disregard it.

46. The Psychologist acknowledged in her evidence that since her assessment the Applicant's behaviour in custody had improved, but told the panel that, as things had otherwise stayed the same, she believed her assessment was still valid. The OHP was fully entitled to accept that that was the case, and I cannot accept that their reliance on the Psychologist's evidence was in any way irrational within the meaning explained above.

**Ground 4 (Irrationality): The OHP should not have placed any reliance on the running report prepared by probation for the purposes of risk assessment, which had last been updated in September 2019 and should have been updated nearer the hearing**

47. It is regrettable that there were many changes in the probation officer prospectively responsible for managing the Applicant's case in the community, and the running report was not updated as often or as thoroughly as might have been expected. The three versions of the report in the dossier appear to have been signed off on 20 April 2017 (by one probation officer), 14 February 2018 (by the same probation officer) and 12 June 2020 (by another probation officer) respectively. By the time of the hearing there had been another change of personnel and the probation officer then responsible for the case (who gave evidence at the hearing) appears simply to have run off another copy of the June 2020 version of the report which was almost exactly the same as the previous one.

48. The purpose of the running report (routinely included in parole dossiers) is to include in one document (updated as necessary) information under various headings which may be relevant to probation's (and the Board's) assessment of risk. It is correct that some information which might have been added to the running report had not been. However, that additional information was all made available to the OHP in other ways, so its assessment was fully informed and cannot be regarded as irrational.

**Ground 5 (Irrationality): The OHP failed to take into account the fact that certain measures of risk suggested that the Applicant's risk to the public had been reduced**

49. This ground relates to statistical measures of risk which are recorded in the running report referred to above. It is correct that the statistical calculation of the Applicant's risk of non-violent reoffending had reduced from "medium" to "low" between April

2017 and February 2018 and the statistical calculation of his risk of violent re-offending had been similarly reduced between February 2018 and June 2020.

50. These are purely statistical measures which will change with the passage of time irrespective of any other evidence of actual reduction in risk. They do not reflect probation's overall assessment of current risks. They may be useful in assessing risk but are of limited value in cases where the offender has mental health difficulties (as the Applicant does) and has few convictions but one or more of them are of extreme seriousness (as in the Applicant's case).

51. The OHP were fully aware of the statistical predictions in the Applicant's case. They referred to them in their decision. However, they were also aware of the other evidence including the very detailed structured risk assessment by the experienced forensic psychologist. They expressly stated in their decision: *"These assessments [the statistical ones] are probably influenced by [the Applicant's] age and the length of time [he has] been in prison. The panel does not consider them to be representative of the true risk which is likely to be higher."*

52. They were fully entitled to take that view, and the other evidence in the case supported their conclusion that the Applicant's risk of serious harm to the public was too high to be manageable on licence in the community. That conclusion cannot be faulted and was in no way irrational.

**Ground 6 (Irrationality): The OHP should have accepted that there had been a reduction in the Applicant's risk because over many years in prison he had not been violent or used drugs or alcohol**

53. The OHP were well aware that that was the case (although the Applicant had on occasions made threats of violence). Prison is a tightly controlled environment and the absence of violence or misuse of substances in prison is of limited value in assessing an offender's risk to the public in the community, which was the OHP's task.

54. There can be no doubt that at the start of his sentence the Applicant posed a high risk of serious harm to the public. To justify a direction for release on licence he needed to demonstrate that his risk had been reduced to a level at which it would be manageable on licence in the community. The absence of any evidence of violence or substance misuse in prison was a factor in his favour but there was ample other evidence to support the OHP's conclusion that he had not demonstrated a sufficient reduction in risk to the required level. In particular his anti-probation attitudes and refusal to engage in any kind of supervision were fatal impediments to the manageability of his risk in the community.

**Ground 7 (Irrationality): The OHP placed reliance on the Applicant's refusal to engage with probation, but he had written to them asking for his case to be transferred to probation in the specified area and their refusal to do so was unreasonable**

55. The Applicant states that he does not wish to be released to Area A because he has too many enemies there who would wish to cause him harm. I understand that concern, but it is not a valid reason for refusing to engage with probation in this area. Although he had moved away from Area A to live in Area B he committed the wounding offence on a return visit to Area A and was therefore dealt with by the court and probation there. It is the normal procedure for an offender to continue to be supervised by probation in the same area unless he meets certain criteria (which the Applicant does not).

56. The question which probation area should be responsible for an offender's case while he is in prison is a different question from where he should be released if and when the Board is able to direct his release on licence. If and when the Applicant reaches that stage, he will be able to present reasons to the probation officer managing his case in support of a request to be released (probably initially to probation approved premises) in Area B rather than Area A. If his reasons are good enough, probation will in all likelihood agree to his request. In the meantime, his refusal to engage with them is unjustified and can only do harm to his prospects of progression.

**Ground 8 (Irrationality): The OHP failed to take into account the offending behaviour work which the Applicant completed earlier in his sentence**

57. The OHP were fully aware of that work but were also aware that the Applicant had failed to demonstrate an ability to retain and apply the learning which it would have been hoped he would gain from it, and that the professionals believed that he needed to complete further work in custody to achieve a sufficient reduction in his risk. The OHP were fully entitled to accept the evidence of the professionals on that issue.

**Ground 9 (Irrationality): The OHP expected the Applicant to have undertaken further courses at prisons which do not run them**

58. This is based on a misunderstanding. The problem was that the first step was for the Applicant to be assessed to establish what further work he needed to undertake: once that had been established, he would have been transferred to a prison where he could do the necessary work. The Applicant persisted in refusing to engage in the assessment, so matters never progressed any further.

**Decision**

59. For the reasons set out above I cannot find that there is any basis for a conclusion that there was any procedural unfairness or that the OHP's decision was in any way irrational within the meaning explained above. I must therefore refuse this application for reconsideration.

60. The Applicant points out that another prisoner who had a bad record of substance abuse and disciplinary offences has been released on licence. He feels that it is unfair that he has not also been released. However, each case must be decided by looking in detail at all the facts of that case and applying the statutory test for

release. All cases are different, and the outcome of another prisoner's case has no bearing on the Applicant's.

61. Everyone who has been involved in this case has been anxious to help the Applicant to progress and return to the community, but his own attitudes have prevented him from taking advantage of the help which is on offer. The difficulty lies in his mental health difficulties, which he does not understand.

62. He told the OHP: *"I don't have mental health problems, but the professionals say I do. The judge said I have no mental problems, so they can't say I have now."* That is a complete misunderstanding of the position. Mental health problems are of two kinds, mental illnesses (depression and schizophrenia, for example) and problematic personality traits. Either of those problems can impact on a person's attitudes and behaviour and the manageability of his risk. The Applicant does not have any mental illness, but he clearly does have problematic personality traits of various kinds which are familiar to Psychiatrists and Psychologists.

63. The judge may well have said that the Applicant did not suffer from any mental illness (which might have made him "unfit to plead" or made it appropriate to make a hospital order instead of imposing a prison sentence). However, the judge was well aware from the reports available to her that he had other mental health problems. She referred in her sentencing remarks to probation's belief that the Applicant would pose a high risk to the public unless he received the right treatment for his mental health (and alcohol) issues.

64. During his sentence, professional assessments have been made to identify the various types of problematic personality traits which the Applicant has. They are all traits which have clearly impacted on his behaviour in prison and are likely to impact on his behaviour in the community unless he learns to manage them. Treatments are available to enable him to do so and thus to reduce his risk to the public. Unless he is prepared to be assessed to determine the best form of treatment to assist him, and then to engage in the appropriate treatment, it is unlikely that he will be able to evidence the reduction in risk which is necessary if the Board is to be able to direct his release on licence or to recommend a progressive move to an open prison. He would therefore be well advised to agree to an assessment and any treatment recommended.

**Jeremy Roberts**
**14 December 2020**