[2020] PBRA 72

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Application for Reconsideration by Rehman

Application

1. This is an application by Rehman (the Applicant) for reconsideration of a decision of an oral hearing panel (the OHP) dated the 27 April 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 Oral Hearing Decision Letter (the Decision Letter)
   - The Application for Reconsideration dated 16 May 2020, drafted by counsel
   - The Dossier, which is identical to that considered by the OHP with the addition of the Decision Letter

   I have also, as appears below, listened to part of the recording of the final day of the hearing in order to resolve a factual issue raised in the Application

Background

4. The Applicant was born in 1989. On 12 January 2007 he was sentenced at the Central Criminal Court for possession of a firearm with intent to cause fear of violence and for unlawful wounding. He was then 17. The facts were that immediately after a court appearance for possession of cannabis with intent to supply he went to collect a drug debt. He was armed with an air pistol which he pointed at the victim's face and pressed the trigger. The Sentencing Judge accepted that he did not believe the weapon was loaded. It was, and a pellet lodged in the victim's face. He was sentenced to Detention for Public Protection with a minimum term of 301 days, based on a notional term of 30 months.

5. The Applicant had previous convictions: attempted robbery when he was 14; 2 street robberies when he was 15; and possession of an imitation firearm with intent to cause fear of violence when he was 16. On that occasion he fired plastic pellets from a gun in a fast-food restaurant. On 3 August 2006, the day

of the index offence, he was fined for possession of cannabis with intent to supply.

6. On 10 March 2010 the Applicant was released on licence. On 3 April 2012 he was recalled, having left the United Kingdom, and therefore, obviously, ceased to comply with his licence conditions. He was unlawfully at large until he was returned to custody on 3 January 2019.

7. The evidence is that having left the country he went to Pakistan, where he settled with his family, worked and married. However, in October 2013 he was arrested in the Netherlands and later convicted of possession of €120,000 as a preparatory step to drug purchase. Before that conviction he was bailed on 12 December 2013. At some point he returned to Pakistan: there is nothing to suggest he was in breach of his bail in so doing. He returned to the Netherlands in August 2014, and on 11 August 2014 he was arrested for possession of a firearm and ammunition, possession of 1 kilogram of hemp (cannabis), and possession of 242 grams of cocaine. The Netherlands court regarded the drugs offences as what in the United Kingdom would be possession with intent to supply. The firearm was a Biretti (*possibly misprint for Beretta*) pistol with 12 7.65mm Browning cartridges. He was convicted of those offences after a trial in November 2014, and his appeal against the convictions was dismissed on 11 August 2015. In September 2015 he was convicted of the offence involving the €120,000, again after a trial. For the drugs and firearm offences he received a 15 month sentence of imprisonment, and for the money offence a further 6 months. The conviction for the money offence is still under appeal, even though nearly 5 years have passed. The money was confiscated.

8. The defence to the firearms offence was that he had never been in possession of the firearm. His factual defence to the cocaine offence (technical defences were also raised) was that the cocaine, though found in a hostel locker to which he had the key, was not his. His defence to the money offence was that he had the money to buy agricultural machinery for export to Pakistan. All those defences were rejected by the Netherlands courts.

9. According to the Application, the Applicant returned to Pakistan, having served his sentences, in September 2015. He then returned to the Netherlands in November 2017, returning to Pakistan in February 2018, and then went to the Netherlands again from August to October 2018.

10. On 1 January 2019 he was arrested in Scotland. He had travelled from Pakistan via Belgium, then to Eire and Northern Ireland before reaching Scotland. He was convicted of attempting to pervert the course of justice and sentenced to 8

months' imprisonment. He was then transferred to the prison system of England and Wales on 15 May 2019 having served his sentence.

Request for Reconsideration

11. The application for reconsideration is dated 16 May 2020.

12. I summarise the grounds for seeking a reconsideration as follows:

I. <u>Irrational assessment of the Applicant's risk</u>

The OHP erred in three principal respects in assessing the Applicant's risk

(i) **Risk of re-offending and imminence of risk**: given the OHP's findings, the Applicant's risk and the imminence of that risk fall below the threshold that justifies continuing detention – see **Sturnham [2013] UKSC 23 and Wells 2019 EHWC 2710 (Admin)**.

(ii) **The Netherlands convictions**:

- The OHP was wrong to reject the Applicant's evidence that he disclosed his cocaine conviction to the prison psychologist. The prison psychologist accepted in evidence that the Applicant had disclosed this conviction to him. This is a factual dispute as to the evidence the OHP heard.
- The OHP placed too much weight on the Netherlands convictions and the failure to disclose them, particularly in the light of the psychologists' views that they did not demonstrate an escalation in risk. The OHP did not provide any reasons for departing from the witnesses' assessments.

(iii) **Risk factors**: it is irrational for the OHP to conclude that the fact that an accurate assessment of the Applicant's risks cannot be completed is a barrier to his release. The OHP's findings include an assessment of risk. The professional witnesses did not suggest any outstanding treatment needs, except for the possibility of a training course addressing decision making and better ways of thinking, which the OHP rightly rejected as not relevant. The OHP failed to consider the opinion of the psychologist instructed on behalf of the Applicant that there was no evidence of the Applicant's involvement in organised crime, and, even if there were, the risk management strategies would be the same.

II. <u>Irrational conclusion on sufficiency of the risk management plan (the RMP)</u>

It was irrational for the OHP to conclude that the RMP was insufficient to manage the risk without adjourning for the RMP to be put into place or for further information. The OHP's reasoning emanates solely from the practicalities of restrictions resulting from the Coronavirus pandemic.

Current parole review

13. This was the first parole review following the Applicant's return to custody. The application was for release. The OHP first met to consider the case on 21 October 2019 and adjourned for information from the courts in the Netherlands about the Applicant's convictions and sentences in 2015. The panel reconvened on 29 November 2019. Due to issues at the prison there was little time for the hearing. The panel started to hear evidence from the Applicant but was obliged to adjourn when the Offender Manager had to leave. The OHP still needed further information about the Netherlands convictions, and also considered that a psychological assessment should be conducted to assess the Applicant's risks and identify whether further core risk reduction work was required. The hearing resumed and concluded via video link on 23 April 2020, due to the coronavirus pandemic.

14. The Applicant was represented by a lawyer throughout the proceedings. The Offender Manager (OM) gave evidence at all three hearings. The Offender Supervisor (OS) gave evidence at the first two hearings. The Prison Service Psychologist and the Independent Psychologist gave evidence at the third hearing. The Applicant gave evidence at the second and third hearings. The Prison Offender Manager (POM) gave evidence at the third hearing, which was observed by the Applicant's new POM.

15. The OHP had access to a dossier containing 508 pages, all of which were disclosed to the Applicant.

The Relevant Law

16. The panel correctly sets out in its decision letter dated 27 April 2020 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019

17. 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

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. 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.

24. 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.*"

The reply on behalf of the Secretary of State

25. The Secretary of State has neither responded to the Application nor sought to make any representations.

Discussion

26. The Application is couched in terms of irrationality. Ground II (see Paragraph 12 above), the decision not to adjourn for clarification of or further information about the practicability in the circumstances of effectively operating the RMP, might be put under the heading of procedural unfairness. However, I accept the Applicant's formulation of irrationality as covering the real issue on both Grounds.

27. It seems to me that the sensible starting point is to consider whether the OHP's approach to the Netherlands convictions is irrational in the sense discussed above. The Applicant, as the OHP noted, maintains his innocence of the offences of which he has been convicted. The panel therefore concluded that it was unable accurately to assess the risk factors associated with that offending, as it had no information as to how the Applicant came to be in

possession of a loaded gun and a significant amount of drugs; who the Applicant's associates were and what his intentions were. Given the Applicant's possession (not all at the same time) of a significant amount of money, a loaded firearm and cocaine for the purpose of onward supply, the OHP concluded that the Applicant clearly had links to criminal associates in that country, and that financial gain is likely to have been his primary motivation.

28. Those were conclusions to which the OHP could properly come on the evidence. The panel was also entitled to conclude, in the light of the Applicant's denials of the offences of which he had been convicted, that he was not a reliable witness. They were entitled to take their own view of the facts of those cases, and the explanations the Applicant gave, and assess his reliability and frankness accordingly. It is noteworthy that the Applicant did not disclose any of these convictions to the professionals dealing with him until his Offender Manager confronted him with them in September 2019, at which time he claimed that all the convictions were still under appeal.

29. The Prison Service Psychologist did not consider that the possession of a loaded firearm and a significant amount of cocaine demonstrated an escalation in the Applicant's risks, as he had already taken drugs and weapons into account within his risk assessment. The OHP was not obliged to accept that assessment. The OHP agreed with the Independent Psychologist that a training course addressing decision making and better ways of thinking was not needed in prison, as the Applicant had completed such a course before. However, the OHP did not agree that there were no outstanding treatment needs: the panel considered that a definitive finding about that could only be made if the needs or areas of risk were known. The panel made it clear that they disagreed with the Independent Psychologist's opinion that there was no evidence of the Applicant's involvement in organised crime. The facts of the Netherlands offences are a sufficient evidential basis for the panel's conclusion.

30. All of these were conclusions that were properly available on the evidence. The OHP expressed agreement with the assessment that an offender with the Applicant's risk profile presented a medium risk of re-offending within a two year period, a medium probability of violent re-offending and a medium probability of non-violent re-offending. The assessment tool used by the psychologists indicated that the Applicant presented a medium risk of general violence, and the OHP accepted that assessment. The panel also accepted the Offender Manager's assessment that the Applicant presented a high risk of harm to a known adult and the public and a low risk of harm in other areas.

31. However, the panel's ultimate conclusion was that management of the Applicant's risk depended on an understanding of his offending, including the Netherlands offences, and that further core risk reduction work was necessary

in the light of his escalation in offending. Given the persistence of his offending in relation to firearms, and its connection with drug dealing both at the time of the index offence and (in much more serious circumstances, when he was an adult) in the Netherlands offences, that was not an irrational conclusion for the OHP to have reached. The OHP could properly conclude that the level of risk presented by someone who carries a loaded firearm while involved in the drugs trade is sufficiently substantial to cross the threshold for continuing detention.

32. The foregoing discussion deals with all the matters raised under Ground I except the factual issue as to whether the Applicant told the Prison Service Psychiatrist about his conviction for possession of cocaine (held by the Netherlands courts to have been with intent to supply). I have listened to the recording of the hearing to help me decide the factual issue. I undertook this task as a matter of thoroughness and out of courtesy to all concerned, including the OHP and the Applicant and his lawyers.

33. The assertion in the Application is factually incorrect. The Prison Service Psychologist told the panel that during his interview with the Applicant cocaine was not mentioned at all. The first he knew of it was during the panel hearing on 23 April 2020, and he took advantage of a recess in the proceedings to consider its effect on his assessment.

34. I cannot understand how the assertion in the Application came to be made. The Applicant's legal representative questioned the Prison Service Psychologist on the basis that there was reference in the dossier to the cocaine, but the Prison Service Psychologist in preparing for the interview overlooked it and so did not raise it with the Applicant. The legal representative specifically put that as a possibility to the Prison Psychologist in an attempt to weaken any suggestion that the Applicant deliberately concealed this conviction. The Prison Service Psychologist said that was one possibility. It was not suggested to the witness that the Applicant said anything to him about his cocaine conviction.

35. I do not find irrationality in any of the OHP's conclusions which are criticised in Ground I of the Application.

36. I now turn to Ground II.

37. The OHP considered an adjournment for a Risk Management Plan to be put into place. It decided that bearing in mind the concerns the panel had about the Applicant's honesty, reliability, credibility, and increasing risks and the need for further assessment for core risk reduction work adjournment could not be justified. The panel commented that any adjournment would be for an indefinite period given the uncertainty about when the coronavirus pandemic lockdown would end.

38. I do not read the Decision Letter as asserting that the sole reason the OHP considered the RMP to be inadequate was the practicalities of the restrictions resulting from the pandemic. The foregoing paragraph of this Reconsideration sets out their reasoning, which was very clear. It was not irrational or procedurally unfair to refuse to adjourn

Decision

39. 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.

Patrick Thomas
2 June 2020