[2022] PBRA 175

the Parole Board
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Application for Reconsideration by Hayles

Application

1. This is an application by Hayles ('the Applicant') for reconsideration of the decision of a panel of the Board ('the panel') which on 7 November 2022, after an oral hearing on 4 November 2022, issued a decision not to direct his release on licence.

2. I am one of the members of the Board who are authorised to make decisions on reconsideration applications, and this case has been allocated to me.

Background and history of the case

3. The Applicant is aged 34. He is serving an extended determinate sentence ('EDS') for conspiracy to commit robbery and possession of an imitation firearm with intent to commit an indictable offence ('the index offences'). This sentence was imposed on 7 August 2015. It comprised a custodial term of 9 years and a licence extension period of 4 years.

4. The Applicant became eligible for early release on licence on 19 December 2020. If not released early by direction of the Parole Board, he will be automatically released on licence in December 2023. His sentence will not expire until December 2027.

5. From an early age the Applicant became involved in criminal and gang-related activity. Before the index offences he had accumulated a substantial criminal record and had served four custodial sentences in Young Offender Institutions. The last of those was a 5-year sentence imposed in November 2009, when he was still only 20 years old, for offences similar to the index offences.

6. In November 2014, within quite a short time of his release from that 5-year sentence, the Applicant (in company with a much older man) began to commit the series of robberies which formed the basis of the conspiracy charge. Both men pleaded guilty to that charge and to the associated imitation firearm charge. The sentencing judge described the robberies (of which the Applicant was known at that stage to have been involved in five) as follows:

> *'Each of the robberies were well planned and ruthlessly executed, you travelling up from your address to commit these offences. You had obtained a hire car in order to provide yourselves with the transport. You wore disguises. You targeted vulnerable shops, post offices and a bookmaker over a period of about a month.'*

7. It would seem that while the Applicant was serving his present sentence evidence emerged that he and his co-defendant had been involved in three more

robberies of a similar kind during the period of the conspiracy. They were both charged with those offences. They pleaded guilty to them and each received a concurrent 10-year determinate sentence.

8. The Applicant clearly had deeply entrenched criminal attitudes and was undeterred by the 5-year sentence from continuing a life of serious crime. He had completed an accredited thinking skills programme during that sentence but that also had little impact on him. It was evident that, if he was to be released early from his current sentence, he needed to undertake (and to complete successfully) further work of an appropriate kind to reduce his risk to the public.

9. The Applicant's case was first referred to the Parole Board in 2020. It was considered in November 2020 by a panel ('the 2020 panel') which decided on the papers not to direct his early release on licence. His record of behaviour in prison had not been good, and he had had to be moved from one prison to another on several occasions. He had not completed any further accredited offending behaviour programmes (he says that he had embarked on two but had not completed them).

10. A psychological risk assessment had been carried out and it was recommended that he should be assessed for a high intensity treatment programme. He had expressed a willingness to engage with that process. The 2020 panel pointed out that the work which he was willing to undertake would help him to explore his offending, to understand his behaviours and to manage his risks in the future. It also pointed out that after completing the work he would need to consolidate his learning and allow time for testing. Hopefully, that panel pointed out, he might be able to practice skills from any interventions completed, so as to ensure that they were properly embedded and would help to stop him from offending in future.

11. In June 2021 the Applicant's case was referred again to the Board, and in due course an oral hearing was directed.

12. Unfortunately, for a variety of reasons the Applicant had been unable to complete the high intensity work which had been recommended and which he had been willing to undertake. Those reasons included:

    (1) The COVID pandemic and the restrictions necessarily imposed as a result of it: risk reduction programmes were suspended and, when they were resumed, there were long waiting lists and priority was given to prisoners assessed as posing the highest risks;

    (2) The statistical method used by probation to assess the risk of an offender committing future violent-type offences. This is based on the number of the offender's convictions for offences of that type. It is then used by the prison service to assess the prisoner's suitability for programmes in prison: in the Applicant's case the statistical assessment indicated only a medium probability of proven violent-type re-offending when the reality clearly was (and is) that that probability is significantly higher.

(3) Further instances of poor behaviour on the Applicant's part in prison, one of which resulted in his being moved in December 2021 to a prison with a higher security categorisation. He was alleged to have assaulted several prison officers, and the matter was referred to the police for investigation (which is still ongoing).

13. The hearing was listed to take place on 4 November 2022. On 28 October 2022, the Applicant's solicitor requested that it should be adjourned. He explained that the Applicant had recently enrolled on the same thinking skills programme which he had completed during his 5-year sentence. He suggested that the hearing should be adjourned until February 2023 to allow him to complete that programme and consolidation exercises and to participate in a post-programme review.

14. The thinking skills programme was only suggested now by the prison programmes team because (a) on the basis of the Applicant's statistical risk assessment (see above) he was deemed unsuitable by the treatment manager for the high intensity programme originally recommended and (b) an alternative programme which was then proposed in its place had been discontinued.

15. The panel chair refused the application for an adjournment but stated that it could be renewed after the panel had taken evidence at the hearing, and if the panel considered that successful completion of the thinking skills programme was pivotal to its decision it would adjourn at that stage.

16. At the start of the hearing the solicitor renewed the application for an adjournment. It was again refused but the panel chair invited the solicitor to renew it after the taking of evidence. Oral evidence was then taken from the Applicant and three professional witnesses, namely: - the official responsible for supervising the Applicant at his present prison (Ms A); - the official responsible for supervising him at his previous establishment (Ms B); and - the official prospectively responsible for supervising him in the community (Ms C).

17. As part of his closing submissions to the panel the solicitor again renewed his request for an adjournment. The panel chair stated again that, if on consideration of the evidence the panel considered that successful completion of the thinking skills programme was pivotal to the decision, it would adjourn as requested.

18. Having thoroughly considered the evidence the panel decided that completion of that programme was not pivotal to its decision. It stated in its decision:

> *'Although the panel considers that [the Applicant] is likely to benefit from undertaking [that programme], it does not consider that successful completion will have a sufficient impact on risk reduction to make release safe. In consequence the panel does not consider that it needs to adjourn pending completion of the programme …*

The panel is satisfied that taking into account the extent of [the Applicant's] violent acquisitive offending, and his poor custodial behaviour for much of his sentence, he has not addressed his risk factors sufficiently to reduce risk to a level that warrants release. Based on the written and oral evidence, the panel is satisfied it remains necessary for the protection of the public for [the Applicant] to remain detained.'

The Relevant Law

The test for release on licence

19. The test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public.

The rules relating to reconsideration of decisions

20. Under Rule 28(1) of the Parole Board Rules 2019 (as amended in 2022) a decision is eligible for reconsideration if (but only if):
    (1) It is a decision that the prisoner is or is not suitable for release on licence and
    (2) One of more of the following three grounds is established:
        a) it contains an error of law and/or
        b) it is irrational and/or
        c) it is procedurally unfair.

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

22. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. It is made on both grounds (irrationality and procedural unfairness).

The test for irrationality

23. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, (the "Worboys case"), the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It stated at paragraph 116 of its decision:

    "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."

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

25. The Administrative 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 Board in making decisions relating to parole.

26. The Parole Board, when deciding whether or not to direct a reconsideration, adopts 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 cases in the courts 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, for example, **Preston [2019] PBRA 1**.

The test for procedural unfairness

27. 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 focuses on the actual decision.

28. The kind of 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.

29. The overriding objective in any consideration of a prisoner's case is to ensure that the case is dealt with fairly.

The request for reconsideration in this case

30. The solicitor, in his concise and helpful representations, makes his points under two headings: (1) the incorrect process was followed and (2) the decision was irrational. His detailed points will be discussed below.

The Secretary of State's position

31. By e-mail dated 17 November 2022 the Public Protection Casework Section ('PPCS') on behalf of the Secretary of State stated that he offers no representations in response to the application.

Documents considered

32. I have considered the following documents for the purpose of this application:

(i) The dossier provided by the Secretary of State for the Applicant's case, which now runs to page 303 and includes a copy of the panel's decision letter;

(ii) The representations submitted by the Applicant's solicitor in support of this application; and

(iii) The e-mail from PPCS stating that the Secretary of State offers no representations in response to the application.

Discussion

33. The solicitor's essential complaint is that the panel should have adjourned the hearing instead of issuing a decision adverse to the Applicant. That complaint is made both on the ground of procedural unfairness and on the ground of irrationality. The arguments deployed under each heading will be discussed in turn.

Submission 1: Incorrect process/procedural unfairness

34. The solicitor submits that the panel should have adjourned the hearing and that its failure to do so resulted in a risk assessment which was procedurally unfair in that (a) it was made whilst the Applicant was still engaging in an accredited offence-focussed intervention so the panel was unable to assess his level of progress, engagement, or improved levels of insight and (b) there was not a fully prepared risk management plan.

35. As regards argument (a), I have carefully examined the whole of the evidence in the dossier and the summaries of the oral evidence which are contained in the panel's decision and in the solicitor's representations. Whilst I have considerable sympathy with the Applicant. I cannot avoid the conclusion that the panel was fully entitled to its view that completion of the thinking skills programme (however successfully) would not be effective to reduce the Applicant's risk to a level at which early release could be justified.

36. Accredited programmes are of different kinds and designed to address different needs. The Applicant's needs are complex and substantial: the psychologist who assessed the Applicant's case in August 2020 and the 2020 panel which considered the case later that year were both clearly of the view that a high intensity programme designed to target the Applicant's risk of future violent offending was required. The present panel concluded that that remains the position and I can see no reason to disagree with that conclusion.

37. It is most unfortunate that the combination of circumstances to which I have referred in paragraph 12 above has, largely for reasons outside the Applicant's control, prevented him from being able to access a programme of the kind which he needs. It is particularly unfortunate that in January of this year he was found to be unsuitable for such a programme because of the statistical risk assessment, which I am satisfied understates his actual risk of future violent offending.

38. A 'clinical override' can sometimes be applied to enable a prisoner to complete

a programme where his statistical risk assessment suggests that he is unsuitable for that programme but he clearly needs to complete it. The solicitor states (and of course I accept) that in her evidence at the hearing Ms A, having confirmed that the Applicant had been deemed unsuitable for the high intensity programme which had previously been recommended, stated that *'any clinical override would have therefore been considered at this juncture'* and that the high intensity programme was *'taken off the table'* (i.e. removed from the Applicant's sentence plan) and the thinking skills programme was added to the sentence plan in its place.

39. I have not seen any evidence that anybody did in fact consider a clinical override, but even if they did and rejected it the panel was not bound, when assessing the Applicant's risk and its manageability in the community, by the views or actions of officials in the prison service. The very experienced panel was fully entitled on the evidence to conclude, as it did, that successful completion of the kind of high intensity programme previously recommended was necessary to reduce the Applicant's risk of serious harm to the public to a level at which early release could be directed.

40. I appreciate that this conclusion was extremely disappointing to the Applicant, but it was the panel's responsibility to make its own assessment of his risk and its manageability on licence in the community. It is unfortunate that for the reasons explained above the Applicant has not thus far been provided with the opportunity to undertake the kind of programme which he requires. Situations of this kind have not been uncommon during and after the pandemic.

41. As regards argument (b), in the light of the panel's reasonable conclusion that the Applicant's risk remained too high to be manageable in the community, there would have been no benefit in adjourning the hearing for a fully developed risk management plan to be formulated. If there had been an adjournment the panel's eventual decision would clearly have been the same: the adjournment would merely have resulted in prolonging this review of his case and delaying any opportunity for him to engage in a more effective programme to reduce his risk.

42. In all of these circumstances, despite my sympathy for the Applicant I am afraid I am not persuaded that an incorrect process was followed or that there was any procedural unfairness.

Submission 2: Irrationality

43. There is necessarily an overlap between the solicitor's submissions on procedural unfairness and those on irrationality: he submits that adjourning the hearing was both procedurally unfair and irrational. I will now address the points which I have not addressed under the heading of procedural unfairness.

44. The solicitor draws attention to a number of pieces of evidence given by the professional witnesses which he submits should have led the panel to adjourn the hearing. He therefore submits that the panel's decision was irrational.

45. Ms A told the panel that it was encouraging that the Applicant had started the thinking skills programme, that he had received positive feedback from the facilitators and that he had not accrued any proven adjudications since arriving at his present prison in December 2021.

46. Ms B told the panel that, when the Applicant was at his previous prison, she had been able to deliver individualised victim awareness material to him; feedback was encouraging; he was able to reflect on his behaviour and had learnt that his actions had consequences; and he was also able to demonstrate appropriate insight into his risk factors and triggers.

47. Ms C told the panel that she had had little contact or interaction with the applicant since taking on his case in May 2022 but she felt that the thinking skills programme would definitely address factors associated with his offending, in particular impulsivity and consequential thinking. However, without having access to the post-programme report she was unable to say definitively whether the applicant's risk had sufficiently reduced.

48. These pieces of evidence were of course encouraging, but I am afraid that none of them leads me to regard as irrational the panel's view that successful completion of a higher intensity and appropriately targeted programme than the thinking skills programme was needed if it was going to be possible to say that the Applicant's risk had been reduced sufficiently to justify early release on licence. I cannot agree that the panel's decision was premature or its findings irrational (as suggested by the solicitor).

Decision

49. For the reasons explained, I am unable to accede to this application for reconsideration. It is of course a matter for the Secretary of State to decide what steps should now be taken to enable the applicant to reduce his risk to a safe level before his is automatically released on licence in a little over a year's time. The Secretary of State may consider that it would be in the best interests of the public as well as the Applicant for him now to be offered the opportunity to engage in a higher intensity programme than he has been offered thus far.

Jeremy Roberts

14 December 2022