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[2022] PBRA 65

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 (the panel) dated the 11 April 2022 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 written decision reasons ('the reasons') dated 11 April 2022; a request for reconsideration in the form of written representations from the Applicant's legal representative dated the 20 April 2022; and the dossier, now numbered to page 329, of which the last document is the Decision.

Background

4. The Applicant is now 43 years old. On 19 March 2019, when he was 40 years old, he received an extended sentence comprising of 5 years custodial element and a 3 year extended licence period and a concurrent determinate sentence of 12 months imprisonment. The sentence followed the Applicant's conviction for offences of Attempted Robbery and Possession of an Offensive Weapon (the Index Offences).

5. The Applicant had numerous previous convictions including a Robbery in 2010 where he was sentenced to 8 years' imprisonment.

6. The Applicant became eligible to be considered for release by the Parole Board on 9 March 2022. In anticipation of that eligibility, his case was referred to the Parole Board by the Secretary of State on 4 June 2021 and this was the first review of his case.

7. On 9 November 2021, the Applicant's case was considered on the papers by a single member of the Parole Board and an oral hearing was directed. The oral hearing took place on 28 March 2022. The panel heard evidence from the Applicant's probation officer in the community and the officer responsible for his case in custody. The Applicant also gave evidence to the panel.

8. If not released by the panel, the Applicant would otherwise be released automatically on 8 November 2023 at the conditional release date of his sentence, unless released following a further review by the Parole Board. In its reasons, the

panel noted the support for release from the witnesses at the oral hearing, however, it disagreed with the recommendations made and did not direct his release.

Request for Reconsideration

9. The Applicant's grounds for reconsideration are:

a) The decision was irrational because the panel erred in finding the proposed risk management plan ('RMP') insufficiently robust;
b) The decision was irrational because irrelevant and incorrect information was relied upon in formulating the risk assessment;
c) The decision was irrational because an unreasonable amount of weight was placed on intelligence reports provided by the prison;
d) The decision was irrational because the panel failed to take into account relevant material relating to the reduction of risk following the successful completion of an offending behaviour programme and work to address substance misuse;
e) The decision was irrational as the panel did not apply the test for release properly; and
f) The decision was procedurally unfair and irrational as the panel failed to give sufficient reasons as to why witness recommendations were not followed.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 11 April 2022 the test for release.

11. 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

12. In **R (on the application of 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."

13. 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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

14. 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

15. 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.

16. 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.

17. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Other

18. 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*."

19. 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.

20. 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. However, if a panel were to make a decision contrary to the opinions and recommendations of all the 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** and **Stokes [2020] EWHC 1885 (Admin).**

The Reply on behalf of the Secretary of State

21. The Secretary of State confirmed by way of email dated 12 May 2022 that he did not wish to make any representations in response to the application.

Discussion

22. The grounds as set out above are in the order given within the application for reconsideration. There is cross over with regards to some of the grounds raised. For reasons which will become clear I have not needed to address each ground raised in specific terms.

23. As already stated, panels of the Board are not obliged to accept the recommendations of professional witnesses. It is the responsibility of a panel to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence presented to it and to decide what evidence it is able to accept and what evidence it cannot accept. However, having reached conclusions upon the evidence it is clear that a panel is then required to explain its reasons, especially if they are going to depart from the recommendations made by experienced professionals. A panel can rationally depart from expert evidence, but a rational explanation for doing so must be given and it must ensure as best it can that its stated reasons are sufficient to justify its conclusions. The importance of giving adequate reasons in decisions of the Parole Board has been made clear in case law as set out above.

24. The Applicant seeks to persuade me that the panel did not explain its reasons sufficiently and made some leaps in its reasoning by placing too much weight on unproven matters and failing to give sufficient weight to other matters.

25. Parole Board panels are often faced with information within dossiers about wider allegations of criminal and/or risky behaviour. These can include, as was the case here, allegations which never resulted in charge, allegations where there is an outstanding court trial to be held and allegations made within security reports. The Parole Board has issued Guidance on Allegations to apply in these circumstances. This issue has also been addressed within recent case law. In the case of **Pearce [2022] EWCA Civ 4**, the Court of Appeal considered wider allegations made against the prisoner which did not result in criminal conviction and the ruling made the following points: on a proper construction of the law, in order to take allegations of wider offending into account, they need to be based on facts, so panels need to

examine the evidence to see if they can find any factual basis for the allegation (such as who was present, where they were, what happened). If the panel is in a position to make a finding of fact about the allegation, it can do so, but if not, it must be careful not to go further than the background facts will allow. This is because it must be careful not to adopt a 'no smoke without fire' approach.

26. It is unfortunate in this case that the panel did not make reference to either guidance or case law so it is not clear how it approached each of the allegations and whether it identified any of the security/intelligence entries in this case as allegations over and above 'rule breaking'.

27. The panel noted in paragraph 1.6 of its decision that there were domestic abuse and sexual allegations which did not result in conviction. However, there is nothing within its reasons which indicates that the Applicant was asked about any of these allegations to give him the opportunity to offer his side. As the application confirms, the Applicant's probation officer in the community had also not asked the Applicant about these matters. The panel did not set out any findings or reasons why weight was attached to the allegations, but it is apparent that they were a significant element to its decision given its conclusion in paragraph 4.3 that, '*The panel also considered that personal relationships remaining an unexplored and potentially serious risk bearing in mind the historic references to instances of domestic violence and other allegations regarding sexual offending including against children. [The Applicant] was recalled to custody in July 2017 for alleged assault of his then partner. An indefinite Non-Molestation Order remains in place*.' Although I do not necessarily accept, as the Applicant submits, that relying on these matters was irrational because the information was either irrelevant or incorrect, I do consider it to be procedurally unfair to place weight on allegations which have not resulted in conviction without giving the Applicant an opportunity to address them. It is incumbent on a panel to give the Applicant a fair hearing and to inform him of the case against him. By failing to ask him about these matters, it would seem to me that the Applicant and his legal representative may have understandably drawn the conclusion the panel was not concerned by them or did not intend to place much weight on them and therefore did not introduce the issue themselves.

28. The panel's reasons included discussion around the security/intelligence reports from custody, particularly those rated as 'High'. It is apparent from paragraphs 2.4 and 2.9 of the reasons that the Applicant was asked about some of these entries. The Applicant made some admissions in relation to some entries. He went on to explain that others related to him sharing a cell and having no control over the behaviour of cell-mates as well as other misunderstandings. The officer responsible for managing his case in custody expressed concern to the panel about the number and *"reliability"* of the security entries but does not appear to have been asked about how a rating of 'High' is reached on a security report in this particular prison generally or specifically regarding the entries the panel was concerned by, which can often be significant as it does not always mean it is wholly reliable. The Applicant's probation officer in the community was also asked about the entries and stated that the majority of the reports had no outcome and so it was difficult

to have a firm view on the security reports, but the witness accepted there was a high number of entries and is quoted as saying "*so maybe there is an issue*" (paragraph 2.9). However, the reasons do not record any specific finding(s) of fact made by the panel with regards to entries.

29. It is clear from the panel's reasons that it applied significant weight on security/intelligence reports. It is cited as the one and only reason why the panel reached its conclusion that the Applicant would not comply with the requirements of supervision on licence (paragraph 3.6). It is also a specific part of the conclusion with the panel stating at paragraph 4.2,

    '*The panel listened to his accounts of his behaviour and was concerned about the number and nature of these, the credibility of a number of his responses, and his lack of honesty and openness, that resulted in the panel assessing that he may not comply should he be released into the community as had occurred previously in 2017. The panel was not reassured as to the extent to which his family would be protective.*'

30. Furthermore, despite the panel noting he had completed an accredited offending behaviour programme, had "*demonstrated insight*" and "*there was nothing presented in oral evidence or read in the dossier to indicate that he would be an imminent risk of serious harm*", the panel then relied on his "*behaviour*" as evidence he did not have the internal skills to manage his risk. Although the panel said "*a number of his responses about his behaviour lacked credibility*", it is not clear to me which responses the panel meant. For example, there was a great deal of exploration about one incident involving the Applicant fighting with another prisoner which then resulted in an adjudication, with both witnesses seemingly of the view that the Applicant was acting to some extent in self-defence, but the panel did not state whether it accepted this analysis or not, nor did it ask to view the CCTV seen by one of the witnesses. In addition, there were recent entries about the Applicant having a pot of marmite and matchstick models and it is not clear whether those were considered relevant or not. I am therefore concerned that, without further explanation, the panel has adopted the 'no smoke without fire' approach that case law warns against.

31. It is also noticeable that, with regards to both the security information and the other allegations of criminal behaviour, the panel referenced his recall on an earlier sentence in 2017 but again, from the reasons given, did not appear to ask him about this time in his life to give him the opportunity to say why matters may be different now. Furthermore, the panel did not explain why it placed so much weight on events from some years ago and why the risk reduction work completed since then (and since some of the security entries) was not sufficient to address concerns.

32. In terms of other conclusions, the panel draws, I also have concerns that sufficient reasons are not given. At paragraph 3.13 the panel concluded that the risk management plan was not capable of managing the Applicant's risks in the

community, but the panel did not say why it reached that conclusion. It is not clear whether the panel asked the current probation officer in the community about the risk assessments within OASys as the panel appeared to rely on the previous probation officer's assessment (that officer is named in both paragraphs 3.1 and 3.5).The panel detailed the warning signs identified by both the Applicant and his current probation officer but it did not go on to say whether it accepted those and why it did not think the proposed plan would be capable of picking up on them to manage the risk. Within its later conclusion at paragraph 4.4 the panel states that it was "*not convinced by the robustness of [the Applicant's] Relapse Prevention Plan*" but again there is no explanation as to why. The only earlier mention of relapse prevention is when the panel indicated that it will form part of the work to complete on release in supervision sessions. The Applicant argues the panel's conclusion that the risk management plan was insufficiently robust was irrational. Without the panel explaining its conclusions in this regard, I can only agree.

33. The panel states in its reasons at paragraph 2.10 that it concluded the "*interventions and services he appears to have engaged with appear to have had limited impact on several of his risk factors*". Firstly, it is not clear which interventions and services are being referenced, as this paragraph precedes discussion of in cell work and an accredited offending behaviour programme. It is also not clear why the panel says the Applicant "*appears*" to have engaged with them. This suggests the panel may have formed the view the engagement was superficial, but the panel did not explain why it formed that view. It is at odds with a conclusion as noted earlier that the Applicant "*demonstrated insight and spoke very well about his risks"*. It is also at odds with the post programme reports quoted, and the assessments and recommendations from the witnesses. Finally, the specific risk factors to which work has had "*limited impact*" upon are not identified (the panel having earlier identified eight separate risk factors at paragraph 1.8).

34. Both witnesses supported release in this case. The panel correctly records this at paragraph 3.14 but did not continue on within that paragraph (or in any part of its conclusion) to explain why it disagreed with those recommendations. In my view, in accordance with established case law, the panel should have provided more detailed reasoning as to why it disagreed with the recommendations being made in this case, as well as setting out the reasoning behind the findings it made in relation to wider allegations.

35. Given my findings above, I do not propose to deal with the remaining grounds outlined in the Applicant's submissions in any detail as it is unnecessary.

Decision

36. Accordingly, applying the tests as defined in case law, for the reasons discussed above, I conclude that the decision was irrational and procedurally unfair. The application for reconsideration is therefore granted.

37. I have given careful consideration to the question whether this case should be reconsidered by the original panel or whether it should be considered afresh by

another panel. I have no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, there is an important principle which applies to parole hearings as it does to court hearings, that justice should not only be done but be seen to be done. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was wrong. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh panel.

Cassie Williams
24 May 2022