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[2024] PBRA 22

Application for Reconsideration by Hora

Application

1. This is an application by Hora (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 5 July 2022. The decision of the panel was not to direct release.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, and/or (b) that it is irrational and/or (c) that it is procedurally unfair.

3. I have considered the application on the papers. These are the dossier consisting of 639 pages; the Application for Reconsideration submitted by the Applicant's legal representative; and the response by the Secretary of State.

Background

4. On 7 December 2007 the Applicant was sentenced in relation to offences of rape and sexual assault. The Applicant was sentenced to an indeterminate sentence of imprisonment for public protection. The tariff set by the judge was 3 years and 96 days.

5. The Applicant committed the offences upon a family member.

Request for Reconsideration

6. The application for reconsideration is dated 15 July 2023.

7. The grounds for seeking a reconsideration are set out below and listed by way of submissions.

Current parole review

8. This was the Applicant's sixth review by the Parole Board.

Oral Hearing

9. The review was conducted by an independent Chair of the Parole Board, and a psychologist member of the Parole Board. Oral evidence was given by a Prison

Offender Manager (POM), a prison instructed psychologist and a Community Offender Manager (COM). The Applicant was represented by leading counsel.

10. A dossier consisting of 618 pages was considered.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 5 July 2023 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

12. Pursuant to 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)).

13. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

14. 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."

15. 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.

16. 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

17. 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.

18. 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.

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

20. 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.*"

21. 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. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

Adequate Reasons

22. It is well established now, by decisions of the courts, that a failure by a panel to give adequate reasons for its decision is a basis on which its decision may be quashed and reconsideration directed. Complaints of inadequate reasons have sometimes been made under the heading of irrationality and sometimes under the heading of procedural unfairness: whatever the label, the principle is the same. The reason for requiring adequate reasons had been explained in a number of decisions including:
    - **R v Secretary of State for the Home Department ex parte Doody (1994) 1WLR 242;**
    - **R (Wells) v Parole Board (2009) EWHC 2710 (Admin);**
    - **R (PL) v Parole Board and Secretary of State for Justice (2019) EWHC 306;**
    - **R (Stokes) v Parole Board and Secretary of State for Justice (2020) EWHC 1885 (Admin).**

23. The principal reason for the duty to give reasons is said to be the need to reveal any error which would entitle the court to intervene. Without knowing the panel's reasons, the court would be unable to identify any such error, and the parties right

to challenge the decision would not be an effective one. In **Wells** Mr Justice Saini pointed out that the duty to give reasons is heightened when a panel of the Board is rejecting expert evidence.

24. 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.

The reply on behalf of the Secretary of State (the Respondent)

25. The Respondent offered no representations.

Reconsideration grounds and discussion

Grounds

26. The Applicant in this matter has formulated the application by way of narrative and listed submissions. I have therefore dealt with the representations as set out in the various documents submitted to the Parole Board within the application itself by way of summarised submissions as listed below.

Legal context

27. The Applicant in his application has directed the reconsideration panel to fundamental legal principles behind his application. These fundamental principles are, in brief,
    a) That factually incorrect matters may be relevant to a decision which is irrational;
    b) that a panel should not refuse parole solely because a prisoner is denying having committed the index offence; and
    c) that the parole board panel in reaching a decision must consider the evidence of all parties and all the evidence presented to it.

28. These principles are clearly all correct and all relevant considerations in relation to an application for reconsideration.

Submissions

Submission 1

29. The parole board embarked on the hearing without sufficient information. In particular, the parole board did not have a copy of the Applicant's draft release plan and that draft release plan had not been implemented by the authorities.

Discussion

30. The position with parole board hearings is that both parties are at liberty to submit material for inclusion in the dossier. The panel will make its decision based upon the written evidence in the dossier, and any oral evidence taken at any oral hearing. Therefore, the responsibility is upon the relevant parties to upload any information which they might wish the parole board to consider. Additionally, the parole board panel would be acting improperly to reach a decision based on information which was not presented at the hearing.

31. Although the parole board panel may not have had a copy of the Applicant's personally drafted release plan, the panel did have a risk management plan which was referred to by the panel in the decision. The panel's conclusion was that there were further matters which require development in relation to a final risk management plan and further core risk reduction work to be completed. It is clear, however, from the decision that the presence or absence of factors in a release plan was not a material factor in the final decision of the parole board. The Parole Board also heard evidence from the Applicant and were appraised of the Applicant's plans, if released, by way of the oral evidence.

32. In the circumstances, therefore, I do not find that this submission amounts to evidence of irrational decision-making or procedural unfairness.

Submission 2

33. The POM who gave evidence in this case failed to acknowledge the effectiveness of licence conditions when giving evidence to the panel.

Discussion

34. Parole board panel hearings are quasi court like proceedings. Professionals and witnesses provide written evidence by way of reports and are subject to examination. It is incumbent upon the parties to address any issues with the witnesses in examination. The Applicant in this case was legally represented. Witnesses are at liberty to present their views, which may sometimes not accord with the views of either of the parties. It is the role of the panel to reach an objective conclusion upon the evidence presented. The panel were present at the hearing and had the best opportunity to assess the evidence. It is apparent, from the decision itself, that the position taken by the POM, was that further behavioural work was required before consideration could be given to release. The panel were at liberty to accept or reject this view.

35. I am not persuaded that this submission amounts to irrationality in the sense that out above.

Submission 3

36. The Applicant submits that the panel failed to take account of a diagnosis of a psychological disorder, which was evidenced on the dossier.

Discussion

37. Within the panel decision at paragraph 2.9 is a reference to the psychological condition. It is acknowledged by the panel that the Applicant was working with psychological services to reach a psychological formulation in relation to the disorder. That work had not been completed by the time of the hearing. The panel therefore acknowledged the fact that the Applicant was undertaking some work in relation to this disorder but also noted that at the time of the hearing they had been no formal diagnosis.

38. It appears to me that the panel were aware of the existence or concern about the disorder and acknowledged that the Applicant was undertaking work to address the negative consequences of this disorder. This does not appear to me to amount to irrationality in the sense set out above.

Submission 4

39. The Applicant submits that the panel failed to consider a letter which would have contained evidence indicating that offending behaviour work could be addressed in the community.

Discussion

40. As indicated above, the panel decision is based upon the evidence presented to the panel at the hearing. The parties are at liberty to submit any information or documentation they wish to include, in advance of the hearing. The panel's decision could not be based upon the contents of a document which was not part of the evidence presented at the hearing. However, it is clear from the wording of the hearing that the panel fully understood the argument being adduced by the Applicant and his legal representative, namely that any outstanding behavioural work should and could be addressed in the community. That issue was considered by the panel within the hearing itself. The panel clearly disagreed with the contention that the work could be addressed in the community. I do not find that this submission amounts to irrationality in the sense set out above.

Submission 5

41. The Applicant submits that the use of a particular psychological measurement tool used to measure violence was inappropriate. This was because a complainant, in the past, had told the police that the Applicant "had never used violence".

Discussion

42. The decision as to the use of psychological measurement tools is one which is the responsibility of psychologists in preparing their reports and assessments. The assessment of a suitable psychological tool is based upon recognised criteria and is research-based. In this case, the use of a tool which relates to violence was not surprising in the light of the fact that the Applicant had been convicted of offences which involve violence or the threat of violence. The Applicant himself was at liberty to maintain his position of denial of the offending. However, in relation to psychological assessment. The professionals were bound to accept that the convictions were recorded and were the basis upon which future assessments should be made. It is not surprising that the Applicant, having been convicted of offences relating to violence or the threat of violence was likely to be tested with psychological tools addressing violence.

43. In the circumstances, therefore, the use of a psychological tool relating to violence was not in my view, a matter which amounted to irrationality in the sense set out above.

Submission 6

44. The Applicant submits that the parole board failed to take account of the fact that appropriately trained psychologists would be available in the community to undertake the offending behaviour work, which was being suggested by the professionals.

Discussion

45. It is clear from the concluding remarks by the panel that the panel had in mind the submissions by and on behalf of the Applicant that further offending behaviour work should be completed in the community. The Applicant's legal representative submitted that if the Applicant were subject to a clear requirement to notify developing relationships, this would be sufficient to manage the Applicant's risk, pending the completion of a behavioural programme in the community.

46. It appears therefore that the panel had in mind the views of the Applicant and his legal advisers that any behaviour work should, and could be completed in the community. There is no specific reference to the availability or otherwise of psychologists competent to undertake work with the Applicant in the community, although it appears from later submissions by the Applicant that this was an issue which was debated in the hearing.

47. It appears to me that this submission fails not on the basis of whether psychologists are available in the community, but on the basis that the panel's duty was to consider risk and to consider whether it was necessary for the Applicant to remain confined. The panel would be unlikely to be adhering to the statutory criteria in circumstances where they directed release, knowing that core behavioural work was required to be completed. The duty of the panel was to consider whether it remained necessary for the Applicant to be confined which will often be based (in part) upon an assessment of whether the Applicant has undertaken any or sufficient behavioural work before release. For these reasons I do not find that this submission amounts to irrationality.

Submission 7

48. The Applicant submits that the prison instructed psychologist failed to correctly answer questions regarding the possibility of the Applicant undertaking appropriate work in the community rather than in custody.

Discussion

49. The role of the panel, in this case, was to assess the evidence as presented. As indicated in other submissions. The Applicant and his legal adviser had every opportunity to challenge evidence given by witnesses and to comment upon the quality or otherwise of that evidence in submissions. The assessment of evidence is uniquely the role of the panel. I can observe no evidence of the panel failing to assess the evidence as reflected in the detailed and measured decision letter. This submission does not, in my view, amount to irrationality in the sense set out above.

Submission 8

50. The Applicant submits that the Parole Board took account of a historic psychiatric report indicating the diagnosis of a psychological condition and also took account of false information in reports which were provided later.

Discussion

51. The background to this submission is that, some years before the panel hearing, there had been a psychiatric assessment and diagnosis of a psychological disorder. The Applicant disagreed with the diagnosis and by implication, this submission argues that the diagnosis is being unfairly relied upon, many years after it was made.

52. The Applicant correctly indicates that care must be taken in adopting the assessments of professional witnesses, which may have been made some years before. This is particularly relevant to some psychological assessments, which may be based upon tools which rely upon the development of an individual over time. However, some distinction can be made between pervasive and lifelong conditions and assessments, and those which may be susceptible to change over time. It is noted in this case that at the outset of this review (in 2020) the Applicant and his legal advisers had applied for an adjournment to commission independent psychological and psychiatric reports. Those reports were never forthcoming. The Applicant was entirely at liberty to choose whether to embark upon independent assessments or if indeed the independent assessments were made to decide whether they should be disclosed within the hearing. However, the appropriate method of challenging any diagnosis would be by way of a second opinion, possibly by an independent psychiatrist or psychologist. The Applicant had a full opportunity to present any challenge to the earlier diagnosis. In those circumstances I am not persuaded that the panel acted irrationally in taking account of the diagnosis of a condition which would be likely to be lifelong and pervasive. I am not therefore persuaded that this issue amounts to irrational decision-making.

Submission 9

53. The panel failed to take account of the fact that the Applicant was a victim of assault in prison and failed to take account of his achievements in prison over the years.

Discussion

54. In paragraph 2.6 of the panel's decision, the panel indicated that the Applicant's behaviour had been "mixed" since he had transferred in to the current prison. The panel acknowledged that he had received several positive behavioural comments and that he had assisted a member of staff in a difficult situation. The panel also acknowledged that the Applicant had engaged in education and vocational qualifications and that he was an active participant in the chaplaincy and in pursuing an interest in music.

55. The panel however, also indicated, that his employment record was less than optimal and that there had been a need for substantial effort to be made to persuade the Applicant to undertake assessments to progress his prison plan. There had also been various negative entries, one of which resulted in blows being exchanged with another prisoner.

56. The panel made no specific reference to the fact that the Applicant himself, was the victim of assaults in prison.

57. In the light of the fact that the panel clearly had in mind positive factors in relation to the Applicant and recorded them in the decision letter. I am not persuaded that the letter was unbalanced and failed to take account of positive factors or of difficulties in terms of assaults suffered by the Applicant. The letter was a lengthy document which clearly considered a number of factors relating to the Applicant's risk and any evidence supporting or not the statutory test. For that reason, I am not persuaded that this complaint amounts to irrational behaviour by the panel.

Submission 10 – Factual errors

58. The Applicant scheduled a number of matters which the Applicant submitted were factual errors in the decision. They are listed below.
    i. Sentence tariff incorrectly recorded – stated as 4 years should have been 3 years and 96 days.
    ii. Applicant's family member did not encourage fighting (when the applicant was child) – the family member supported using self defence.
    iii. The panel failed to consider that acquittals in earlier cases may have been an indicator that the later cases (which resulted in conviction) - were malicious.
    iv. The victim of index offence failed to disclose important evidence at the trial.
    v. At the time of the Applicant's trial, a reporting psychiatrist made an 'offensive' diagnosis, to distract attention away from police misconduct.
    vi. The said psychiatrist's diagnosis was wrong.
    vii. The Applicant was seriously assaulted in prison but the panel misidentified the location of the prison where the assault took place.
    viii. The panel failed to acknowledge that the Applicant's violence has always been in self defence.
    ix. The panel were wrong to find that the Applicant lacked insight.
    x. The panel took account of sexual risk factors, but failed to acknowledge that the Applicant was denying the sexual offending.

Discussion

59. I have considered the above listed submissions by the Applicant relating to mistakes of fact. As indicated above, a mistake in fact may be relevant to reconsideration in certain defined situations. The mistake must be a factual mistake and not one of opinion. Additionally, a mistake of fact must have a material, although not necessarily decisive effect upon the final decision. I have considered the listed issues above. The majority of those issues relate to a difference of assessment and opinion. The panel were entitled to reach their own conclusion about the evidence albeit that their conclusion may not have accorded with the view of the Applicant. Additionally, some minor mistakes of fact (for example, the correct length of tariff) are not issues which, in my estimation are sufficient to have made any material difference to the decision of the panel. I am therefore not persuaded that the matters amount to either procedural irregularity or irrationality in the sense set out above.

Submission 11 - Factual error

60. The Applicant submits that the panel noted adjudications in 2013 and 2014 incorrectly.

Discussion

61. The position relating to the adjudications was that all parties at the oral hearing agreed that there had been no adjudications recorded against the Applicant since

2015. It was therefore acknowledged that there had been a substantial period of time since the last recording of an adjudication. There is no evidence that the panel were relying upon adjudications in reaching their decision relating to release. There is insufficient historical evidence on the dossier to directly investigate the exact dates of earlier adjudications, although it appears that the Applicant does not deny that they were adjudications historically. I am not persuaded that the exact dates of any adjudications in the past, had any material effect upon the decision of the panel. Accordingly, this is not a matter which I consider to be irrational or a procedural irregularity.

Submission 12

62. The panel failed to acknowledge the representations by the Applicant to the Criminal Cases Review Commission, which included an appeal to refer his case to the Court of Appeal.

Discussion

63. The Parole Board's position relating to convictions and appeals is well established. The panel is bound to accept the current court convictions as being correct and relevant unless and until a relevant court concludes otherwise. In the circumstances, therefore, the panel would be acting improperly to take account of applications for appeal hearings which remained unresolved.

Submission 13

64. The panel failed to mention at paragraph 2.7, that the police did not pursue criminal charges in relation to an allegation of assault in the prison.

Discussion

65. I note at bullet point 3 of paragraph 2.7. of the panel's decision letter that the panel indicated, in relation to allegations of fighting, that *"the police declined to take any further action and the adjudication was dismissed"*. It appears to me therefore that the panel did in fact note the fact that this matter was not pursued by the police.

Submission 14

66. The panel failed to name the staff in the prison, who were said to be bullying the Applicant.

Discussion

67. The role of the panel is not to investigate, prosecute or identify behaviour in the prison system by staff or others. It would not have been appropriate for the panel to seek to name and identify prison staff who may have been behaving improperly. The role of disciplining prison staff is a matter for the prison and eventually, if necessary, the police.

Submission 15

68. The panel incorrectly indicated that the Applicant had not been formally diagnosed with a historical psychological disorder, when in fact there had been a diagnosis in 2017.

Discussion

69. I note at paragraph 2.9 of the panel's decision that the panel acknowledged that the Applicant was seeking help in relation to the disorder. The panel's view was that

there was no evidence of a formal diagnosis on record. It seems to me that whether there was a formal diagnosis or not, the panel acknowledged that the psychological disorder was an issue. The panel also acknowledged that the Applicant was seeking help in relation to this disorder. I am not persuaded that this issue is one which is relevant or material in relation to the panel's decision not to direct release.

Submission 16

70. The Applicant submits that the inclusion of a psychological measure in relation to sexual violence was inappropriate as the Applicant takes the view that he is not a risk to females.

Discussion

71. In the light of the Applicant's convictions, although denied by the Applicant, the panel were bound to consider the risk of sexual violence. Psychological tools, used to measure sexual violence, are commonly engaged and are clearly a factor that a panel are bound to take account of in reaching their decision. This is not in my view, an issue which indicates irrationality.

Submission 17

72. The Applicant submits that it was incorrect to record that he declined to engage in a psychological assessment relating to sexual violence.

Discussion

73. The panel noted at paragraph 1.17 that a psychologist who had been commissioned to prepare a report had indicated that the Applicant had declined to engage with the sexual violence assessment. There is clearly a difference of opinion in relation to this issue. However, the panel took the view that the absence of the formal assessment meant that the risk factors and triggers which might be associated with the Applicant's sexual convictions remained unexplained. There was clearly a differing view in relation to this issue. However, the panel were entitled to assess the representations of the psychologist, as against the representations of the Applicant. The panel were also entitled to accept the view of the psychologist if they thought that the representations were reasonable. In the light of the fact that the Applicant also strongly denies any involvement in sexual violence. It would be unsurprising if the Applicant was reluctant to engage in an assessment of sexual violence.

74. I do not find therefore that there is an issue here, which relates to irrationality on the part of the panel.

Submission 18

75. The Applicant submits that the panel failed to accord sufficient weight to submissions by senior counsel who was representing the Applicant.

Discussion

76. At paragraph 4.1 of the panel's decision, the panel summarised the submissions by legal counsel on behalf of the Applicant. In particular, the panel noted that in the view of counsel, the Applicant was now motivated to undertake a further behavioural programme, that they had been no violence proven since 2014 and that licence conditions would support a release into the community.

77. Whilst it is acknowledged that counsel for the Applicant was arguing for the Applicant's release, and the panel did not direct release, the decision letter indicates that the panel took account of the representations by counsel on behalf of the Applicant. The panel pointed out in their decision that they assessed that core risk reduction work remained necessary in the area of both general violence and sexual violence. The panel indicated that they had considered the risk management plan which had been alluded to by the representations of legal counsel and had concluded that the plan was insufficient to manage the Applicant's risk of serious harm in the community. The panel also took the view that the Applicant had a limited insight into his risks and that there was insufficient evidence that the Applicant would cooperate with supervision.

78. I find therefore that the panel did take account of and acknowledge the arguments presented by counsel on behalf of the Applicant. The panel explained the reason for their decision not to direct release. I do not find evidence of irrationality or procedural unfairness in this aspect of the decision.

Decision

79. I conclude that the decision in this case was not irrational in the legal sense set out above and that the decision was not procedurally unfair. I refuse the application for reconsideration.

HH S Dawson
24 January 2024