the Parole Board

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[2020] PBRA 26

Application for Reconsideration by Stevens

Application

1. This is an application by a life sentence prisoner, Stevens ("the Applicant"), for reconsideration of the decision of a panel of the Board not to direct his release on licence or to recommend a move to open conditions. That decision was made following an oral hearing on 7 January 2020. Though dated 10 January 2020, the decision was not issued until 14 January 2020.

2. In considering the application I have considered the following documents:
   - Dossier containing 546 numbered pages, which includes the decision of which reconsideration is sought;
   - Representations submitted by the Applicant's solicitor in support of his application; and
   - An e-mail from the Applicant's solicitor's assistant dated 7 February 2020 concerning an offending behaviour programme (see below).

Background

3. The history of this case is complex, and needs to be set out in a little detail.

4. The Applicant is aged 41. He has a long record of serious offending, and is currently serving consecutive sentences of automatic life imprisonment for 5 offences of causing grievous bodily harm with intent (the "index offences"). These sentences were imposed on 27 April 2002. His tariff expired on 26 June 2006. He has been released on licence three times and recalled three times since then.

5. His most recent recall was on 27 April 2015 and was the result of his arrest for serious further offences (of a quite different nature from the index offences). For those further offences he received a determinate sentence of 7 years imprisonment which will not expire until November 2022. But for his life sentences he would have been automatically released on licence from his new sentence at its half-way point (14 May 2019). Until then, by virtue of the new sentence, he was not eligible for re-release on licence from his life sentences.

6. In August 2017 the Secretary of State referred the Applicant's case to the Board for advice about his suitability for a move to open conditions. The Board's review of his case has been substantially delayed and in August 2018, by which time the Applicant had become eligible for re-release on licence from his life sentences, the Secretary of State made a further referral to the Board to decide whether to direct his re-release. The two referrals have, very sensibly, been combined.

7. The delay in the progress of this case has been largely due to the desire of the police for the Board to consider certain intelligence information suggesting that, if released on licence or moved to open conditions, the Applicant would pose a risk of serious harm to members of a particular family ("the D family").

8. In 2018 the Applicant's son was shot and seriously injured. A member of the D family was suspected to have been responsible. The police believe that the Applicant's family and the D family were *"closely linked through location and criminal activity".* They also believe that tensions between the two families had arisen from a fatal road traffic accident in 2017. On the basis of the intelligence information the police are concerned that the Applicant and other members of his family are planning a revenge attack against the D family.

9. The Board has been faced with the problem of how to deal with the police intelligence. This problem first arose on 9 May 2018, which was the day on which a panel of the Board was about to conduct an oral hearing of the case. That panel was chaired by the first of no fewer than four panel chairs to whom the case has been allocated at different times, as will be explained below.

10. Before the May 2018 hearing began the panel chair (A) was informed that two Police Officers wished to see the panel. This was of course highly irregular: the matter should have been dealt with before the hearing through PPCS. However, in order to decide how to proceed the panel needed to know what the police wished to say. They therefore agreed to see the officers and, having done so, deferred the hearing with appropriate directions and recused themselves from any further involvement in the case.

11. On 7 June 2018 a report was submitted by a Detective Inspector which referred to the intelligence in very general terms.

12. The next panel chair (B) issued directions on 7 August 2018. In those directions B agreed with the Applicant's solicitor that further information was required about the sources of the intelligence if the panel was to be able to make a fair assessment of its value and credibility. Appropriate directions were issued, in which reference was made to the need for a non-disclosure application in respect of any material which the police did not wish the Applicant to see. It was directed that the application and associated information should be disclosed to the Applicant's solicitor provided that the solicitor gave the usual undertaking not to disclose it to anyone else without the panel chair's approval. It appears that this procedure was never followed.

13. On 1 October 2018 a report was submitted by another Detective Inspector which contained details of the investigation into the shooting. The suspect had been arrested but not yet charged. It was stated that the Applicant's son was understood to have been involved in a number of physical confrontations with members of the D family over preceding months. It was also stated that the identity of the suspect was understood to be known to the Applicant.

14. The oral hearing was next scheduled to take place on 6 November 2018. One of the Detective Inspectors gave evidence on that date and stated that there was further

intelligence relevant to risk which could be provided to the Board if the police could be sure that it would not be disclosed to the Applicant or his solicitor. The panel enquired why no non-disclosure application had been made. It appeared that PPCS had taken the view (erroneously) that none was required. The panel explained the non-disclosure process and adjourned the hearing so that any relevant further material could be provided and accompanied by a non-disclosure application.

15. Two further police reports were then supplied and added to the dossier.

16. One of them referred to over 200 pieces of intelligence but gave only a bare summary of what was being alleged. The author of this report stated that the *"information may have been told directly to the source or was part of rumour and community chats about the families involved."* He gave examples of various untested pieces of information.

17. The other report stated that the suspect had been charged with the murder of the Applicant's son and was to be tried in the Crown Court.

18. The next hearing took place on 15 May 2019, by which time the case had been allocated to a new panel chair, a judicial member (C). The relevant information and accompanying non-disclosure application had still not been provided, so the hearing had to be adjourned again. C proposed a very sensible procedure to resolve the non-disclosure problem.

19. That procedure involved C viewing the intelligence logs in the presence of a police officer. After viewing the intelligence logs C issued directions which are not in the dossier: it is clear from other documents, though, that he approved non-disclosure of the intelligence to the Applicant himself but directed that, subject to the usual undertaking, it should be viewed by his solicitor.

20. The Parole Board Rules provide for an appeal by either side against a ruling on a non-disclosure application. The appeal is to the Board Chair, whose decision is final. Such appeals are usually delegated by the Board Chair to a senior judicial member of the Board.

21. In this case PPCS on behalf of the Secretary of State appealed against C's ruling on the basis that the intelligence should be withheld not only from the prisoner but also from his legal representative. In accordance with the usual practice the appeal was considered by a senior judicial member, who allowed it (accepting the views of PPCS and the police that disclosure to the solicitor might inadvertently result in highly sensitive information coming into the wrong hands).

22. Withholding material from a prisoner's legal representative, whilst permitted by the rules, is highly unusual. It would normally be unfair to the prisoner and a breach of his right to a fair hearing if the panel were to see material which neither he nor his legal representative has any opportunity to address. It was no doubt for that reason that the senior judicial member, in allowing the Secretary of State's appeal, directed that the actual logs should not be seen by the panel and that the hearing should proceed on the basis of the gist contained in the police reports.

23. That decision of course necessitated the allocation of a new panel chair in place of C, who had already seen the intelligence logs. So it was that at the end of October 2019 another judicial member (D) replaced C.

24. The long-delayed hearing took place on 7 January 2020 with D chairing the panel (which will be referred to below as "the OHP"). Shortly before the hearing a further police report was disclosed. It stated that approximately 50 further pieces of intelligence had been received but that these *"neither reinforced nor reduced the strength and concerns expressed in the original gist".*

25. At the hearing the Applicant was represented by an experienced and highly reputable prison law solicitor who argued for release on licence. An equally experienced and reputable Secretary of State's representative presented the Secretary of State's case and, whilst making no specific submission as to the course which the panel should take, urged the panel to exercise caution in making its decision.

26. The witnesses who gave evidence at the hearing were:
    (a) Three police officers;
    (b) The Head of Security at the prison where the prisoner is detained;
    (c) The line manager (P1) of the probation officer responsible for supervising the Applicant in prison (P2, who was indisposed and therefore unable to attend the hearing though she had submitted reports for the purpose of the Board's review of the case);
    (d) The probation officer who would be responsible for supervising the Applicant in the community (P3); and
    (e) P3's line manager (P4).

27. Further reference will be made below to the evidence given by the probation witnesses. In brief, P1, P2 and P3 all supported release on licence (regarding the police intelligence as *"community gossip or hearsay"* to which no weight could properly be attached), while P4 did not support either release on licence or a move to open conditions. It is highly unusual, if not unprecedented, for contradictory opinions to be expressed at a parole hearing by a probation officer and her line manager. No doubt the fact that such a thing happened in this case is a mark of the unusual nature of the case.

28. The OHP's decision not to direct re-release or recommend open conditions was, as indicated above, issued on 14 January 2020. The request for reconsideration was made by the Applicant's solicitor on his behalf on 27 January 2020.

29. By e-mail dated 4 February 2020 PPCS informed the Board that the Secretary of State offered no representations in response to the application.

The Relevant Law

30. 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

- as in this case, 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).

31. 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 reconsideration application in **Barclay [2019] PBRA 6**.

32. An application for reconsideration must be made within 21 days after the decision in question (as happened in this case).

33. It follows that the OHP's decision in this case not to direct re-release on licence is eligible for reconsideration, but their decision not to recommend a move to open conditions is not.

Grounds for Reconsideration

34. There are only two grounds on which reconsideration of a decision may be ordered: (1) that the decision was irrational and/or (2) that it was procedurally unfair.

Irrationality

35. 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 paragraph 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."*

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

37. 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.

38. The Board, when considering whether or not to direct reconsideration of a panel's decision, 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.

39. The Applicant's solicitor in her representations in this case refers to the Decision of Mr Justice Saini in the Administrative Court in the case of **R (on the application of Wells) v Parole Board [2019] EWHC 2710 (Admin).** Mr Justice Saini adopted a practical approach to the question of irrationality, namely "… *to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the Panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied."*

40. In most cases (including this one) I do not think it makes any significant practical difference which of the two above approaches is adopted. A number of decisions applying the law as interpreted in **DSD** have treated as irrational decisions in which factual findings were not, on proper analysis, supported by the evidence placed before the decision-making body.

Procedural unfairness

41. 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 distinct from the issue of irrationality which focusses on the actual decision.

42. Examples of cases of procedural unfairness are:
    - Where express procedures laid down by law were not followed in the making of the relevant decision;
    - Where the prisoner was not given a fair hearing;
    - Where the prisoner was not properly informed of the case against him;
    - Where the prisoner was prevented from putting his case properly; and
    - Where the panel was not impartial.

The Request for Reconsideration

43. The Applicant's solicitor submits that the decision of the OHP in this case was both irrational and procedurally unfair. She submits, in essence, that the decision hinged on the weight given to the police intelligence, and that the information presented to the OHP was insufficient to enable the credibility and reliability of that intelligence to be properly tested and evaluated. In the solicitor's submission the OHP *"fell into the trap of accepting the credibility and reliability because it was presented to them by the police".*

44. Further specific points made by the solicitor will be discussed below.

The Reply on behalf of the Secretary of State

45. As indicated above, the Secretary of State made no representations in response to the application for reconsideration.

Discussion

46. I have great sympathy with everyone who has been involved in this difficult and important case. It is entirely understandable that the police should be anxious to avoid any risk to the D family or to the sources of the intelligence in this case. On the other hand the Applicant was entitled to a fair hearing at which the evidence against him could be properly tested and evaluated by the panel.

47. A panel of the Board is a judicial tribunal (and a "court" for the purposes of **Article 5(4) of the European Convention on Human Rights**, which is a part of UK law). That means that the Board is required under Article 5(4) to have in place and to follow an appropriate set of judicial procedures to ensure fairness. This means

fairness to both parties (the prisoner and the Secretary of State, who represents the public).

48. The judicial procedures applicable to parole proceedings mean that the OHP, like any panel of the Board, was required to reach its decision on a fair and impartial assessment of the evidence. Hearsay evidence (such as police intelligence) is admissible in parole proceedings, but decisions of the Court of Appeal **R (on the application of Sim) v Parole Board 2003 EWCA Civ 1845** and **R (on the application of Brooks) v Parole Board 2004 EWCA Civ 80** establish that a panel should only attach weight to it if it can be satisfied that it is fair to do so.

49. It was of course for this reason that the second and third panel chairs in this case were concerned to ensure that sufficient information about the sources of the police intelligence was provided to enable a fair evaluation of its credibility and reliability to be made by the panel hearing the case.

50. I am driven to the conclusion that, as things turned out, that was simply not the case. Difficulty was of course caused by (a) the understandable wish of the police and the Secretary of State that the Applicant's solicitor should not be made aware of the details of the intelligence and (b) the senior judicial member's understandable decision, when upholding the Secretary of State's appeal against the third panel chair's decision on the non-disclosure application, that the need to avoid the obvious unfairness to the Applicant which would have resulted from the OHP seeing material of which he and his solicitor were kept in ignorance meant that the panel itself should not see that material.

51. Instead, the OHP saw only the summaries contained in the disclosed police reports, which were to be treated as "gists" of the material being withheld from the Applicant and his solicitor. I have carefully examined those summaries to see whether it can be said that they contained sufficient information to enable the panel to make its own evaluation of the credibility and reliability of the intelligence, as required by law. I cannot conclude that they did. I have also carefully examined the remainder of the evidence to see whether any of it can properly be regarded as corroborating the police's understanding (from the intelligence) about what was happening. Again, I cannot find anything of that nature.

52. What has clearly happened is that the OHP, having insufficient information to make its own independent assessment of the credibility and reliability of the police intelligence, chose to rely on the assessments of the police themselves and the senior probation officer P4. It may well be the case that contained within the intelligence there was material, known to the police and P4, upon which a finding of credibility and reliability could have been made; but, if so, that material was not made available to the OHP.

53. To be set against the assessments of the police and P4 were (a) the absence of any real corroboration of their understanding of the matter and (b) the assessments of P1, P2 and P3.

54. The solicitor makes the point that the evidence before the OHP included a great deal of intelligence recorded by the prison security department, and there was evidence

from the Head of Security that since March 2019 all of the Applicant's telephone calls and correspondence had been monitored. No evidence, independent of the police intelligence about a plan for a revenge attack, emerged: there were prison security intelligence reports about such a plan, but the Head of Security told the OHP that all of those reports were based on the information received from the police.

55. There was one report that the Applicant *"is telling his family not to take any retaliation in relation to the shooting of his son as it will affect his parole and the chance of him seeing his boy".* This is equally consistent with (a) the suggestion in the police reports that any revenge attack was merely being put on hold until the Applicant had been released from prison and (b) the Applicant's evidence that he did not wish any revenge attack to be made at all. It does not therefore corroborate the police intelligence.

56. Of course the absence of prison intelligence supporting the police intelligence is far from a conclusive factor but it is, nevertheless, something which needs to be considered.

57. Two matters were relied on by the OHP as affording some support for the police intelligence. One was the Applicant's denial that he knew any of the D family, and the other was what the police regarded as the uncooperative attitude of the Applicant's family to the investigation into the shooting of his son. It is difficult to support the view that either of these factors can fairly be regarded as affording corroboration of the intelligence.

58. The police stated that it was *"obviously untrue"* that the Applicant did not know any of the D family. There is, however, nothing in the evidence which I have seen to show that that was the case. The Applicant had been in prison since his arrest in 2015, and was in prison at the time of the fatal road accident in 2017 and during the few months before his son was shot in 2018 (when there were said to have been problems between him and the D family). There may of course be evidence available to the police to show that the Applicant had known any of the D family: but, if so, it was not made available to the OHP.

59. The apparently uncooperative attitude of the Applicant's family to the police investigation cannot fairly be regarded as corroboration of the existence of a plan for a revenge attack, let alone a plan to which the Applicant himself was a party. Regrettably, in the circles in which the D family and the Applicant's family evidently live, there is often a mistrust of the police and a reluctance to assist them in their enquiries. Assisting the police can also often bring reprisals.

60. In relying on the police's and P4's assessments of the credibility and reliability of the police intelligence, the OHP roundly dismissed the assessments of P1, P2 and P3, suggesting in particular that P1, P2 and other members of the staff at the prison where the Applicant was detained had failed sufficiently to challenge him. The OHP even went so far as to suggest, at the end of their decision, that the Applicant should be moved to a different establishment and that P3 should be replaced by another probation officer.

61. It is far from clear from the evidence I have seen that this critical attitude towards the three probation officers and the staff at the prison can be justified. All three of the probation officers are experienced and conscientious, and it must have taken some courage for P3 to resist the pressure from her line manager to change her recommendation.

62. The OHP's acceptance of the police's and P4's assessment of the police intelligence must have coloured their other conclusions and was clearly critical to their decision.

63. In particular the OHP stated in their decision: *"Irrespective of the issues relating to the police intelligence, the panel accept the concerns of [P4] that you have not undertaken any offending behaviour work into your thinking skills and pro-criminal attitudes that led to your serious offending so soon after release."*

64. There is however an obvious difficulty with P4's suggestion that the Applicant needed to do further work of that kind in prison. As P3's line manager, P4 had endorsed P3's report of March 2018, at which time she had not suggested that any further offending behaviour work was required. Furthermore the Applicant had in fact been assessed for, and found not to meet the criteria for, two accredited offending behaviour programmes. He had however successfully completed two non-accredited programmes. The Board has now been informed by the solicitor's assistant that he has recently been re-assessed for one of the accredited programmes but again found not to meet the criteria.

65. It was only after being made aware of the police intelligence and assessing it as credible and reliable that P4 introduced the suggestion that further offending behaviour work was required. It can be seen, therefore, that her recommendation for such work must have been heavily influenced by the police intelligence.

66. The OHP do not appear to have addressed the question, as required by the Court of Appeal decisions, whether it was fair to rely on the police intelligence as outlined in the summaries. Had they done so, it is difficult to see how they could have concluded that it was fair, given the absence of any opportunity for them to test and assess its credibility and reliability.

Decision

67. This is not an easy case, as witness the differing views of experienced professionals and the difficulties encountered by the panel chairs (and the senior judicial member who dealt with the non-disclosure appeal) in deciding how the police intelligence should be dealt with.

68. Whilst I have every sympathy for the position in which the OHP found themselves, it follows from the discussion above that this is a case in which I must conclude that the OHP's view of the facts of the case was not, on proper analysis, supported by the evidence placed before them and must therefore be regarded, whether the **DSD** approach or the **Wells** approach is to be applied, as irrational.

69. I must therefore allow this application and direct that the case should be reconsidered.

70. In the light of this conclusion it is unnecessary to consider the solicitor's additional submission that the decision was procedurally unfair. I have some doubt about whether it can be categorised as such; if it can, this ground in practice adds nothing to the ground of irrationality on which I am allowing this appeal.

Directions

71. I have given careful consideration to 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 with scrupulous fairness. However, it is important that justice should not only be done but be seen to be done. If the original panel were to adhere to their previous decision, there would inevitably be room for suspicion that they had simply been reluctant to admit that their original decision was wrong. That is particularly so in the light of their highly critical approach towards P1, P2 and P3 and the prison staff generally. However inaccurate or unfair a suspicion of unfairness 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.

72. I would ordinarily have directed that the next hearing should be expedited and that the new panel, whilst being made aware that this is a reconsideration, should not be made aware of the reasons. However, in the particular circumstances of this case (and to avoid the risk of a further application for reconsideration on similar grounds) I think it would be sensible for the next panel to be aware of certain things and for time to be allowed for further steps to be taken.

73. I am at this stage in a position to make the following directions:
    (a) This decision and the note annexed to it should be disclosed to PPCS, to the prison and probation services and to the Applicant and his solicitor.
    (b) The case should be reheard at an oral hearing by a fresh panel chaired by a judicial member.
    (c) The time estimate is 6 hours, and once any further evidence has been obtained the new panel chair may wish to consider whether a longer period may be required and a second day set aside.
    (d) The decision of the OHP should be removed from the dossier and should not be referred to in any future reports.
    (e) The note annexed to this decision should be added to the dossier so that the all members of the next panel are aware of it.

74. It will be a matter for the next panel chair to make any further directions.

ANNEX TO RECONSIDERATION DECISION

NOTE

The decision of the previous panel in this case has been the subject of an application for reconsideration, and a Reconsideration Assessment Panel ("RAP") has directed that the case be reconsidered by a fresh panel.

The basis of that decision is that the panel attached weight to summaries of police intelligence when insufficient information was available to enable a fair assessment to be made of the credibility and reliability of that intelligence. Because it had been decided (unusually) that the intelligence material should be withheld not only from the Applicant but also from his solicitor, it had also been decided that it should not be seen by the panel and that the hearing should proceed on the basis of the summaries.

PPCS may wish to consider (a) whether any and if so, what further information should be provided to the next panel and (b) whether any non-disclosure application should be made in respect of all or any of such information. If a non-disclosure application is made, the next panel chair may wish to consider whether any information that is to be withheld from the Applicant should be disclosed to the Applicant's solicitor on the usual undertaking.

If nothing is to be disclosed to the solicitor, the panel chair may wish to consider whether to direct the appointment of a special advocate under Rule 17(8) so that the Applicant's interests are protected.

Jeremy Roberts
25 February 2020