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[2021] PBRA 113

Application for Reconsideration in the case of Weston

Application

1. This is an application by Weston (the Applicant) for reconsideration of a decision made on 10 May 2021 by a panel comprising of 2 independent members of the Board that it was necessary for the protection of the public for the Applicant to remain in custody with the consequence that no direction was made for 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, which are the decision of 10 May 2021, the application for reconsideration dated 1 June 2021, the response on behalf of the Secretary of State by PPCS stating that they will not be making a response and the dossier totalling 611 pages.

4. The panel conducted an oral hearing on 5 May 2021 in which it considered a dossier of 349 pages. The hearing was conducted remotely via video-link, due to Covid-19 restrictions in place at the time. There was no material considered by the panel which had not been disclosed to the Applicant.

5. At the oral hearing, evidence was taken from the Applicant's Prison Offender Manager (POM), his Community Offender Manager (COM), a Psychologist (who will be referred to as "L") and the Applicant. The POM and L were of the view that the Applicant could be released but the COM recommended that it was necessary for the protection of the public for the Applicant to remain in custody.

Background

6. On 17 November 2006, the Applicant, who was then 19 years old, received an indeterminate sentence for public protection, for the offences of blackmail and robbery, with a minimum term set at 2 years, 9 months and 9 days' imprisonment. This term expired on 25 August 2009.

7. The index offence was committed after the Applicant had met the male victim, who was a stranger, and forced him to hand over money. Two days later, the Applicant went to the victim's house and threatened him with a crowbar and forced the victim to give the Applicant more money. The Applicant then blackmailed the victim.

8. By the time he committed the index offence at the age of 18, the Applicant had 20 previous convictions for 72 offences which included much violent and acquisitive offending.

9. The Applicant converted to Islam in 2011 while he was in prison. Since then, he has been subjected to continuing scrutiny in relation to his beliefs and any contacts with Islamist extremists. Indeed, past assessments of the risks posed by the Applicant if released have been focussed on his risk of extremist offending, rather than on his risk of violent offending.

10. In September 2013, the Applicant was corresponding with a friend, and he asked that friend to send him a book which the Applicant called "The Caravan". When a parcel to the Applicant was intercepted, it was found to contain terrorist-related material.

11. The Applicant was then charged with intentionally encouraging or assisting the commission of an offence contrary to s 44 of the Serious Crimes Act 2007 by requesting the friend previously mentioned in paragraph 10 to send him a copy of the book which was capable of encouraging or assisting the commission of an offence, namely the dissemination of a terrorist publication.

12. After a trial lasting 6 weeks, in September 2014 in which the Applicant was cross-examined over several days about his beliefs and his opposition to terrorism, he was acquitted.

13. In February 2016, the Applicant progressed to open conditions. In March 2016, during a period of temporary release, the Applicant went through a religious ceremony of marriage to a woman he had been introduced to four months earlier. It is said that it was their intention to establish the marriage under UK law, but this has not happened.

14. In November 2016, the Applicant was returned to closed conditions after the police investigated a photograph that raised extremist concerns. It was established that this photograph was taken in 2013, but that it was not possible to determine whether the Applicant's gesture in the photograph was a salute in support of Islamic State which the Applicant denied. No further action was taken against the Applicant.

15. Although the Applicant was returned to open conditions in August 2017, he was returned to closed conditions in December 2017 because of unproven allegations of connections of the Applicant with extremism and a heightened risk of absconding. He returned to open conditions in March 2018 from where he was first released to designated accommodation in November 2018 after a Parole Board decision made in October 2018.

16. He was first recalled to custody on 10 May 2019 after about 6 months in the community after he had contacted a specific individual via Facebook in breach of his licence. He had also posted a video on his Instagram account inside a prayer room at a Mosque which he did not have permission to attend. The circumstances of his recall were considered in depth by the last panel in the decision letter following a hearing in January 2020.
17. All the professional witnesses supported the Applicant's release at that hearing. The panel had the benefit of evidence from Dr W which was to the effect that whilst there

were concerns about the Applicant's extremist links, there was no clear evidence of him supporting extremist acts. Dr W's risk assessment of serious harm from violent extremist activity assessed the Applicant's engagement as low to moderate, his intent as low as was his capability with his risk of causing serious harm was assessed as not being imminent.

18. The Applicant was duly released for the second time on 4 March 2020 to designated accommodation. Because of the COVID-19 restrictions, his intended stay of 12 weeks was cut short, and he returned to live with his wife sooner than had been planned. Their relationship broke down and he spent further periods in approved premises until his licence was revoked for a second time on 10 July 2020 after 4 months in the community.

19. This recall was triggered by the Applicant's arrest on 9 July 2020 when he was suspected of being involved in the commission, preparation and instigation of acts of terrorism in the form of an attack in the UK. In fact, he was one of 4 people arrested in a joint police/security services investigation into the planning of an attack of low sophistication linked to extremist Islamist ideology. The others involved were two individuals who were charged with offences. On 13 April 2021 one of them was convicted of an offence relating to the preparation of a terrorist attack and he was sentenced to life imprisonment while the other individual was acquitted of an offence of assisting an offender.

20. The Applicant was not charged with any offence and according to the panel's decision *"police reports in the dossier indicate he is no longer under investigation in relation to the matters for which he was arrested."*

21. During his 4-month period in the community during his second release, the Applicant voluntarily engaged with a local de-radicalisation team and a community mentor. He explained that he did this to assuage concerns expressed by professionals regarding his potential risks related to extremism.

22. The Applicant turned away from the Islamic faith after the death of a family member, because the Imam who delivered that news of the death to the Applicant refused to pray for the deceased, because he was a non-Muslim and so *"he would burn in hell fire".* Following research, the Applicant found that this was a standard Muslim viewpoint with which he was not happy. By the time of his parole hearing in May 2021, the Applicant was no longer practising Islam and he had lost his belief in God. He had by then changed his recorded religion to agnostic on the prison system.

23. The Applicant had begun a new intimate relationship with T who lives abroad, but he chose not to disclose it to his COM and POM. He did not have a licence condition to disclose it, but the panel thought that he should have disclosed it.

24. By the time of the hearing of the panel, the most recent psychological assessment was conducted by L who assessed the Applicant as posing a moderate risk of future general violence and a low risk of extremist offending. In reaching that conclusion, L had used two well-established risk assessment tools. The panel disagreed and concluded that his risk of future extremist activity to be "medium" rather than "low" as if he did become involved in such activity the risk of serious harm to the public would be high. The

Panel's evaluation of the Applicant's future extremist activity is the subject of a ground for reconsideration (Ground 1).

25. The panel proceeded to consider the risk management plan (RMP) proposed for the Applicant before concluding that it was not *"sufficiently robust to manage [the Applicant's] risks safely in the community"*. This finding is the subject of another ground for reconsideration (Ground 2).

26. The POM recommended the Applicant's release to a regime designed and supported by psychologists to help people recognise and deal with their problems, which were designated accommodation where the Applicant could potentially reside for longer than 3 months and be monitored and permitted to access services. The panel's evaluation of this recommendation was the subject of another ground for reconsideration. Ground 3 is that that the panel failed to give a proper reasoned evaluation of the proposal of a regime designed and supported by psychologists to help people recognise and deal with their problems which was recommended by L and by the POM.

27. The panel concluded that the Applicant's risk of serious harm has reduced as he has not been violent in custody for a considerable period and there has been no evidence of him reverting to his previous misbehaving during his short period of release. The panel was concerned by the Applicant's conduct which led to his recalls and in particular that *"he made poor decisions by reaching out and associating with negative associates he previously met in prison."*

28. The panel concluded that the Applicant posed *"a moderate risk of general violence and a moderate risk of terrorist related violence and in the event of such offending the risk of serious harm to the public would be high".* It was then pointed out that there was not a consensus among the professional witnesses with the POM and L recommending release and the COM advocating that he should remain in closed conditions.

29. The conclusion of the panel was that the Applicant's risk of serious harm remains too high, and he was not "currently manageable in the community under the proposed [RMP] so that it continues to be necessary for the protection of the public that he remains confined". So, his release was not directed. The panel also did not recommend his transfer to open conditions.

Request for Reconsideration

30. The application for reconsideration is dated 1 June 2021.

31. The grounds for seeking a reconsideration can be summarised as follows:

    a) The panel irrationally departed from the expert psychological evidence regarding the Applicant's risk of extremist offending (Ground 1);
    b) With regard to the risk management plan that it was not sufficient to manage the Applicant's risk in the community was irrational (Ground 2);
    c) The panel acted irrationally in failing to give a proper reasoned valuation of the proposal for a regime designed and supported by psychologists to help people recognise and deal with their problems (Ground 3); and

d) The panel made irrational findings regarding the Applicant's mental health expected progress prior to the next Parole Board hearing (Ground 4).

The Relevant Law

32. The panel correctly sets out in its decision letter dated 10 May 2021 the test for release.

Parole Board Rules 2019

33. 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)).

34. 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

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 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."*

36. 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 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.

37. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

38. 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."*

The Reply on behalf of the Secretary of State

39. The Secretary of State declined the invitation to comment on the Grounds for Reconsideration.

Discussion

40. In dealing with the grounds for reconsideration, it is necessary to stress two matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgment of the Panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his or her view of the facts in place of those found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

41. The second matter of material importance is that when considering whether a decision of the Parole Board was irrational, due deference must be given to the expertise of the Panel in making decisions relating to parole.

Ground 1

42. This ground is that the panel irrationally departed from the expert psychological evidence of L, the prison psychologist, relating to the very important issue of the nature and extent of the Applicant's risk of extremist offending. L is an experienced psychologist with 18 years of experience with the prison service, and she holds chartered status with the British Psychological Society. She had carried out an in-depth assessment of the Applicant. As has been explained, she *"concluded that [the Applicant] presents moderate risk of future general violence and a low risk of extremist offending".*

43. The Panel disagreed, explaining that it was not persuaded that the assessment concerning extremist offending upon which L relied *"has given adequate weight to [the Applicant's] repeat pattern of behaviour whereby he has twice been recalled to custody for proactively contacting associates who have either committed or gone on to commit terrorist related offences and has previously requested extremist material be sent to him in prison"* (emphasis added). The Panel concluded that the Applicant's *"risk of future extremist activity to be medium rather than low."*

44. The Applicant's case is that the panel's approach was irrational for three different reasons. No response has been made to any of these three reasons.

45. First and perhaps most importantly L was not given an opportunity to comment on the proposition that she had underestimated the Applicant's risk of extremist reoffending and that she had failed to take account of or understand the circumstances leading to the Applicant's recall including his proactive contacts with those who had committed or who had gone to commit terrorist offences.

46. It is probable that L would have been able to give a cogent answer to these criticisms if the panel had questioned her about them as I will explain. No reason has been put forward as to why L was not questioned about these criticisms.

47. The second reason why the panel's approach was irrational was that (contrary to the panel's conclusions) there is in fact no evidence that the Applicant *"previously requested extremist material be sent to him in prison".* His evidence at the Parole Board hearing was that he requested the material without knowing it was a terrorist publication and that was not challenged at the Parole Board hearing. Furthermore, his evidence to that effect was apparently accepted and certainly not rejected by the jury who acquitted him of requesting extremist publications.

48. A third reason why the panel's decision was irrational is that there is no evidence in relation to the second recall that the Applicant proactively contacted his co-defendants. On the contrary, as has been explained, the evidence is that they contacted him first and, in any event, no criminal proceedings were taken against him. As I have explained, he is no longer under investigation in relation to those matters and those facts undermine the conclusion of the panel.

49. The assessment of the nature and extent of the Applicant's risk of terrorist- related offending was of crucial importance in determining whether it would continue to be necessary for the protection of the public for him to remain confined. Therefore, there was overwhelming reasons why L should have been given an opportunity to answer the contention that she had underestimated the Applicant's risk of extremist reoffending and that she had failed to take account of or understand the circumstances leading to the Applicant's recall including his proactive contacts with those who had committed or who had gone to commit terrorist offences. The failure to afford her that opportunity means that the decision of the panel must be reconsidered.

50. For those reasons, I order reconsideration.

Ground 2

51. It is contended that it was irrational for the panel to have concluded that the RMP was not sufficient to manage the Applicant's risk and/or that this conclusion of the panel was inadequately reasoned.

52. A crucial issue in determining the adequacy of the RMP is the nature and extent of the Applicant's risk and that entails assessing his risk of future extremist offending. As has been explained, that risk will have to be reconsidered and the adequacy of the proposed RMP will also have to be reconsidered in the light of that finding.

53. In consequence, it is premature to deal with the issue of the sufficiency of the RMP before an assessment is made on reconsideration of the Applicant's risk of future extremist offending. In those circumstances, it is not appropriate to deal with the second ground on this application.

Grounds 3 and 4

54. Ground 3 contends that the panel failed to give a proper reasoned evaluation of the proposal of the specialist regime (see above), while Ground 4 is based on the argument

that the panel "made irrational findings regarding the Applicant's mental health expected progress prior to his next board hearing".

55. The issues raised by both these grounds will have to be determined in the light of conditions prevailing at the time of the reconsideration hearing, rather than the present time. In those circumstances, any consideration of those grounds in this decision will not be of assistance at the reconsideration hearing and so they will not be dealt with now.

Decision

56. For the reasons I have given, I consider that the decision to refuse the Applicant parole was irrational and accordingly the application for reconsideration is granted.

57. 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.

58. I have no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, the question of justice being seen to be done arises again. 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.

59. I have also made directions for the Offender Manager, the Offender Supervisor and the Prison Psychologist to produce reports before the re-hearing.

Sir Stephen Silber
11 August 2021

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