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[2021] PBRA 172

Application for Reconsideration by Murphy

Application

1. This is an application by Murphy (the Applicant) for reconsideration of a decision of an oral hearing panel which, on 8 November 2021, after a hearing on 26 October 2021, decided not to direct his release on licence and not to recommend his transfer to open conditions.

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 733 page dossier provided by the Secretary of State, the reasons for the decision ('the decision letter'), the application for reconsideration and an email on behalf of the Secretary of State.

Background and current parole review

4. The Applicant is now aged 54. On 14 May 2001, when he was aged 33, he received an automatic life sentence for a s18 assault with intent (variously recorded as wounding and as grievous bodily harm in the dossier). The sentence was triggered by earlier serious violent offending. He was lodging with the male victim and, when in drink, he attacked him with a pick axe handle causing serious head injuries requiring stitches, bruising to his body and a fractured wrist. His minimum term was set at 3 years and 3 months and expired on 14 August 2004.

5. During this sentence the Applicant has completed accredited programmes to address offending behaviour. Following an oral hearing in June 2019, a parole board panel directed release.

6. After less than seven months in the community his licence was revoked on 17 February 2020. He was recalled to custody after being arrested for a further offence of affray involving an incident with his then partner in the street. He was later convicted of using threatening words and behaviour and sentenced to 18 weeks in custody in November 2020.

7. This was his first review by the Parole Board following his recall. His case was referred by the Secretary of State on 4 March 2020.

8. The case was directed to an oral hearing after consideration by a parole board member as part of the member case assessment process. The oral hearing took place by video link on 18 October 2021. The oral hearing panel heard evidence from the Applicant, his Prison Offender Manager (POM), his Community Offender Manager (COM), a forensic psychologist employed by the prison service and a forensic psychologist instructed by the Applicant's legal representative. The Applicant was legally represented throughout the hearing. The Secretary of State was not formally represented.

Request for Reconsideration

9. The application for reconsideration, dated 24 November 2021, was submitted by the Applicant's legal representative.

10. The Applicant seeks reconsideration on the following four grounds:

    Ground 1. It was irrational for the panel not to recommend open conditions. This was based on the panel's 'disproportionate' assessment that the Applicant would abscond.

    Ground 2. The decision was irrational as too much weight was placed on the recall offence.

    Ground 3. The decision was both irrational and procedurally unfair as too much weight was placed on the Applicant's relationship.

    Ground 4. The panel's assessment of the evidence was flawed. The panel's decision to accept the COM's recommendation over the recommendations from the POM and the Psychologist instructed by the Applicant's legal representative was irrational. The panel did not undertake a fair assessment of the POM's evidence and the POM's support for release. This was both irrational and procedurally unfair.

The Relevant Law

11. The panel correctly sets out in its decision dated 8 November 2021 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. 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)).

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.

The reply on behalf of the Secretary of State

20. The Secretary of State confirmed by way of email dated 2 December 2021 that he did not wish to make any representations in response to the application.

Discussion

Ground 1

21. The first ground can be dealt with quickly. The Applicant's legal representative has erred by submitting that the panel 'directs' (or decided to not so direct) a transfer to open conditions and that this decision is within the scope of reconsideration. As detailed above, a decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28.

Ground 2

22. The Applicant submits the decision was irrational as too much weight was placed on the recall offence. The Applicant was convicted of a public order offence. The information the panel had was that he was threatening his partner in the street whilst holding a pool cue and this caused a member of the public to report the matter. When police arrived, the Applicant had a pool cue in a box. The Applicant's partner described being dragged around by him but did not support a prosecution.

23. The Applicant argues that he was not charged with violence or possession of a weapon. He states that there was no evidence it was removed from the box or used as a weapon. This appears to directly contradict what he said to his own psychologist witness. He told the psychologist that he recalled dropping the case and struggling to put the pool cue back inside. He accepted hitting the cue against the wall in frustration which could be perceived as intimidatory (paragraph 4.6 psychologist's report). This is also similar to what he told his COM as he said to her that he smashed his pool cue box against the wall to "*calm himself down*" during the argument (Part B report) and that he "*waved it around*" during the argument (Part C report).

24. It is therefore clear that the panel had evidence relating to the use of a weapon during the incident. The panel must make up its own mind about the evidence it reads and hears and what weight to attach to such evidence in its risk assessment. The panel concluded that it was evidence of active risk factors and paralleled to index offence in some ways. Given the evidence it had, I see no compelling reason to interfere with that analysis. Accordingly, this ground fails.

Ground 3

25. The Applicant argues that it is clear that his relationship was a significant part of the panel's decision not to release him and this was neither rational or proportionate in the circumstances. He submits that he has been open with professionals about his partner's drinking, the recall offence was a one off incident and the relationship could be managed in the community. He highlights the fact that the COM had not met his partner and argues it would be reasonable to expect she should have done so. He goes on to say that it is procedurally unfair not to have adjourned for further information in the circumstances.

26. It is apparent from the decision letter that each witness, including the Applicant, was asked about the relationship. Given the circumstances of the recall, this would be entirely expected and reasonable. I accept the Applicant's submission that the

relationship impacted on the decision in a significant way given the panel said directly in its conclusion that it was "*anxious*" about the relationship. As explained in the decision, it was not just the fact of the relationship which caused this anxiety, it was also the potential for other linked risk factors and risky situations including drinking alcohol, destabilisation and poor emotional management. Concerns about the relationship were expressed by both psychologists and the COM. The panel concluded that the risk could not be managed even after an analysis of the risk management plan. Included within that was the panel's concern that there may not be the necessary engagement with his COM as it was a new working relationship, needing time to develop, and he had a history of mistrust of professionals.

27. Again, the panel must make up its own mind on the totality of the evidence, including evidence from the Applicant. The panel would be failing in its duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if it failed to do just that. As was observed by the Divisional Court in **DSD**, panels of the Parole Board have the expertise to do it. The panel provided sound reasons for its conclusion in this case.

28. It is not at all clear how an adjournment would have assisted. The Applicant submits that it could have provided further information about the relationship, although no particulars are given. He submits that a full assessment of the link between the relationship and risk could have been completed, but the witnesses had already assessed matters and provided their opinions on the relationship, which the panel had considered when making its own independent risk assessment. The Applicant's legal representative did not make an application for such an adjournment at any stage and I am certain they would have done had they thought some key information was missing.

29. Accordingly, this ground also fails on both the submission that it was irrational and that it was procedurally unfair.

<u>Ground 4</u>.

30. The panel in this case was faced with conflicting recommendations. It is established in case law that, if a panel makes 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**. Consequently, where a panel essentially 'prefers' one recommendation over another, it must flow that reasons must be given as to why.

31. The panel addressed this issue. The panel gave a detailed conclusion about its findings and the parts of the evidence it accepted/agreed with. This included the evidence given by witnesses in reports and in the hearing, and included a thorough analysis of the evidence from both psychologists who had helpfully provided a joint position statement (section 5 of the decision letter). In the conclusion, the panel correctly set out the differing recommendations: with the POM and one psychologist supporting release and the COM and other psychologist recommending transfer to open conditions. The panel specifically stated that it did not agree with the recommendations for release as it felt they "*understated the need for [the Applicant] to demonstrate stability especially within [his] relationship*".

32. In essence, where there is a conflict of opinion, it was plainly a matter for the panel to determine which opinion it preferred, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above. The panel provided those reasons in my opinion.

33. As part of this ground, the Applicant submits that there was too much emphasis on aspects of his custodial behaviour which were not of concern to anyone else in the same way they appear to have caused concern for the panel. The panel is not obliged to adopt the opinions of the witnesses. The panel was told of outbursts in January 2021 in custody. In addition, there was a recent incident reported in oral evidence by the POM where the Applicant had been swearing at staff due to being unhappy about a decision over the amount of exercise allowed. Set against that, the panel was told of numerous positive reports and recent difficult personal situations. The POM accepted that the Applicant would get angry and frustrated but made it clear it did not result in violence. However, these outbursts had, in part, caused the POM to change their recommendation to release. It had previously been a recommendation for open conditions but the POM was concerned that the staff in open conditions would not be able to provide the same support which the Applicant had been receiving, including enabling him to diffuse situations by going directly to staff. The psychologist employed by the prison service told the panel that there was still some evidence of poor emotional management in custody. The panel ultimately assessed these outbursts in custody as relevant and evidence of "*flashes of anger and poor emotional management*". Therefore, the panel had evidence to form such a conclusion.

34. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel. The Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Accordingly this ground fails.

Decision

35. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

Cassie Williams
6 December 2021