the Parole Board
working with others to protect the public

[2024] PBRA 110

Application for Reconsideration by Chapman

Application

1. This is an application by Chapman (the Applicant) for reconsideration of a decision of a panel of the Parole Board (the Panel) dated 16 April 2024 not to direct his release. The decision was made following the review conducted by way of an oral hearing on 10 April 2024.

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, (b) that it is irrational and/or (c) that it is procedurally unfair. This is an eligible case, and the application was made within the prescribed time limit.

3. I have considered the application on the papers. These are: the application letter and written representations dated 7 May 2024; the written decision; the case dossier; and the email message dated 15 May 2024 from the Public Protection Casework Section (PPCS) of HM Prison and Probation Service on behalf of the Secretary of State (the Respondent).

Request for Reconsideration

4. The application for reconsideration is dated 7 May 2024.

5. The grounds for seeking a reconsideration are as follows:

   (a) The decision contains an error of law in stating that the Applicant needs to remain confined in the interests of public protection whereas the test for release relates to the necessity for a prisoner to remain confined for the safety of the public which itself relates to risk of harm.
   (b) The decision was irrational in that it ignored the factors which were relevant to deciding whether the Applicant should be released and focussed on lack of respect for licence conditions rather than whether his behaviour properly impacted on the test for release. There was no evidence of violent behaviour either in or out of prison and no reason expressed as to why the Applicant posed a serious risk of violent or sexual offending.
   (c) The Panel equated lack of compliance with risk of serious harm.

Background

6. On 18 December 1996, the Applicant was sentenced to custody for life in respect of one offence of arson being reckless as to whether life was thereby endangered, and also to detention for life in respect of one other offence of arson being reckless as to whether life is endangered, and to detention for life in respect of one offence of simple arson. Concurrent fixed terms of imprisonment were imposed for 5 offences of dwelling house burglary. The Applicant pleaded guilty to all offences.

7. Each of the burglaries was committed on a different day in November 1995 with one or more accomplices. The three arson offences were committed when each of the houses from which items had been stolen was subsequently set on fire. In two of those cases the houses were destroyed. The Applicant blamed an accomplice for returning to the houses and setting them alight in order to destroy evidence, although the guilty pleas did acknowledge his own involvement. A contemporaneous Fire Officer's report referred to the use of an accelerant and to the disabling of a fire alarm.

8. When interviewed by a forensic psychiatrist before being sentenced, the Applicant volunteered information about his interest as a juvenile in lighting and watching fires. He said that during the second arson offence he had felt pushed by some external force to set the house alight. The consultant concluded that maturation would reduce the risk of re-offending. By the time of his interview for the pre-sentence report by the probation service, the Applicant reverted to his original account to the police that his accomplice was to blame. In 1998, he explained to a detention review board that he had hoodwinked the psychiatrist by giving an explanation suggested by his grandmother in order to imply some mental instability.

9. The Applicant is reported to have had a disruptive upbringing. He was 17 at the time of the index offences and already had a number of convictions dating from 1993. They included convictions for burglary, theft, assault occasioning actual bodily harm, common assault, possessing an offensive weapon in a public place, and criminal damage. He had already served concurrent short sentences of detention in a Young Offenders Institution imposed after he committed offences whilst subject to an attendance centre order.

10. The minimum custodial term under the life sentences was fixed at 4 years and the Applicant's tariff expired on 20 November 1999. It was not until his 5th Parole Board review on 28 May 2012 that a recommendation was made for a transfer to open conditions. His conduct in prison had been generally good and he displayed a positive employment ethic but motivation to stick to challenging work to address his risk factors was lacking.

11. The Applicant moved to [Prison A] in September 2012. However, he absconded the following month on 8 October, having bought a contraband mobile phone with the proceeds from selling DVDs. He left a dummy in his bed and caught the bus out of area. Whilst at large, the Applicant joined with an associate of the phone seller in committing dwelling house burglaries.

12. After giving himself up to police officers he encountered during a street sweep for known offenders, the Applicant was charged with escaping from lawful custody, and two burglaries. At the Crown Court, he pleaded guilty, asked for four other

burglaries to be taken into consideration and was sentenced to concurrent terms of 2 years imprisonment. They have now expired by effluxion of time.

13. Having been returned to the closed prison estate firstly at [Prison B]and then at [Prison C], the Applicant completed the Thinking Skills Programme and the Sycamore Tree Victim Awareness Programme, and achieved Enhanced Status under the Incentives and Earned Privileges Scheme (IEP).

14. The panel which conducted the Applicant's review on 26 March 2014 declined either to direct the Applicant's release or to recommend a return to open conditions. Despite the lack of index offence paralleling behaviour and any evidence of mental instability, it was concluded that there was a high risk of absconding with associated high risks of re-offending and serious harm to the public.

15. At the next review which concluded on 30 September 2015, all the professional witnesses, including a psychologist, recommended the Applicant's release. The psychologist considered that his risk could be managed in the community as long as he engaged with the risk management plan. The panel noted that he had not committed any act of violence for a significant period of time and that all witnesses believed that the risk of acquisitive crime rather than violence was much more likely were he to fail on release. In its decision letter dated 2 October 2015, the panel directed release.

16. The Applicant was released on 20 October 2015 with a licence condition to reside permanently at designated premises. He left there early the following morning of 21 October, and telephoned that evening to say he was lost at a train station but would be back soon. He failed to return. The Applicant's licence was revoked the same day for breaching the residence, reporting and curfew conditions.

17. The Applicant remained at large until 21 April 2023 when he was arrested on suspicion of burglary and returned to custody. During his 7 and a half years unlawfully at large, the Applicant used a different name to obtain a driving licence and open bank accounts, obtained advice about how to generate a false identity for employment and National Insurance purposes, worked as an electrician and latterly in data protection, bought a property and saved around £70,000.00. He formed long term relationships with two women, one of whom sadly died and the other remained a friend.

18. On 29 April 2023, having pleaded guilty to two offences of burglary and having asked for four other admitted offences to be taken into consideration, the Applicant was sentenced to concurrent terms of four months imprisonment. The further burglaries included break-ins at a café and a fish and chip shop. There has been no evidence of any violent behaviour on his part during his period at large.

Current parole review

19. The Respondent referred the Applicant's case to the Parole Board by Notice dated 25 April 2023 for the Board to consider whether to direct his release. In the event that release was not directed, the Board was invited to advise whether the Applicant should be transferred to open conditions.

20. The review was conducted by a panel of the Board, comprising an Independent Member as Chair and a Psychologist Member, on 10 April 2024 by way of an oral hearing conducted by way of video-link to the prison where the Applicant is currently located. The Applicant, now aged 45, attended and was represented by his legal advocate.

21. The case dossier of 217 pages included a recent Psychological Risk Assessment Report (PRA) by a Prison Psychologist and reports from the Applicant's Community Offender Manager (COM) and the Prison Security Department. OASys report included assessments of the Applicant's risks.

22. Oral evidence was given by the Psychologist, by the COM, by the Applicant's Prison Offender Manager (POM) and by the Applicant himself. The Applicant's solicitor confirmed that he had covered the ground of closing submissions in his questions to the COM during the hearing. The decision to recall the Applicant was not challenged.

23. Since his return to prison the Applicant's conduct and compliance has been variable. There was a proven adjudication for making threats to staff in October 2023 when he refused to comply with an order to return to his cell. In response to an allegation that he had been improperly accessing the internet at [Prison C], the Applicant refused to comply with the regime and spent time in Segregation. He was moved to [Prison D] where he continued his protest, advised staff not to enter his cell but in the event did not resist. The internet investigation was eventually dropped with no charges being brought and the Applicant's protest ceased.

24. The Risk Management Plan (RMP) anticipated initial placement in designated premises with probation service monitoring and support. The likelihood of proven violent re-offending was assessed in the OASys report as low. The probability of non-violent re-offending was assessed as medium and the Applicant fell into the category of offenders whose likelihood of offending generally was at a medium level. The risk of serious harm to the public in the event of any proven re-offending by the Applicant in the community was assessed as high. To a known adult, children and staff members, including probation staff such risk was assessed as low. The risk of serious recidivism (RSR) based on dynamic or changing factors was assessed as low at 0.63% over a two year period. The Psychologist witness assessed the Applicant's risk of future violence as moderate with a moderate number of protective factors in place. However, she noted that some of these were based on his self-report and should be treated with caution.

25. Neither the Psychologist nor the COM supported release. The Psychologist expressed concern that, the Applicant had yet to access appropriate interventions to support him in managing his risks in the community. The COM considered it unlikely that the Applicant would comply with licence conditions given his view that he should not be subject to a life sentence. The POM was hesitant about giving a firm opinion about release but suggested that if the Applicant's account of his time in the community were accurate she would conclude that he met the test for release.

26. The Panel expressly took into account the Applicant's offending history, including the fact that during the 27 years following the index offences the Applicant had not been known to resort to either assaultive violence or fire-raising. However, in the

light of his limited engagement with professionals, his opting out of any degree of compliance on licence in the community, his evasion of arrest for some eight years, the commission of further burglaries, and his stance of resistance to the prison regime, the Panel concluded that the Applicant *"needs to be confined in the interests of public protection"*. The Panel decided that it was unable to direct his release.

27. In reaching that decision the Panel referred to the contacts the Applicant had within the community who have assisted and colluded with him. It could not be confident that the Applicant would sustain trust if re-released and without that confidence it considered he could not be returned to licence, even though his risk of serious harm to the public had markedly moderated. In the Panel's view *"lifers cannot mark their own homework. Accountability is crucial if the public are to be protected"*.

The Relevant Law

28. The Panel correctly sets out in its decision letter dated 16 April 2024 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 (as amended)

29. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

30. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

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

Irrationality

32. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined in Associated Provincial Houses Ltd -v- Wednesbury Corporation 1948 1 KB 223 by Lord Greene in these words *"if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere".* The same test applies to a reconsideration panel when determining an application on the basis of irrationality.

33. In R(DSD and others) -v- the Parole Board 2018 EWHC 694 (Admin) a Divisional Court applied this test to parole board hearings in these words 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."

34. In R(on the application of Wells) -v- Parole Board 2019 EWHC 2710 (Admin) set out what he described as a more nuanced approach in modern public law which was *"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)".* This test was adopted by a Divisional Court in the case of R(on the application of the Secretary of State for Justice) -v- the Parole Board 2022 EWHC 1282(Admin).

35. As was made clear by Saini J this is not a different test from the Wednesbury test. The interpretation of and application of the Wednesbury test in Parole hearings as explained in DSD was binding on Saini J.

36. It follows from those principles that in considering an application for reconsideration the reconsideration panel will not substitute its view of the evidence for that of the panel who heard the witnesses.

37. Further while the views of the professional witnesses must be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. The panel must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.

Procedural unfairness

38. 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.

39. 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;
    (e) the panel did not properly record the reasons for any findings or conclusion; and/or
    (f) the panel was not impartial.

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

41. No issue of procedural unfairness arises in this case, except in the sense that it is argued on behalf of the Applicant that the Panel should have considered an adjournment.

Error of law

42. An administrative decision is unlawful under the broad heading of illegality if the panel:

    a) misinterprets a legal instrument relevant to the function being performed;
    b) has no legal authority to make the decision;
    c) fails to fulfil a legal duty;
    d) exercises discretionary power for an extraneous purpose;
    e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
    f) improperly delegates decision-making power.

43. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Other

44. 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.

45. 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.*"

46. There are no arguable grounds for establishing a mistaken finding of fact in this case.

47. Reconsideration is a discretionary remedy. That means that, even if an error of law, irrationality, or procedural unfairness is established, the Reconsideration Member considering the case is not obliged to direct reconsideration of the panel's decision. The Reconsideration Member can decline to make such a direction having taken into account the particular circumstances of the case, the potential for a different

decision to be reached by a new panel, and any delay caused by a grant of reconsideration. That discretion must of course be exercised in a way which is fair to both parties.

The reply on behalf of the Respondent

48. PPCS has confirmed that no representations are offered by the Respondent.

Discussion

49. It was not in dispute that, in spite of the Applicant's complete disregard for the obligations imposed on him as a life sentence prisoner on licence in the community, he did not commit any offence involving fire setting or violence to the person.

50. The Applicant deliberately cut himself off from supervision, ignored the fact that he was on licence, and committed further offences of burglary for which relatively short concurrent determinate sentences of imprisonment were imposed. All of these have expired. The COM conceded, and the Panel accepted, that no serious harm was suffered by any person and that no-one had been exposed to the risk of such harm.

51. It is submitted on behalf of the Applicant that the Panel was "*vexed*" by the Applicant's explanations and that its vexation clouded its judgement. I can find no evidence of this in the Panel's careful reasoning which in my judgment was entirely objective.

52. The Panel went out of its way to explain why the commission of further offences did not per se lead to a risk of serious harm. It noted the concern of the Psychologist witness that the Applicant has yet to access appropriate interventions to support him in successfully managing himself on release and abiding by his life licence.

53. In their submissions, the Applicant's solicitors argue that the Panel did not apply the legal test for release.

54. They further argue that if the Panel was unsure of the credibility of the Applicant's version of life in the community, it should have considered adjourning and issuing appropriate directions.

55. I am not satisfied that the Panel failed to apply the correct test for release. The test is clearly set out at the beginning of the decision document and there is nothing in the reasons to suggest that the Panel lost sight of it. The risk of non-compliance and further offending is linked by reason of history to the risk of serious harm. The need for the Applicant to remain confined *"in the interests of public protection"* has to be read in the context of the acknowledged type of harm from which the public needs to be protected. I am not persuaded that the Panel confused the risk of committing further offences with the risk of causing serious harm. The fact that the Applicant's risk of serious harm has markedly moderated and lacks imminence does not mean that the risk does not exist.

56. Nor am I persuaded that an adjournment would have led to further evidence being provided which would have been of benefit to the Applicant or the Panel in further

clarifying the risk of serious harm. The Panel had sufficient evidence before it to reach an objective and fully reasoned decision.

Decision

57. For the reasons I have given, I do not consider that the decision was irrational nor has there been an error of law by the Panel. Nor has there been any procedural irregularity. Accordingly, the application for reconsideration is refused.

HH Judge Graham White
05 June 2024