[2019] PBRA 77

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Application for Reconsideration by Johnson

Application

1. This is an application by Johnson (the Applicant) for reconsideration of the decision of a panel of the Board, after an oral hearing, not to direct his release on licence. No representations have been submitted on behalf of the Secretary of State.

Background

2. The Applicant is now aged 56. Prior to the offences for which he was sentenced in 2011 he had no previous convictions. He is currently serving a determinate sentence of 15 years imposed in October 2011. The Applicant meets the eligibility criteria as he is a discretionary release prisoner. His parole eligibility date was reached in April 2019, his non-parole date is in October 2021 and his sentence expires in October 2026.

3. The Applicant's offending took place over a period of more than 20 years. The first of his three victims was a friend of his sister whom he indecently assaulted between 1979 and 1982. The second victim was his younger sister who between 1981 and 1985 he raped twice when she was a prepubescent girl of no more than 13. He was also convicted of two offences of indecent assault and two acts of gross indecency relating to her. His third victim was his 17 year old daughter with whom he had sexual intercourse on four occasions during 2004. In relation to one of these allegations his wife also participated in the sexual activity. She too was convicted and sent to prison. All the offending took place either in the family home or in a caravan which the family visited regularly.

Request for Reconsideration

4. The application for reconsideration submitted by the Applicant's solicitors is dated 30 November 2019 and is on the sole ground (in six respects) that the decision of the Oral Hearing Panel (OHP) was irrational.

Current parole review

5. In July 2018 the Secretary of State referred the Applicant's case to the Parole Board for his first review.

The Relevant Law

6. Rule 25 (decision by a panel at an oral hearing) and Rule 28 (reconsideration of decisions) of the Parole Board Rules 2019 apply to this case.

7. Rule 28(1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case.

8. In **R (on the application of 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."*

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. The bar is thus set high for irrationality to be established.

The Solicitor's Representations

9. The Applicant's solicitors submit that the OHP's decision not to direct release on licence was irrational, citing what they described as a number of errors, as follows:

   (a) That the repeated references by the OHP to the risk of offending against pubescent and pre-pubescent girls is misconceived. They submit that the only offending that took place which can be described as pre-pubescent took place when the victim, his sister's friend, was 10 years old. They further submit that the offending took place first nearly forty years ago when the Applicant was himself a teenager and there was no evidence of any pre-pubescent offending since then. In short they submit that this was not an ongoing risk factor.

   (b) That the characterisation of the offending as "*indiscriminate and opportunistic*" is misplaced, bearing in mind that all the offending was either within the family or with someone in the family home and so should not have been described as "*opportunistic offending in the community*".

   (c) That the OHP's findings that this was "*a well established pattern of illegal sexual behaviour*" and "*high density offending*" is flawed because there were only two periods of offending between 1980 and 1985 followed by a gap of almost twenty years to 2004.

(d) That the OHP fell into error in finding that a specific training course designed to address sex offending had not addressed the Applicant's risk. It is also submitted that the OHP were in error in finding that the Applicant needed to remain in custody to complete another course addressing sex offending, a programme for which he was not eligible given that he had been assessed as a low risk prisoner and the intervention in question was only for those designated as high risk. Finally, on the issue of programmes/interventions it is submitted that the Offender Manager and the Psychologist both agreed that he had worked upon his core risk factors and any further such work could and should be community based.

(e) That the OHP's finding that the Applicant had in the past, and might in the future exert undue influence over his wife was not supported by the evidence.

(f) Finally, that the OHP had not given sufficient weight to the evidence of all the professional witnesses each of whom supported release.

Discussion

10. It is well understood that panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. The Panel must make its own risk assessments and evaluate the likely effectiveness of any risk management plan that is proposed. They must make up their own minds on the totality of the evidence they hear, including any evidence from the Applicant. If they failed to do just that they would be failing in their duty to protect the public from serious harm and also failing in their duty to protect the prisoner from unnecessary incarceration.

11. If a panel decides not to follow the recommendations of experienced professional witnesses then it is obviously important that it should explain as best it can why it is doing so and that the reasons it gives should be sufficient to justify the conclusions it has reached. It will be necessary to return to this point.

12. In dealing with the specific points raised by the solicitors, I shall address each one, retaining the lettering in paragraph 9:

(a) It was the Judge in passing the sentence, with all the relevant material and information before him, who described the Applicant's sister as "*a pre-pubescent teenager of about no more than 13*". Anyone who has any experience of the conduct of trials of offences of this kind will understand the difficulties that can be encountered in establishing the chronological ages and maturity of some victims when the offending took place many years before a trial. In my judgment the OHP were perfectly entitled to reach for a convenient shorthand to describe the vulnerability of the victims in this case. This ground is not sustainable.

(b) That the OHP described the environment created by the Applicant as one where grooming of children took place in order to "*facilitate and normalise sexual offending*" is a statement of fact based on all the evidence. This

offending began with a sexual assault of a 10 or 11 year old child in his home. The phrase complained of was, in my judgment, entirely appropriate. This ground is not sustainable.

(c) That the finding made by the OHP was of a "*well established pattern*" clearly seeks to encapsulate deeply engrained conduct over a long period of time within a highly sexualised household. The addition of the description "*high density*" in reality adds nothing and is very far away from an irrational finding. Again this ground is not sustainable.

(d) In my judgment it is clear that the OHP is carrying out its duty in making a finding as to the suitability or otherwise of a particular programme or intervention. The flaw in the argument put forward on the Applicant's behalf regarding the alternative programme is that it fails to take into account the finding made by the OHP that it did not accept the risk assessments placed before them. The three assessments of risk of reoffending were regarded by the OHP in the decision letter as being "*artificially low as the numerous offences over two decades involving three victims were all reflected in a single court appearance and sentence*". Furthermore, the OHP cast significant doubt upon the assessment made by the Offender Manager reducing the Applicant's risk from high to medium as being premature. As for eligibility for the alternative programme, the same point applies. Even if this was a mistake, it is accepted that a finding of fact made by a decision maker may be said to be irrational, but to justify such a finding it has to be fundamental. This error (if it was one) did not in my view reach that high standard. This ground also fails.

(e) The OHP clearly found credible evidence on which to base their finding that the Applicant exerted undue influence over his wife who was also his co-defendant. It is said in this ground that she remains prepared to give evidence to this effect. If so, I am bound to observe that the time for that was at the oral hearing. This ground fails.

(f) It is clear that the OHP is perfectly entitled to accept or reject evidence placed before them, making up their own minds on the evidence they receive and giving the evidence they accept such weight as they think is appropriate.

13. The OHP in this case was not assisted by an up to date psychological assessment. The one before them was dated 29 September 2018 and was based upon an interview between the Psychologist and the Applicant on 5 September 2018. I remind myself that the oral hearing was 14 months later. Generally speaking, it is understood that such reports remain of value for no longer than approximately six months. The papers before me are silent as to whether any application was made to the OHP or consideration given by it to an adjournment for a more up to date assessment. The position was therefore that the OHP had to make their own assessment of risk with the benefit of such assistance as the professional witnesses were able to offer.

14. I have carefully considered the evidence in the case, the decision letter and the solicitors' representations. While I am entirely satisfied that taken individually or together the grounds put forward on the Applicant's behalf do not justify a direction for reconsideration there is one further aspect of the OHP's decision that has given me cause for anxious consideration.

15. In reaching their conclusions, specifically with regard to important evidence given by the Offender Supervisor, the Offender Manager and the Psychologist, the panel simply indicated that it did not agree. It would have been helpful to explain why they did not agree in each case especially as this was the Applicant's first review. If a panel make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should clearly explain its reasons for doing so. Put simply, its stated reasons should be sufficient to justify its conclusions. **(See R (Wells) v Parole Board EWHC 2710).**

16. In light of the conclusions I have reached on this application I regard it as both appropriate and fair to draw attention to a non-exhaustive list of assessments and conclusions reached by the OHP as set out in the decision letter, as follows:

    (a) The finding that the statistical assessments of current risk were artificially low;

    (b) The finding, given its view that the Applicant's core risk factors remained unaddressed, that any reduction in the risk of serious harm from high to medium was premature;

    (c) The finding that the Applicant's account of his nine offences was not credible and at variance from that of his wife, led the panel to conclude that they did not accept (as the professionals had) that the Applicant would be open in making certain disclosures to those supporting him;

    (d) That while finding that completion of a particular training programme was to the Applicant's credit, it also found that the risks it identified were not the Applicant's prominent risk factors relating to sexual offending;

    (e) The panel found itself concerned about the Applicant's evidence regarding his relationship with his wife and the environment in which they lived, revealing in its view a concerning lack of insight on the Applicant's part;

    (f) The panel's opinion was that notwithstanding the evidence of the experts, core reduction work was still outstanding and had not been addressed in the training course he had completed;

    (g) The panel could not detect any internal controls and risk management finding the Applicant would, in consequence, be entirely dependent on external management which itself would be reliant on open and frank disclosure by the Applicant;

(h) Finally, given their finding of his ability to manipulate his wife, the OHP indicated it remained uneasy about the Applicant's plan to resume cohabitation with her.

17. I must now take a step back and consider the case as a whole. Having done so, I am satisfied that the conclusions reached by the OHP were not unreasonable, were soundly based on the evidence they received, and were sufficient to justify their rejection of the recommendations of all the professional witnesses. Notwithstanding what might be described as a paucity of reasoning in relation to the OHP's conclusions as to aspects of the evidence of the three professional witnesses, I am satisfied that the OHP's decision overall was fully justified.

Decision

18. Accordingly, the application for a reconsideration is dismissed.

HH Michael Topolski QC
10 December 2019