[2020] PBRA 156

the Parole Board
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Application for Reconsideration by Welsh

Application

1. This is an application by Welsh (the Applicant) for reconsideration of a decision of the Parole Board made under rule 25(1) of the Parole Board Rules 2019 (the 2019 Rules) that the Applicant was unsuitable for release (the Decision).

2. Rule 28(1) of the 2019 Rules 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, comprising a dossier of 1036 numbered pages, the decision letter dated 21 September 2020 and written submissions for the Applicant by his solicitors dated 28 September 2020.

Background

4. The Applicant is serving an indeterminate sentence for public protection that he received after his conviction in March 2006 for robbery and two counts of attempted robbery. The minimum tariff was set at two years and expired in March 2008. He was aged 20 at the time of conviction. He is now aged 35.

Request for Reconsideration

5. The application for reconsideration was received by the Board on 28 September 2020.

6. The grounds for seeking a reconsideration are that the Decision is marred by irrationality and procedural unfairness.

Current parole review

7. The Decision was made on the Secretary of State's referral of the Applicant's case to the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release, and if not and if relevant, to advise on suitability for open conditions. The Applicant had been released on two occasions on indefinite licence,

each of which was revoked leading to his return to prison, most recently in March 2018. The Decision relates to the first referral of the Applicant's case to the Board following that second recall.

8. The Decision was made by a panel that considered the Applicant's case at an oral hearing on 7 September 2020 that was conducted remotely due to restrictions on social contact due to the COVID-19 pandemic. The panel comprised three members of the Board, one of whom is a specialist psychiatrist member.

Relevant Law

9. Rule 28 of the Parole Board Rules 2019 provides that a party may apply to the Board for the case of a prisoner who is serving a sentence of a type that is specified by the rule to be reconsidered on the grounds that a decision on the prisoner's suitability for release is irrational or procedurally unfair.

Irrationality

10. 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 review 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."*

11. 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.

12. The application of this test in applications for reconsideration under rule 28 has been confirmed in previous decisions, such as **Preston [2019] PBRA 1.**

Procedural Unfairness

13. 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.

The reply on behalf of the Secretary of State

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14. On 12 October 2020, the Board was informed by the Public Protection Casework Section, on behalf of the Secretary of State, that no representations were offered in response to the Applicant's reconsideration application.

Discussion

15. The Applicant has noted in the submissions that his release was supported by three out of the four professional witnesses, specifically the Prison Offender Manager, prison-instructed psychologist and prison-instructed psychiatrist. The fourth professional witness was the Community Offender Manager who did not support release. The panel noted those differing views.

16. The Parole Board is not obliged to adopt the opinions and recommendations of professional witnesses. It is important that a panel should explain clearly a decision that is contrary to the opinions and recommendations of all the professional witnesses: **R (Wells) v Parole Board 2019 EWHC 2710**. However, it is a panel's responsibility to make its own risk assessment and to evaluate the likely effectiveness of any risk management plan proposed on the totality of the evidence, which it may be expected to perform with the benefit of its expertise in the realm of risk assessment; see **DSD**, for example.

17. I am satisfied that, in this case, the panel made a rational assessment, which it explained with adequate clarity.

18. The panel noted that the Applicant did not appear to have completed any targeted offending behaviour work to address his use of violence specifically, and that there had been concerns about his misuse of alcohol and aggressive behaviour during both of the periods he had spent in the community on licence. The Applicant had moreover been convicted for offences of violence and threatening behaviour during the more recent period, and there had also been reports of alleged violence and aggression towards his intimate partner in March 2018 that had occasioned the most recent recall to prison.

19. A key factor in the panel's reasoning was the extent to which the Applicant was willing and motivated to work with the Probation Service in an open and transparent manner, specifically around his decision not to disclose psychiatric/medical information to his Community Offender Manager.

20. The panel also noted that the Applicant had indicated that he had not been taking his prescribed medication for some time prior to the incident in March 2018, for reasons connected with the closure of his General Practitioner's surgery and his difficulty in registering with another doctor. The Applicant had accepted that he had been regularly drinking alcohol. The panel noted the assessments by both the psychologist and psychiatrist witnesses that the Applicant posed a low or relatively low risk of future violence, but also that those assessments of a low risk were dependent on the

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Applicant's compliance with medication and his avoidance of alcohol. The panel noted that the psychiatrist witness had stated that without medication the Applicant would probably experience symptoms within two to three days, and that the use of alcohol was intimately linked to risk, which would increase quickly if he used alcohol to help manage his symptoms.

21. The panel also noted that the Applicant had also been described as confrontational during supervision during the more recent period of release.

22. The panel did note that the psychologist witness had stated the opinion that the Applicant had developed some internal controls to manage his risk, but the panel doubted that the Applicant had developed the necessary level of internal control that would be required to manage his own risks in the community, beyond the external controls proposed by his Community Offender Manager. That was a rational consideration, and the panel did not suggest, as is asserted in the application, that likelihood of compliance with the measures proposed by the Probation Service and the working relationship with the Offender Manager were the only factors to be considered in the assessment of the necessity for the protection of the public that the Applicant should remain confined. It is axiomatic that those factors were relevant to that assessment.

23. With regard to the rationality of the advice given by the panel on the Applicant's suitability for open conditions, reconsideration under rule 28 of the 2019 Rules applies only to decisions made by the Board under rule 19(1)(a) or (b), 21(7) or 25(1) of those Rules, which are decisions on suitability for release. Recommendations as to suitability for a move to open conditions are outside of the scope of rule 28, so reconsideration could not be directed on the grounds that the Board has erred in its consideration of a request by the Secretary of State to advise on that matter. See also **Barclay [2019] PBRA 6**.

Decision

24. The application for reconsideration is accordingly refused.

Timothy Lawrence
23 October 2020