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[2020] PBRA 200

Application for Reconsideration by the Secretary of State in the case of Smith

Application

1. This is an application by the Secretary of State for Justice (the Applicant) for reconsideration of a decision of a Parole Board panel which heard the case of Smith (the Respondent) on 27 October 2020 and in its Decision Letter (DL) of 8 November 2020 ordered 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. These are:

   a. The application and grounds in support of 3 pages.
   b. The dossier of 552 pages.
   c. The decision letter of 8 pages.

Background

4. The Respondent was sentenced to life imprisonment for murder in August 2003. His tariff was set at 15 years. This expired in February 2018. He was 22 years old at the time of sentencing. He is now 39 years old.

Request for Reconsideration

5. The application for reconsideration is dated 30 November 2020.

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

Ground 1

a. (Paras 5 & 6 of the Grounds submitted). The decision was irrational because:

   i. There was insufficient evidence that sufficient risk reduction work had been undertaken: in particular work on mental health, demonstration of remaining drug-free for a substantial period, engaging with a particular programme.
   ii. That although the DL stated that the Respondent had completed some 6 programmes designed to reduce his risk in one way or another the

evidence before the panel from his Offender Supervisor (OS) suggested that his motivation to do so had been prompted by the need to comply with a previous recommendation of the Board rather than because of any real desire on his part. In respect of a programme designed to assist with the Respondent's mental health the OS had a similarly critical opinion of his effective engagement with it, and the DL reflects that lack of genuine desire to avail himself of the services of the relevant team.

iii. In summary it was irrational of the panel to base its decision in any way on the Respondent's alleged desire to reduce his risk by taking part in courses designed to do so.

b. (Para 7 of the Grounds). The decision was irrational because by his own admission the Respondent had been a regular abuser of drugs since he was a child and had only been abstinent for a period of 7 weeks before the hearing. In those circumstances it was irrational:

i. To describe the drug taking in August 2020 as a "*relapse*".
ii. To describe a period of 7 weeks as a period of "*prolonged stability*".

c. (Para 8 of the Grounds). The decision was irrational because although the DL stated that the Respondent has scant support in the community it went on to say that he had recently established support from a number of agencies, one of which is named. In fact, the evidence before the panel was that he had failed to engage with relevant services and failed to respond to attempts to contact him by a key worker. In those circumstances it was irrational of the panel to state in the DL that a warning sign of his disengagement would include him disengaging from support.

Ground 2

a. (Para 9 of the Grounds). The release test was not applied properly, and was therefore irrational because:

i. The panel agreed with the assessment of risk by the professionals – very high. In spite of this it went against their recommendations that the Respondent should not be released. In particular the OM and psychologist expressed the opinion that the risk was imminent.
ii. The panel failed to explain why it had gone against the recommendations of these three professionals.

b. (Para 10 of the Grounds). The DL made no mention of, and there is therefore no way of assessing, whether, and if so how, the panel took into account previous offences of attempting to escape from custody and assaulting a prison officer as well as an "*index offence paralleling*" allegation of slashing a fellow prisoner with a weapon containing a razor blade.

Current parole review

7. The case was referred to the Parole Board (PB) in March 2019. The Respondent's case was considered by a Parole Board panel in October 2019. The case was deferred with directions that various matters be attended to by the end of February 2020. In

December 2019 applications were made and granted for extensions of time to serve certain documents by March 2020. In April 2020 a further extension of time was granted for the obtaining of another report. In July 2020 directions were issued requiring witnesses to assess the effect if any of the Covid 19 situation on the Respondent and in particular as to his mental health. As set out above the hearing took place on 8 November 2020 with a judicial chair, a psychologist and an independent member. The panel heard evidence from

- A therapist;
- The Offender Supervisor (OS);
- The Offender Manager (OM);
- A Prison Service psychologist;
- A Psychologist instructed on the Respondent's behalf; and
- The Respondent.

The Relevant Law

8. The panel correctly sets out in its decision letter dated 8 November 2020 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

9. 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.

10. 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 a previous reconsideration application - **Barclay [2019] PBRA 6**.

Irrationality

11. 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."

12. 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.

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

Other

14. 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.

15. 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.*"

The reply on behalf of the Respondent

16. Belatedly, on 29 December 2020, the Respondent's legal representative sent in representations. Unfortunately they do not deal with the grounds submitted in detail but submit that there was indeed support for the Respondent in the community, that the panel had obviously given careful thought to the case and that the alternative suggested by the professional witnesses would be 'setting (the Respondent) up to fail'.

Discussion

17. It is important to stress at the outset that the existence of the Parole Board and its ability to seek and obtain relevant evidence and conduct oral hearings is so that an independent tribunal can hold the balance between the right of offenders to have their continued detention by the state reviewed and of the Secretary of State to put forward, if he wishes, reasons why that detention is still necessary to protect members of the public from serious physical or mental harm. Such a system will inevitably sometimes result in decisions of the Board which reject the recommendations of professionals.

18. Grounds i. a-c. These allege in different ways that any decision to direct release would be irrational since the Respondent had not done enough remedial work over the previous 17 years to merit such a decision, and, in addition, that such work as he had undertaken had not been done out of a genuine desire to reduce the risk he might pose of inflicting serious harm on members of the public but simply on a wish

to "tick" boxes, and impliedly, although not expressly since no reference is made in the grounds to the evidence given to the panel by the Respondent, that the panel should simply have dismissed his evidence as worthless. I have the opportunity to study the very lengthy dossier and to read the reports of the Respondent's participation in some of those courses designed in various ways to reduce the risk of his re-offending in such a way as to cause serious harm. None of those reports from 2008, 2010 and 2016 support this conclusion. There were no such reports concerning the remaining courses he attended but the OASys from within the bundle contains the following (summarised): *"To his credit he has completed (5 courses) at [his current prison establishment]".* The possibility that he might attend another course in 2019 was not followed up but not - according to the report concerning it within the dossier - because of a concern that the Respondent might not participate with any genuine intention to benefit from it. I reject this ground of appeal.

19. Grounds ii a and b. The OS' evidence to the panel on this point was summarised in paragraph 2 of the DL. On the assumption that the DL summary is accurate she made a number of points:

    i. The Respondent has an addiction. He claims to use drugs out of boredom. The use of drugs induces unconsciousness rather than violence or other erratic behaviour.
    ii. He had used SPICE in August 2020 but had been abstinent since. Although drug misuse did not lead itself to an increased risk to the public it would in time lead to renewed association with criminal peers and possible further offending.

20. With the exception of the index offence, the Respondent had not, though often convicted of a large number of offences of dishonesty and possession of drugs, been convicted of many offences involving actual or potential violence. The panel identified drug addiction as the Respondent's principal risk factor and noted that the Respondent's progression had been 'stymied' by it.

21. I see no obvious error, and certainly no irrationality, in the panel use of the words "*relapse*" and "*stability*" in the context of the particular case.

22. It would of course have been open – and certainly not 'irrational' - to the panel to decide that the risk that the Respondent would relapse into drug abuse and thus into offending behaviour, including serious violent behaviour, was sufficient to mean that release could not be directed and that perhaps the better course would have been to refuse to direct release or to recommend his transfer to open conditions. However the decision to direct release on the basis that clear signs of deterioration would be identified early and could be dealt with by warnings, further licence conditions or recall cannot be characterised as 'irrational' under the strong legal definition set out above in **DSD**.

23. Ground iii. This ground has no validity. There is no conflict, let alone irrationality, between findings that, on the one hand, the Respondent has no or very little support from family or friends – 'the community' - but has been able to attract and rely on the support of organizations such as those described in the dossier and the DL. It follows that I accept the submission of the respondent on this ground.

24. Ground iv.
    a. The question of the risk posed by the Respondent. "*High*" in the opinion of the report writers, repeated and accepted in the DL. However, this is a common if not invariable assessment of cases in which the offender has been convicted of murder and has a background of offending. It is also said that 'the psychologist gave evidence that the risk was imminent'. There are a number of references to the 'imminence' of the risk of serious harm presented by the Respondent within the dossier.
        i. At pp51,52 & 54 (the previous decision of the Board in 2018) where it was said that 2 psychologists described the risk of serious harm as "*not imminent*" and the panel agreed.
        ii. An independent psychologist instructed for the Respondent for the previous parole hearing expressed the same conclusion at p133, as did the prison psychologist's report at p282 and a different independent psychologist instructed for the Respondent at p450, and
        iii. Probation service assessment reports repeated the same opinion at pp367 and 522.

    There is therefore nothing in this ground.

    b. The failure of the panel to explain:
        i. why it had rejected the recommendations of the OS, OM and the prison psychologist that the panel should recommend to the Secretary of State that the Respondent remain in closed conditions in the hope that he could in due course be transferred to a prison which operates a regime designed and run by psychologists, and then, if all went well, to open conditions and eventual release, and
        ii. how the identified risks were manageable against the test for release.

25. As to i. The Respondent had declined the opportunity to be considered for referral to the above-mentioned unit – DL para 5. At para 7 the DL describes the proposal that the Respondent be housed in designated premises and from there applications could be made to facilities for drug rehabilitation.

26. As to ii. The panel concluded that the Risk Management Plan suggested for the Respondent was *"robust and that the staff around you….will quickly observe warning signs of any deterioration in your behaviour before the risk level to the public of serious harm arises."*

27. It is clear that the panel rejected the recommendations of the witnesses because it considered that, having heard from all the witnesses, read the dossier and, importantly, heard evidence it described as *'frank'* and *'coherent and lucid'* from the Respondent, it was satisfied that it was no longer necessary for him to be confined. The object of the oral hearing was for the panel to be able to hear and test the various opinions expressed by witnesses, including the prisoner and any witness called in his support, and come to its own independent conclusion.

    a. The DL failed to mention 3 occasions on which the Respondent had committed offences of violence or had – or was alleged to have - breached prison rules.
        i. In 1998 (aged 17) the Respondent was convicted of 21 offences – one of which was escaping from lawful custody for which he was sentenced to a concurrent term of twelve weeks in a Young Offenders Institution.

ii. Following his arrest for the index offence of murder he escaped from custody and received a concurrent – or possibly consecutive - sentence of 2 years or 1 year[1]. In any event, by the time of the hearing under review the tariff period which had ended in February 2018 and an additional sentence of even 2 years had long expired by the time of the instant hearing.

iii. In April 2017 the Respondent was convicted of common assault by throwing urine at a prison officer and received a sentence of 4 months imprisonment.

28. The panel states in the DL, at paragraph 3 – Analysis of Offending – that his past record demonstrated *"a poor attitude towards authority; assaults on police and breach of licence conditions and failing to surrender to custody".* In my judgment it is clear that so far as the first matter referred to above the panel had it well in mind. While there is no specific mention of the offence committed soon after his arrest for the index offence it is clear that the panel had well in mind the fact that in the early years of this century the Respondent's attitude to rules had been poor. Neither of these complaints come close to proving "irrationality".

29. In the same paragraph, having correctly summarised the Respondent's criminal record up to the time of the commission of the index offence, the DL refers to more recent (2019-2020) security reports concerning actual or alleged breaches of prison regulations. There is however no explicit reference to the offence of assault in 2017. While it is inconceivable that the panel did not know of - and therefore consider - the details of the offence, which is described in some detail on at least 16 occasions in the dossier[2] and must have been referred to by the 5 witnesses at the oral hearing – it is unfortunate that it does not figure within the DL, in particular because of the opinion expressed in a document[3] prepared by the OM – *"The most recent offence of assault is indicative of serious harm, where he has covered a staff member with bodily fluids, putting (them) at risk of infection and serious disease."*

30. Does the omission of this important matter from the text of a DL render the DL "irrational" within the **DSD** definition? In my judgment, after anxious consideration, it does. It is necessary to approach the examination of the DL in the way set down by Lord Bingham in *Oyston* quoted above at paragraph 15. In short, the DL:
    - summarised the general matters for and against the 3 courses open to it, and
    - made clear its view that although there remained a risk of serious harm to the public evidenced by the index offence and his previous and some of his subsequent behaviour, it could be managed in such a way that if it looked like becoming a reality the strict licence conditions would mean that appropriate action could be taken in advance of it doing so; but
    - it made no reference to the most recent and most serious offence of violence committed by the Respondent, an act which had clearly influenced the previous decision not to direct release, and which had been put forward as recent evidence of the risk of serious harm the Respondent still posed.

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[1] *The dossier records the length and starting date for the sentence differently at different points.*
[2] *At pp 49, 53, 55, 83, 85, 158, 162, 211, 215, 295, 356, 371, 519, 520, 522, 527*
[3] *P522 of the dossier*

31. It was therefore important that the panel not only considered the most recent offence but explained to the Applicant why, having done so, it had nevertheless, reached its decision to direct release.

Decision

32. Accordingly, I do consider that the decision was irrational. I do so solely for the reason set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

Sir David Calvert Smith
4 January 2021