[2022] PBRA 53

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Application for Reconsideration by The Secretary of State for Justice in the case of McCallum

Application

1. This is an application by the Secretary of State (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 19 March 2022 directing 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 Decision Letter dated 19 March 2022;
   b) A request for reconsideration in the form of written representations dated 19 April 2022; and
   c) The dossier, numbered to page 736, of which the last document is the OASys report dated the 8 October 2021.

4. The application was not made on the published form CPD 2, which contains guidance notes to help prospective Applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints and reminds Applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made and I am satisfied that the written representations provide reasonable explanation as to the proposed grounds for reconsideration.

Background

5. The Respondent is now 33 years old. On 20 March 2006, when he was 17 years old, he received a sentence of life imprisonment with a minimum term of 10 years, less time served on remand, following his conviction for an offence of murder (the Index Offence).

6. The background to the Index Offence was that The Respondent, whilst intoxicated, had assaulted the 52-year-old victim who had learning difficulties. He knocked the victim to the ground and stamped repeatedly on his face. Prior to the Index Offence, the Respondent had a limited history of offending. He first came before the Courts in 2005, when sentenced for possessing cannabis. In the same year he was convicted of being drunk and disorderly.

7. The Respondent first became eligible to be considered for release by the Parole Board in January 2015. In April 2017, he was released on the direction of the Parole Board but was recalled three months later due to concerns about his use of alcohol and his poor compliance. A later Parole Board review led to the Respondent being re-released on 26 March 2018, however, he was recalled less than a month later due to concerns about his misuse of drugs. The present Parole review was the second review of his case since his recall in 2018.

8. The Applicant referred the case to the Parole Board in November 2019 to consider whether the Respondent should be re-released or, in the alternative, whether he should be progressed to an open prison. A panel of the Parole Board (the panel) reviewed the case at oral hearings on 3 December 2020, 15 April 2021, 18 November 2021 and 10 March 2022. Following those hearings, the panel issued a Decision Letter dated 19 March 2022 directing release.

Request for Reconsideration

9. The application for reconsideration is dated the 19 April 2022.

10. The grounds for seeking a reconsideration are that the panel's decision was irrational, in that:

    a) The panel over-relied on the Respondent's self-report in contrast to the evidence put forward by report writers.

    b) The panel incorrectly applied the test for release, with a focus on the prospect of imminent risk only.

The Relevant Law

11. The panel correctly sets out in its Decision Letter dated the 19 March 2022 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.

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. 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."

14. 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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

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

The reply on behalf of the Respondent

16. The Respondent and/or his legal representative have not submitted any representations in response to the application.

Discussion

a) <u>The panel over-relied on the Respondent's self-report.</u>

17. The Applicant submits that report writers, who were witnesses at the oral hearing, raised concerns about the Respondent and did not support his release. It is submitted that the panel failed to identify and fully test the Respondent's evidence regarding his insight and his views on treatment and risk reduction, and his self-report of a willingness to engage with work in the community when he has refused to engage with work in custody.

18. Much of the Applicant's representations focus on the panel reaching a different conclusion to those of the witnesses at the oral hearing and what he sees as a failure of the panel to properly explain its reasoning for doing so.

19. In **<u>Oyston</u> [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*."

20. The Applicant and the witnesses at the oral hearing are entitled to disagree with the panel's determination of risk and whether the Respondent meets the test for release. It is not for me, in a reconsideration application, to substitute my own assessment of risk in place of the conclusions reached by the panel.

21. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

22. Any reading of the Decision Letter demonstrates that the panel undertook its task with great care, indeed the panel held several oral hearings and reviewed matters over a significant period prior to reaching its decision. The panel did not simply rely upon the Respondent's self-reports and it recognised and reflected on the evidence of the witnesses in respect of the concerns expressed about the manageability of risk and whether the Respondent met the test for release.

23. There was nothing irrational about the panel's approach and in my view any reasonable person, applying his mind to the question, could have reached the same decision. The panel weighed up the evidence and reached a different conclusion to those of the witnesses, and it quite properly explained why. The panel was alive to the concerns that had been expressed and weighted them accordingly. The Applicant may not agree with the decision, but this does not make it irrational.

b) The panel incorrectly applied the test for release, with a focus on the prospect of imminent risk only.

24. The Applicant submits that the panel applied the test for release with a focus on the prospect of imminent risk. In his view, imminent risk is not the sole factor which comprises the test for release and that to effectively apply the test and consider whether it is met, the panel was required to evidence that it was no longer necessary for the protection of the public that the Respondent be confined, including ensuring that he had made sufficient progress in addressing and reducing risk to a level consistent with protecting the public from harm. He submits that the panel have failed to apply the appropriate test for release, alternatively focussing on the imminency of risk of physical violence to the public and consequently reaching a decision to release which could be deemed as irrational.

25. The Applicant's referral to the Parole Board in November 2019 was made under **Section 28 of the Crime (Sentences) Act 1997**. Within his referral, he states:

> "*This case is hereby referred to the Parole Board by the Secretary of State under section 28(6)(a) of the Act to consider whether or not it would be appropriate to direct the prisoner's release*."

26. **Section 28 (6) of the Crime (Sentences) Act 1997** states:

> *"(6)The Parole Board shall not give a direction … with respect to a life prisoner to whom this section applies unless -*
>
> *(a)the Secretary of State has referred the prisoner's case to the Board; and*
> *(b)the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."*

27. Within his application for reconsideration, the Applicant appears to seek to expand on the test for release, including a provision that the Respondent should have made "*sufficient progress in addressing and reducing risk to a level consistent with protecting the public from harm*".

28. If the panel had not been minded to direct release in this case, the referral from the Secretary of State asked for advice in determining the Respondent's suitability for a transfer to an open prison. In considering making such a recommendation, the panel would have been required to take the following main factors into account, as set out in its Decision Letter:

> "• *The extent to which the prisoner has made sufficient progress in addressing and reducing risk to a level consistent with protecting the public from harm on temporary release;*
> • *the extent to which they are likely to comply with any form of temporary release;*
> • *the risk of their absconding; and*
> • *the benefits of testing them in a less restrictive environment."*

29. There is nothing to this ground and in my assessment, although attractively drafted, the Applicant simply seeks to rehearse his argument for disagreeing with the panel's decision. His submission that the panel was focussed on imminent risk is not an accurate reflection of the Decision Letter in its entirety. The panel did consider imminence of risk in terms of violence but was also alive to other matters that may present a difficulty in the management of the Respondent should his release be directed. Protection of the public is paramount in any review by the Parole Board. The panel in this case evaluated the risk of serious harm and the likely risk of reoffending, it correctly applied the test for release, weighing up all matters in reaching the conclusion that it did.

30. It is right that the Respondent may be difficult to manage on release, indeed he may fail for a third time. It is right that he may struggle to manage his emotions and that he may display verbal aggression. The Applicant submits that any type of violence or aggression, including threatening behaviour, is deemed to be offending behaviour. However, in my assessment, that does not mean that that the test for release is not met.

31. A released prisoner may fail to comply on licence but compliance in and of itself does not necessary demonstrate an escalation in risk that cannot be managed under the terms of a risk management plan, including a decision to recall him/her to custody. The Applicant is correct in that certain behaviours may demonstrate offending behaviour, however, it does not necessarily follow that such behaviour would cross the threshold of risk of serious harm.

32. Any reading of the Decision Letter shows that the panel assessed with care, over a number of oral hearings, the likely level of risk in this case and it explained why it reached a decision that the Respondent could be safely managed on licence and therefore why he met the test for release. The Applicant may disagree with the decision but his reasoning does not reach the high standard of irrationality.

Decision

33. This was on any view a serious and troubling case. Two crucially important issues I must decide are first, whether I am satisfied that the conclusions reached by the panel were justified by the evidence and secondly, whether its conclusions were adequately and sufficiently explained.

34. I am satisfied that the decision to direct release was fully justified on the totality of the evidence. In a thorough and carefully reasoned decision which sets out in detail the findings, assessments, operative reasoning and conclusions of the witnesses and takes fully into account all of the evidence given to the panel, the panel in my judgment satisfied the public law duty to provide evidence-based reasons that in my judgment adequately and sufficiently explained the conclusions it reached.

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

Robert McKeon
28 April 2022