

[2019] PBRA 68

Application for Reconsideration by Wilson

Introduction

1. This is an application by a recalled indeterminate sentence prisoner, Wilson ("the Applicant"), for reconsideration of the decision of a panel of the Board in his case. The decision was issued on 22 October 2019 after an oral hearing on 18 October 2019. The Oral Hearing Panel ("OHP") did not direct his release on licence and did not recommend to the Secretary of State that he should be moved to open conditions.
2. The case has been reviewed by a Reconsideration Assessment Panel ("RAP") which has considered the following material:
 - Dossier running to 193 pages;
 - Representations submitted by the Applicant's solicitors on 5 November 2019 in support of the application; and
 - The OHP's decision letter.

There are no representations on behalf of the Secretary of State in relation to the application.

Background

3. The Applicant is aged 37. He has a substantial criminal record. His life is said to have been plagued by using illegal drugs and alcohol. He is currently serving two concurrent sentences of Imprisonment for Public Protection ("IPP").
4. The offences for which these sentences were imposed occurred over the space of a few days. On the first day the Applicant robbed a woman of her car when she returned home late at night. He was driving that car three days later when the police attempted to stop him. He drove off and hit two pedestrians, one of whom received very serious injuries. Two days after that the police saw him driving again and attempted to stop him. He left the car and grabbed a 13-year old boy, threatening to kill him. He ran off but was quickly apprehended.
5. The Applicant was sentenced on 25 July 2005 to IPP with a tariff of 18 months for the offence of 7 June 2005, and on 6 February 2006 to IPP with a tariff of 4 years for the other offences.

6. The Applicant has now been released on licence four times and recalled four times during this sentence. His most recent release on licence was on 27 November 2018, and his most recent recall on 5 April 2019.
7. His case was referred to the Board on 30 April 2019 to decide whether to direct a further release on licence. As the Applicant had previously absconded from open conditions, the original referral on 30 April 2019 did not request advice about his suitability for a move to open conditions, but a subsequent referral on 10 October 2019 did.
8. At the hearing on 18 October 2019 the Applicant was legally represented. Oral evidence was given by the Offender Supervisor (who supported re-release on licence), the Offender Manager (who did not) and the Applicant himself.

The Relevant Law

9. The OHP's decision not to direct the Applicant's release on licence is eligible for reconsideration under Rule 28(1) of the Parole Board Rules 2019.
10. As the solicitors correctly accept, the OHP's decision not to recommend a move to open conditions is not eligible for reconsideration. Rule 28(1) is confined to decisions about a prisoner's suitability for release on licence.
11. The only two grounds for reconsideration under Rule 28(1) are irrationality and procedural unfairness. It is not suggested that there was any procedural unfairness in this case. The solicitors challenge the OHP's decision on the ground of irrationality only.
12. Irrationality is a concept well known in judicial review proceedings in the High Court. 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 paragraph 116 of its judgment:

'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 was the test set out in a different context by Lord Diplock in the House of Lords in **CCSU -v- Minister for the Civil Service [1985] AC 374**.

13. 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.
14. The fact that Rule 28 uses the same word (irrational) as is used in judicial review cases clearly demonstrates that the same test should be applied when considering an application for reconsideration of a panel's decision.



Solicitors' Representations

15. The Applicant's solicitors set out a number of complaints in support of their contention that the OHP's decision was irrational. It will be convenient to consider each complaint separately in the discussion below.

Representations on behalf of the Secretary of State

16. There are none (see paragraph 2 above).

Discussion

17. The solicitors' complaints are as follows:

The panel failed to apply the correct test to the application for re-release on licence

18. The RAP cannot accept this contention. The OHP stated clearly in its decision that it was satisfied that it remained necessary for the protection of the public that the Applicant should be confined. On that finding the test for re-release was not met and the OHP could not direct re-release.

Where probation assess a risk of serious harm as high, that means that there are identifiable indicators of risk of serious harm, the potential event could happen at any time and the impact would be serious. The panel seems to have adopted this definition of high risk of serious harm.

19. The panel, as is normal and appropriate, referred to the probation assessment of the Applicant's risk of serious harm to the public as one of the matters which it had considered, but it correctly applied the statutory test in making its own assessment of risk (see paragraph 18 above).

The panel failed to take into account a number of positive factors.

20. It is clear from the OHP's decision that it had well in mind the positive factors but concluded - as it was entitled to do - that they were outweighed by the negative ones. The positive factors referred to by the solicitors were as follows.

(a) The Offender Supervisor's evidence that he did not believe the Applicant's risk to be imminent - over time he becomes cocky, he becomes complacent - he can be managed in designated accommodation but then when he moves on becomes a concern

21. The Board's task in assessing risk is not limited to imminent risks. The Offender Supervisor's evidence highlighted the very kind of future risk which the OHP was bound to consider. That is why panels frequently have to consider whether there would be warning signs if a prisoner's risk was becoming imminent. In this case the OHP considered that very point and (entirely justifiably on the evidence) was concerned that there would be an absence of warning signs if the Applicant decided (as he had done during previous periods on licence) that



he would drive motor vehicles when prohibited from doing so. The Offender Supervisor's evidence was therefore of very limited value in supporting the Applicant's case for re-release.

(b) The Offender Manager stated in oral evidence that in her assessment the Applicant did not pose an imminent risk of serious harm. She stated that if he is in designated accommodation his risk is not imminent and restrictions are in place to manage his risk.

22. Please see the comments in paragraph 21 above about imminence of risk. Notwithstanding the passage relied on by the solicitors, the Offender Manager was not supporting re-release on licence, and was of the opinion that the Applicant needed to remain in prison. She considered that before release he needed to consolidate his learning in relation to alcohol misuse and driving. The panel agreed with that view, as it was fully entitled to do.

(c) It is therefore apparent that the concern of both professionals was his move on from the designated accommodation.

23. Please see comments in the paragraphs above.

(d) It was submitted that work which was not available in the custodial environment could have been completed in the community with his probation officer prior to his release.

24. There is work available in custody to address the Applicant's outstanding risk factors and the OHP was fully entitled to its view that in order to protect the public from the risk of serious harm such work should be carried out before release. If the work is not available in the Applicant's current establishment he may have to be moved to another one.

(e) We respectfully submit that as he was not assessed as posing an imminent risk of serious harm he does not meet the test for continued detention as a post tariff indeterminate sentenced prisoner.

25. For reasons explained in paragraph 21 above, the RAP cannot accept this submission.

(f) We further submit that due account has not been taken of the steps that could have been put in place to address his risk factors whilst he was in designated accommodation.

26. The OHP was clearly of the view that these steps would not be sufficient to protect the public from serious harm and that continued confinement in prison was necessary. It was fully entitled to that view. The Applicant had previously driven motor vehicles whilst on licence in the community, and his licence conditions had not prevented him from doing so.

(g) The Applicant is incorrectly described in the decision letter as posing a medium level of risk to staff as per the probation assessment. A



probation report in the dossier confirms that he is assessed as posing low risk of harm to staff.

27. There are in fact contradictory references in the dossier to probation's assessment of the Applicant's risk of harm to staff. One probation report shows it as medium, whilst the grid in the actual probation assessment which was updated at about the same time shows it as low. A subsequent probation report (the one referred to by the solicitors) shows it as low. It appears that the reference in the OHP's decision was based on the earlier probation report rather than the more up to date one. It may therefore be described as having been mistaken.
28. This mistake cannot, however, have made any significant difference to the OHP's decision. The OHP identified the Applicant's principal risks as follows:

"Your static risk of reconviction is listed as Medium. When dynamic risk factors are included, you are assessed as presenting a Medium risk of further general and violent offending. Noting your offending history, including offences committed on licence, the panel considered the risk of general offending to be underestimated. In particular, your persistent use of motor vehicles, despite knowing that you are not allowed to drive and do not have a licence, together with your willingness to take action to avoid arrest, presents a High risk of serious harm and the panel considered the risk of further offending would be High. The panel concluded that you currently have neither the strategies or motivation to avoid this behaviour in future."

29. The reason for the Applicant's risk to staff having at one time being assessed as medium was no doubt his propensity to drive recklessly when trying to avoid being arrested for driving when he should not have been. Given the OHP's justifiable finding that that kind of behaviour was liable to recur, the Applicant's risk to police staff could certainly have been regarded as being at least at the medium level.

Decision

30. For the reasons explained above the RAP is unable to find that the OHP's decision was irrational within the meaning in which that expression is to be understood in judicial review and reconsideration cases. This application for reconsideration must therefore be refused.
31. Copies of this decision should be provided to the panel members, the PPCS, the Applicant's solicitors and the probation and prison services.

Jeremy Roberts
27 November 2019