

[2020] PBRA 111

Application for Reconsideration by Maxfield

Application

1. This is an application by Maxfield ("the Applicant") for reconsideration of the decision of a panel of the Parole Board ("the panel") not to direct his release on licence. The decision was made on 13 July 2020 after an oral hearing on 9 July 2020. The oral hearing was conducted remotely due to the COVID-19 restrictions.
2. This application has been allocated to me as one of the members of the Board who are authorised to make decisions on reconsideration applications. I have considered the application on the papers.
3. The documents provided to me for the purposes of my consideration of the application are:
 - (i) The panel's decision;
 - (ii) The dossier considered by the panel, which contained 524 numbered pages;
 - (iii) Representations dated 28 July 2020 submitted by the Applicant's solicitor in support of the application; and
 - (iv) An e-mail from Public Protection Casework Section (PPCS) dated 6 August 2020 stating that they offer no representations on behalf of the Secretary of State in respect of the application.

Background

4. The Applicant is serving a sentence of Imprisonment for Public Protection ("IPP") which was imposed on 24 October 2011 for causing death by dangerous driving (the "index offence"). He was ordered to serve four and a half years (less time served on remand) in prison before becoming eligible for release on licence. He was aged 33 when sentenced and is now aged 42.
5. The Applicant was a career criminal and had already accumulated a substantial record of convictions. At the time of the index offence he was on licence from a 7-year sentence for attempted robbery. The index offence itself occurred when he was acting as the getaway driver for a commercial burglary: he drove through a red traffic light and collided with another motorist who was killed in the collision. He had no licence and no insurance.
6. He was released on licence from his IPP sentence on 20 July 2017, but on 6 October 2017 he took part in a professional burglary of a jeweller's shop in which



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goods to the value of over £10,000 were stolen. When he was arrested and charged with this burglary his licence was revoked and he was returned to prison. On 11 May 2018 he received a fresh 52-month sentence for the burglary. But for his IPP sentence he would have been released on licence from that 52-month sentence in July 2020.

7. Following the Applicant's return to prison, the Secretary of State referred his case to the Board to decide whether to direct his re-release on licence from the IPP sentence, and if not to advise the Secretary of State about his suitability for transfer to open conditions. In February 2019 a single-member panel of the Board decided not to direct re-release (which could not have taken place anyway because of the new 52-month sentence) and did not recommend transfer to open conditions. The Applicant has therefore remained in closed conditions.
8. In September 2019 the Secretary of State made a further referral to the Board in the same terms as before, which resulted in due course in the decision which is the subject of this application. Whilst not directing the Applicant's re-release on licence, the panel did recommend transfer to open conditions.

The Relevant Law

The test for re-release on licence

9. The test for re-release on licence is whether the prisoner's continued confinement in prison is necessary for the protection of the public. This test was correctly set out in the introductory section of the panel's decision letter.

The rules relating to reconsideration of decisions

10. Under Rule 28(1) of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence. A recommendation that the prisoner should or should not be transferred to open conditions is not eligible for reconsideration.
11. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by:
 - (i) a paper panel (Rule 19(1)(a) or (b)) or
 - (ii) an oral hearing panel after an oral hearing, as in this case (Rule 25(1)) or
 - (iii) an oral hearing panel which makes the decision on the papers (Rule 21(7)).
12. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both of two grounds: (a) that the decision is irrational or (b) that it is procedurally unfair.
13. It follows from the above that the decision of the panel in this case not to direct re-release on licence is eligible for reconsideration. The solicitor's representations put the case for reconsideration on the ground of procedural unfairness. Given the argument presented, I think it might have been more appropriate to put the case



on the ground of irrationality, so I will consider the application as if it were made on both grounds.

Irrationality

14. 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."

This was the test set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. It applies to all applications for judicial review.

15. 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.
16. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see **Preston [2019] PBRA 1** and others.

Procedural unfairness

17. 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 from the issue of irrationality which focusses on the actual decision.
18. The kind of things which might amount to procedural unfairness include:
- (a) A failure to follow established procedures;
 - (b) A failure to conduct the hearing fairly;
 - (c) A failure to allow one party to put its case properly;
 - (d) A failure properly to inform the prisoner of the case against him or her; and/or
 - (e) Lack of impartiality.

The overriding objective is to ensure that the case was dealt with fairly.

The request for reconsideration in this case

19. The solicitor in her representations sets out concisely the argument for reconsideration. Essentially the complaint is that release on licence was recommended by all three professional witnesses (an independent psychologist instructed by the Applicant's solicitor, the probation officer responsible for his



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supervision in prison and the probation officer who will be responsible for his supervision in the community) and the panel failed to give adequate reasons for departing from those recommendations.

Discussion

20. The solicitor rightly accepts that a panel of the Board is not obliged to accept the views of professional witnesses: it is the panel's responsibility to make its own assessment of a prisoner's risk to the public and its manageability on licence in the community.
21. The solicitor submits, equally rightly, that if a panel departs from the unanimous recommendations of professional witnesses, it must give adequate reasons for doing so. A failure to give adequate reasons is certainly a basis for saying that the panel's decision was irrational, as has been accepted in previous cases.
22. The question on which this application depends is, therefore, whether the reasons given by the panel for departing from the recommendations of the professional witnesses were adequate (i.e. sufficient to justify a decision contrary to the views of the professionals). If they were not, the application must succeed on the ground of irrationality: if they were, it must fail whether it is put on the ground of irrationality or procedural unfairness. In fact I do not think the ground of procedural unfairness (in the sense described above) arises, and if it does it adds nothing to the ground of irrationality.
23. The panel expressed their conclusion on the issue of release on licence as follows:

"The panel have considered all the written and oral evidence as well as the closing submissions from [the solicitor]. The panel need to consider [the Applicant's] risks to the public if [he was] to be released during [his] IPP licence. [The Applicant has] been a prolific offender with repeated acquisitive offending to fund [his] drug use, which at times has involved violence, often linked with motor vehicles driven by [the Applicant] illegally. On the occasion of [his] index offence, this led to fatal consequences. This offending has repeatedly occurred whilst [he was] on bail and also when on licence."

"When [the Applicant was] released in 2017, the previous Parole Board Panel were clearly impressed with [his] good intentions to put [his] past behind [him] and to use the skills that [he] had acquired from programmes, in leading a pro-social life. Whilst the decision to release to [his family member's] address may, on reflection, not have been the most appropriate course, it is clear that within a very short time [the Applicant] failed to display any measure of internal control and good decision taking in that [he] reverted to [his] previous lifestyle and within 2 months of [his] release [he was] committing a further serious burglary. No violence occurred on this occasion, but [the Applicant's] history shows that a return to this sort of offending has the potential to lead to serious harm to the public as was clearly displayed in previous robberies and in [the] index offence."

"The professionals have recommended that [the Applicant] can be released subject to the current Risk Management Plan, which includes a period in [Designated Accommodation], stringent licence conditions, trail monitoring and



support from Prosper. Whilst the panel have considered these recommendations carefully as well as [the Applicant's] good behaviour in custody, they are not persuaded that [he has] yet acquired the necessary internal controls and decision making skills to prevent a return to offending behaviour as occurred on [his] last release as well as over [the Applicant's] offending history over the last 20 years. The panel are not satisfied that [the Applicant] can be safely managed in the community and conclude that it is therefore necessary for the protection of the public that [he] remain detained and accordingly do not direct [his] release."

24. The panel's decision letter set out the history of the case in impressive detail, and their rationale for departing from the recommendations of the professionals was clear from the above passage. The Applicant had had a deeply entrenched propensity to commit serious crime. Since his recall, he had made good progress, insofar as was possible in closed conditions, to reduce his risk to the public. However, despite that progress and despite the fact that the risk management plan proposed on this occasion was an improvement on the previous one, the fact remained that his internal controls and decision making skills (which professionals and the previous panel had anticipated would be effective when he was last released on licence) had in fact proved to be ineffective when put to the test. The panel was entitled to conclude, as it did, that a period of testing in less restrictive conditions and gradual reintegration into the community was required before it could be said that the Applicant had developed and demonstrated the necessary internal controls and skills to avoid re-offending.
25. The solicitor submits that the panel attached too much weight to the fact that the Applicant quickly re-offended when last released on licence, given that it was accepted that it was a mistake to release him to his family member's address and it would have been better if he had been released to designated accommodation. As is apparent from the above passage in their decision the panel had that point well in mind, but the fact remained that the Applicant's internal controls and decision-making skills did fail. The panel were clearly entitled to attach weight to that fact, and I am afraid I am not persuaded that they attached more weight to it than they should have done.
26. The solicitor also points out that the psychologist's assessment of the Applicant's risk was that it was neither high nor imminent. The panel referred to that evidence in their decision and clearly had it well in mind. However, there was clearly a significant risk of the Applicant reverting to his previous lifestyle, and if he did the consequences could well be serious. As regards imminence of risk, whilst this (or the lack of it) is a relevant factor it is not a determinative one: the Board has to consider not only the prisoner's risks in the immediate future but also his longer term ones.
27. The panel's reasons for departing from the views of the professionals were, I am satisfied, set out adequately and cannot be faulted. Other panels might have taken a different view of the case and agreed with the professionals but that is not, of course, a ground for reconsideration. The panel's decision was not irrational, in the sense explained above, nor was there any procedural irregularity. The panel was fully entitled on the whole of the evidence to reach the conclusion which it did.



Decision

28. For the reasons set out above I cannot find that this decision was irrational or procedurally unfair, and accordingly I must refuse this application.

Jeremy Roberts
17 August 2020



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