[2020] PBRA 14

the Parole Board
working with others to protect the public

Application for Reconsideration by McPhilbin

Decision of the Assessment Panel

Application

1. This is an application by McPhilbin (the Applicant) for reconsideration of the decision of a three-member panel not to direct his release, following an oral hearing at which the Applicant was legally represented. It was his eleventh parole review.

2. I have considered this application on the papers. These were the dossier, the provisional decision letter of the panel dated 12 December 2019, the application for reconsideration dated 30 December 2019 and the response from the panel chair to my invitation to comment on paragraph 22 of the application. The Secretary of State did not wish to offer any representations.

Background

3. The Applicant is now 54 years old. He is serving a sentence of life imprisonment imposed in 1990 after being convicted of murder. His tariff expired in 2005. In 2014 a panel found that his risk had reduced sufficiently for it to recommend a move to open conditions. The Applicant was transferred to an open prison but could not cope there and was returned to closed conditions at his own request. In 2017 another panel made the same finding and recommendation, but the Applicant refused to go to open conditions because of his previous adverse experience in that setting. He has remained in a closed prison during the current parole review.

4. Four report authors gave oral evidence at the hearing – the Offender Supervisor, the Offender Manager and two psychologists.

5. The panel did not direct release. The panel concluded (as had its predecessors in 2014 and 2017) that the Applicant continued to be a suitable candidate for progression to open conditions and duly made a recommendation for his transfer.

Request for Reconsideration

6. The request for reconsideration contends that the provisional decision of the panel not to direct release was irrational. In particular, it is argued that the panel could not reasonably have rejected the recommendation of all the professionals for release. A specific complaint of procedural unfairness is made in relation to the panel chair's conduct of the hearing.

The Relevant Law

7. Rule 25 (decision by a panel at an oral hearing) and Rule 28 (reconsideration of decisions) of the Parole Board Rules 2019 apply to this case.

8. Rule 28(1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case.

9. 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."*

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.

10. The Courts have in the past refused permission to apply for judicial review where the decision would be the same even if the public body had not made the error.

11. Section 31(3C) to (3F) of the **Senior Courts Act 1981** now provides that the Courts must refuse permission to apply for judicial review if it appears to the Court highly likely that the outcome for the Claimant would not have been substantially different even if the conduct complained about had not occurred. The Court has discretion to allow the claim to proceed if there is an exceptional public interest in doing so. See paragraph 5.3.5 of the **Administrative Court Guide to Judicial Review 2019**.

Discussion

12. Panels of the Parole Board are not obliged to accept the plans, opinions and recommendations of professional witnesses. It is the collective responsibility of each panel to make its own risk assessment and evaluate critically the likely effectiveness of the plan that is proposed to manage the prisoner's ongoing identified risks. The panel has the expertise, through training and experience, to make such balanced judgments.

13. There are several types of case in which a period of testing in open conditions has been recognised by the Parole Board as often necessary before a decision can be made that the prisoner meets the test for release. This is particularly so where

(for example) the prisoner has been in custody for a long period and there is limited objective evidence of sustained change.

14. The panel did not share the report authors' confidence that the Risk Management Plan would be effective. It did not find enough evidence to enable it to do so. The Plan was heavily reliant on external controls being put in place. All professionals recommending release accepted that the Applicant's capacity for coping in the community remained untested. He had been in closed prisons most of his adult life. The panel saw and heard the Applicant when he gave his own oral evidence. He did not impress the panel as someone with sufficient insight into his risks and triggers to serious offending (and the consequential risk of serious harm to the public, which the panel assessed as high). There were many potential destabilisers. He also lacked insight into his past drug use and the potential for relapse was high. He had a limited outside support network and his resettlement plans were underdeveloped. The panel made a valid point when it observed that the Applicant's own view that he could not desist from temptations in open conditions must be equally applicable to such pressures in the community.

15. The panel agreed that no further risk reduction work was required in closed conditions. The Applicant was not regarded as an abscond risk. The absence of illicit drug use in the last five months was encouraging. I find that the panel gave due weight to the several positive factors favouring release, which are conveniently highlighted in paragraphs 7 and 19 of the application.

16. The panel explained in its thorough reasons how it had balanced and weighed the competing factors and told the Applicant why it had decided not to accept the report authors' shared opinion in favour of his release. The panel also offered him some pointers as to the practical steps he could take before the next review to improve his prospects. The panel stated and applied the right test for release. It did not misdirect itself. It was correctly focused on risk throughout. The rationale of the decision was clear. It was a conclusion that the panel was entitled to reach, on its own evaluation of all the written and oral evidence presented to it. The legal test of irrationality is a very strict one. Ground 1 does not meet it.

17. Ground 2 of the application is a complaint of procedural unfairness. Paragraph 22 states,

> *"At the final hearing the panel chair was seen to be referring to a document that was a draft decision notice. It had a 'draft' watermark through the middle of each page. The document appeared to contribute to the panel chair's note making during the course of the hearing. This detracted from the panel chair's duty to act with fairness as it gave the impression that the case had already been decided as why else would a draft decision notice be in circulation."*

18. The application was settled by counsel who represented the Applicant at the oral hearing. It might have been thought wise (as well as courteous) for him to raise this concern with the panel chair at the hearing before stating the above assumption as to the actual status of a draft document spotted amongst the chair's papers. The response of the panel chair to my invitation to comment on

this paragraph makes it clear that the criticism is misplaced and there is nothing in the conduct of the hearing that constituted procedural unfairness.

19. All panel chairs' laptop computers have official decision letter templates installed. These contain a series of standard headings and an embedded 'Draft' watermark. When the chair's perfected draft reasons have been circulated and approved by the other members of the panel after the oral hearing, the chair presses a button that removes the 'Draft' watermark and sends the decision letter to another ('finalised') folder ready for dispatch to the case manager to issue to the parties.

20. It has long been good practice of panel chairs (including me) to make a start on drafting the reasons in advance of the oral hearing. The template is first populated with the prisoner details and terms of reference. An early understanding of the dossier is aided by the discipline of beginning to summarise the offending and custodial history; gaps in the written evidence are identified sooner and remedial directions given. It enables the live issues for exploration at the oral hearing to be seen in sharper focus and discourages prolixity. Some chairs add notes as to the topics for discussion and the questions to be asked. This is a matter of personal style in how best to use a working document that is personal to its creator.

21. The panel chair has shown me the draft document of which complaint is now made. It is only six pages long, whereas the provisional decision letter runs to 13 pages. Potential questions to be asked are highlighted in red in the template sections to which they relate. There are several notes of dossier page numbers for ease of reference during the hearing. The section headed 'Conclusion and decision of the Panel' is empty. The draft document was plainly only a work in progress and *aide-memoire.* There is no merit in this second ground.

Decision

22. The complaints of irrationality and procedural unfairness are not made out on the papers before me.

23. Accordingly, this application is dismissed.

Anthony Bate
16 January 2020