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[2020] PBRA 148

Application for Reconsideration by David

Application

1. This is an application by David (the Applicant) for reconsideration of a decision by a panel of the Parole Board (the OHP) dated 27 July 2020, which followed a hearing held remotely on the same day, not to direct 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 the application for reconsideration prepared by the Applicant's solicitors, the Decision Letter and the contents of the dossier.

Background

4. The Applicant is now 30 years of age. He was sentenced on 14 December 2012 for an offence of attempted murder to an indeterminate sentence of imprisonment for public protection, the judge setting a minimum term of nine years less time served on remand. The minimum term expired on 17 February 2020. In passing sentence, the judge described the offence as a very serious one of its kind, involving a sustained and violent attack with weapons on the victim in his own home.

5. The Applicant had no other recorded convictions in the UK. However, the OHP noted that it had been reported that he had been involved in several knife related incidents outside of the UK, all of which he denied and in respect of which he was not convicted. The hearing before the OHP was the Board's first review of the sentence.

6. The OHP found that the Applicant's risk factors, that is to say, matters that make it more likely that he would offend in the future, included concerns about his mental health and the misuse of alcohol and cannabis.

7. The Applicant is classified as a foreign national prisoner liable to deportation under the Tariff Expired Removal Scheme (TERS). The OHP observed that were it not for the COVID-19 outbreak he would have been deported prior to the hearing, the only matters standing in the way of his deportation being the outstanding application for a travel document and the availability of a flight to the Applicant's home country. The OHP were

provided with no further update on the position with regard to his deportation other than to confirm that the Applicant himself was keen to return abroad.

Request for Reconsideration

8. The sole ground for the seeking of a reconsideration of the OHP's decision is set out succinctly in written grounds prepared on the Applicant's behalf by his solicitors and dated 25 September 2020.

9. It is submitted that the decision of the OHP is irrational because the panel gave no reasons nor sufficient explanation why it did not accept the oral evidence given by both professional witnesses that the Applicant, while not suitable for release into the community, could be managed in an Immigration Removal Centre (IRC).

The Relevant Law

Parole Board Rules 2019

10. 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)).

11. 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 in a previous reconsideration application in the case of **Barclay [2019] PBRA 6**.

Irrationality

12. 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."*

13. This test was earlier 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.

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

Other

15. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin), R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:
    (a) the progress of the prisoner in addressing and reducing their risk;
    (b) the likeliness of the prisoner to comply with conditions of temporary release;
    (c) the likeliness of the prisoner absconding; and
    (d) the benefit the prisoner is likely to derive from open conditions.

The reply on behalf of the Secretary of State

16. On behalf of the Secretary of State, no submissions have been made regarding this application.

Discussion

17. The Applicant's challenge rests upon what is submitted to be a failure of the OHP to identify and explain why it did not accept the oral evidence given by the professional witnesses that the Applicant, after release, could be safely managed in an Immigration Removal Centre (IRC) as opposed to a prison.

18. I shall begin by summarising the relevant evidence the OHP had to consider on the point. In written reports prepared by both of the professional witnesses they were clear in their recommendations. The Offender Supervisor (the person responsible for the Applicant's custodial management) did not support release and did not recommend a move to open conditions, as in his opinion the Applicant presented an escape risk. During his oral evidence to the OHP he said that the Applicant's risk could (post release) be managed in an IRC. As for the Offender Manager (the person responsible for the Applicant's management in the community) he too did not recommend release, which he suggested would be potentially overwhelming for the Applicant given the lack of support and structure to his life. He did not recommend a move to open conditions, largely because he too could not rule out the possibility that the Applicant may abscond. He is also recorded as saying in his oral evidence that he believed the Applicant could be managed post release in an IRC. The Applicant's own evidence to the OHP as summarised in the decision letter makes no reference to his location save to say that he told the panel that he wanted to return to his home country. It is noted in the Decision Letter that in final submissions to the OHP, the Applicant's representative submitted that if released the Applicant would be held in an IRC. No evidence was placed before the OHP nor has been brought to my attention to indicate that the immigration authorities intended to place the Applicant in an IRC and there is nothing to suggest that the point was explored any further. It appears therefore to be no more than an assumption made by the professional witnesses and on the Applicant's behalf.

19. It may be helpful to consider the position of Foreign National Prisoners, such as the Applicant. It is my understanding that a significant proportion of them are deported

from prison under the Early Removal Scheme and the Tariff Expiry Removal Scheme (TERS). The Applicant in this case falls into the second category.

20. It is possible to detain a prisoner under immigration powers either in prison or in an IRC while the Home Office seeks to progress the prisoner's deportation. Matters relating to deportation are not the responsibility of the Parole Board, they are the responsibility of the Secretary of State for the Home Office. Because a Deportation Order carries with it the power to detain pending deportation it applies quite separately from any Parole Board direction for release.

21. The impact of these rules on the jurisdiction and powers of the Parole Board are clear. The Parole Board has no power to direct immigration detention. It is submitted on the Applicant's behalf that the OHP should nonetheless have considered the implications of a release decision which, it is submitted, would have led to a removal to an IRC. I accept that a panel would want to take account of all the implications for a prisoner especially where a tariff had expired. That said, in this case the OHP had not been given any indication that the immigration authorities intended to place the Applicant in an IRC. The OHP had to proceed on the presumption that the Applicant would be released into the community. In considering the issue of risk the OHP had to consider the wider community, which must include the occupants of an IRC, be they detainees or staff. The OHP's decision was that the Applicant could not be safely managed in the community. The Parole Board is a creature of statute and is bound to act upon evidence it receives and within the confines of the powers given to it by Parliament. An order for deportation made by the Home Secretary has no impact on the test for release which is absolute and must be applied, namely that the Board shall ***"not release a prisoner unless it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined".***

22. It is clear therefore that the parole process and the deportation process remain separate, albeit that they should normally proceed side by side. A prisoner in the same position as the Applicant, a foreign national serving an indeterminate sentence, can only be removed from the UK if the Parole Board has first directed his release. Prisoners who are liable to be deported are likely to be held in an IRC if the Parole Board directs release. In cases such as that of this Applicant a panel of the Parole Board can (and did in this case) consider a move to an open prison having decided against a direction for release.

23. If that is a correct analysis of the position, it follows that this application must fail. The OHP were not in my judgment required to decide upon a possible move to an IRC for the reasons I have given. Therefore, in my judgment they were not acting irrationally in not providing reasons as to why such a move would be inappropriate. That issue was in effect irrelevant for their purposes and did not require a decision nor an explanation from the OHP who decided what they needed to decide and nothing more.

24. These findings in effect dispose of this application. However, in fairness to the Applicant, I will address the question of the adequacy of the reasons given by the OHP for its decision not to release him.

25. The importance of the giving of adequate reasons in the decisions of the Parole Board has been made clear in two authorities heard in the High Court within the space of nine months. The first decision was in the case of **R (ex parte Wells) v The Parole**

Board [2019] EWHC 2710 (Admin) which contains helpful guidance on the correct approach to deciding whether a decision made by a panel in the face of evidence from professional witnesses can be regarded as irrational. It is a decision I am bound to follow as is the decision which followed in the case of **R (On the application of Stokes v The Parole Board and The Secretary of State [2020] EWHC 1885 Admin** in which it was decided that the oral hearing panel and the reconsideration panel had failed to identify and explain its reasons. The judgment in **Stokes** cited the judgment in **Wells** and also the case of **R (PL) v Parole Board and Secretary of State for Justice [2019] EWHC 3306 (Admin)** in which the High Court quashed a decision of the Board on grounds which included that it had failed to identify concerns about the prisoner's behaviour, re-emphasising that the reasoning of panels must reach an acceptable standard in public law by providing the prisoner and the public with adequate reasons for their decisions.

26. It is suggested in **Wells** that rather than ask the simple question *"was the decision being considered irrational"*, the better approach is to test the panel's ultimate conclusions against the evidence before it and ask whether their conclusions can be safely justified on the basis of that evidence, while giving due deference to the panel's experience and expertise.

27. Panels of the Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan.

28. If a panel is going to depart from the recommendations of experienced professionals it is required to explain clearly its reasons for so doing and ensure as best it can that its stated reasons are sufficient to justify its conclusions.

29. In addition to the dossier which ran to over 350 pages, the OHP had the advantage of hearing live evidence from the professional witnesses and from the Applicant and the submissions made by the Applicant's legal representative. A careful reading of the Decision Letter as a whole in my judgment clearly demonstrates that the OHP:

    (i) Noted and took account of all the relevant evidence;
    (ii) Applied the correct tests to the issue of release and a move to open conditions;
    (iii) Noted that the deportation issue was separate from the Parole Board's proceedings while running parallel with them;
    (iv) Took as its starting point in its analysis of the evidence the gravity of the original offence;
    (v) Noted that several aspects of the Applicant's relationship with the victim had not been fully explained and that the risk factors linked to the commission of that offence were not fully understood nor addressed;
    (vi) Found that the Applicant had not undertaken any significant risk reduction work during his sentence;
    (vii) Found that the Applicant's risk factors remained unexplored in any depth or had not been addressed; and
    (viii) Noted that it could not rule out the possibility of the Applicant absconding from open prison.

30. In my judgment, the OHP's conclusions were succinctly and fairly set out in its Decision Letter and its stated reasons for refusing the application for release were sufficient to justify its conclusions.

Decision

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

Michael Topolski

QC

13 October 2020