

[2020] PBRA 150

Application for Reconsideration by Marshall

Application

1. This is an application by Marshall (the Applicant) for reconsideration of a decision of an oral hearing dated the 2nd September 2020 not to direct 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 Oral Hearing Decision Letter dated 2 September 2020;
 - The Application document, entitled "Written Representations in Support of Application for Early Release on Parole" undated but received by the Parole Board on 21 September 2020; and
 - The dossier, which now contains 342 numbered pages, including the Oral Hearing Decision Letter, but is otherwise identical to that seen by the Oral Hearing Panel (OHP).

Background

4. The Applicant is serving a sentence of imprisonment for public protection for offences of sexual assault at knifepoint imposed on 12 June 2009. The victims in two of the offences were 14 years old. He was 27 at the time of these offences. His tariff expiry date was 16 July 2012.
5. The Applicant has 21 previous convictions for 64 offences, including supplying Class A drugs, assaults, possession of a knife in a nightclub, and dwelling house burglary.
6. The Applicant was first released on licence on 21 May 2018 and recalled on 31 November 2018. He had failed to disclose an intimate relationship to his Offender Manager, which involved his having contact with his partner's child, and had relapsed into drug use. He was released again following a Parole Board Oral Hearing on 16 August 2019, and was again recalled on 26 September 2019, having resumed drug use, resumed his relationship with the previous partner, and breached his curfew three times. He had also taken drugs off a drug dealer and run away.

7. He is resistant to doing any further work in custody, but promises, as he has done before, to co-operate with the Probation Service (for whom he has expressed deep mistrust) if released. He admits having "*made mistakes*" on licence, including resuming cocaine misuse and having a poor attitude to his curfew, though he denies using heroin.

Request for Reconsideration

8. The application for reconsideration is undated but was received by the Parole Board on 21 September 2020.
9. The grounds for seeking a reconsideration are as follows:
 - (1) The principle issue for the Applicant is drug misuse. He has fully addressed this in custody, having been drug-free since December 2019, and as a result his risk can be properly managed in the community.
 - (2) There is no rational explanation as to why the Applicant should serve the equivalent of a six year sentence on recall when he was not convicted of any offences and there is no suggestion that his risk is elevated by anything he has done over the past year on recall.
 - (3) After a year on recall being drug free there is no rational reason to keep the Applicant in prison. He has done nothing to indicate he cannot be safely released. The decision not to release is clearly irrational and unfair. The recommendation to stay in closed conditions is irrational bearing in mind the Applicant's risk factors.

Current parole review

10. The Applicant's case was referred to the Parole Board by the Secretary of State to consider whether it would be appropriate to consider his re-release or to recommend a transfer to open conditions. This was the first review on this recall. The Applicant is now 38 years old.
11. The OHP was due to meet to consider the Applicant's case on 24 August 2020 at a Prison establishment. The panel consisted of three members, including a psychologist member. The Applicant confirmed that he wanted his case to be considered on the papers. The panel originally listed to hear his case therefore considered the Applicant's case on the papers, pursuant to Rule 23(1)(a) of the Parole Board Rules 2019.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 2 September 2020 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.

Parole Board Rules 2019

13. 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)).
14. 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 on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

15. 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."

16. 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.
17. 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 Secretary of State

18. The Secretary of State has indicated that he does not wish to make any representations in regard to the Application.

Discussion

19. The OHP stated in clear terms that the Applicant's entrenched negative attitude towards professionals and towards his sentence led the panel to conclude that he would not comply with his licence conditions, exactly as he failed to comply on his last release, despite having convinced the Parole Board in 2019 that he would.
20. The Application makes plain that there is disagreement with this conclusion but does not advance any basis for suggesting that there is anything irrational about it. There is, for example, no suggestion that the OHP considered irrelevant evidence or ignored relevant evidence.

21. It is true that the Recall Report (Part A) refers to the Applicant screening positive for heroin. This is not repeated in the Post Recall Management Report (Part B). Because the Applicant asked for his case to be dealt with on the papers this disparity was not explored, and the assertion about heroin is repeated in the decision letter. However, it is not disputed that the Applicant resumed cocaine use soon after his release on licence, nor that cocaine use was the precursor to the index offences. Overall, this matter does not affect the rationality of the panel's decision, nor does the Application suggest it does.
22. Apart from that there is no apparent disagreement with any factual matter on the dossier, just with the panel's assessment of risk and consequential decisions. The focus of the Application is on the Applicant's positive behaviour in custody after recall. The OHP was bound also to consider his demonstrated (and agreed) negative behaviour on licence and cannot be regarded as behaving irrationally when it did so or in the decision to which it came.

Decision

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

Patrick Thomas
16th October 2020