the Parole Board

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[2020] PBRA 159

Application for Reconsideration by Collins

Application

1. This is an application by Collins ('the Applicant') for reconsideration of a decision of an oral hearing panel of the Board (the 'OHP'). On 20 September 2020 the OHP decided not to direct the Applicant's release on licence or to recommend to the Secretary of State that she should be transferred from a closed prison to an open one.

2. The case has been allocated to me as one of the members of the Board who are authorised to act as Reconsideration Assessment Panels ('RAPs') to make decisions on applications for reconsideration.

3. I have considered the following documents:

   (a) The OHP's decision;
   (b) The dossier provided by the Secretary of State for the current review of the Applicant's case, which now runs to page 537;
   (c) Representations dated October 2020 by the Applicant's solicitor in support of this application; and
   (d) An e-mail dated 26 October 2020 from PPCS stating that the Secretary of State offers no representations in relation to this application.

Background

4. The Applicant is aged 56 and was born a man. As a man she committed a number of sexual offences against women. The Applicant was convicted of those offences after a contested trial. In February 2002 she received a sentence of life imprisonment for some of those offences (the 'index offences'). Her tariff was set at 7 years less time served on remand. It expired in March 2008, so she is many years 'over tariff'.

5. The index offences were not the Applicant's first serious sexual offences. In December 1991 she had received a 6-year sentence (increased to 8 years by the Court of Appeal) for the knifepoint rape of a young woman into whose home the Applicant had broken. Earlier, in 1987, the Applicant had received a suspended sentence for having unlawful sexual intercourse, when she was aged 23, with a 14-year old girl.

6. The Applicant has remained in closed conditions throughout her present sentence. She has now identified as a transgender person and wishes to pursue gender reassignment. She has continued to deny the index offences, but the Board is of course bound by law to proceed of the basis of the jury's verdicts: it has neither the authority nor the resources to re-investigate the case.

7. The Applicant has completed two offending behaviour programmes but neither of them specifically addressed her risk of sexual re-offending.

8. The current review is the sixth review of the Applicant's case by the Board. It commenced as long ago as June 2018. In December 2018 an oral hearing was directed, but it did not take place until 29 January 2020. The hearing was than adjourned for two reasons: (1) the latest psychological risk assessment was out of date and an up-to-date one was required, and (2) the Applicant wished to have the opportunity to discuss with her solicitor what she believed to be errors (particularly in risk assessments made by professionals) in the dossier.

9. A new hearing date (1 July 2020) was set and directions were given for reports to be submitted. The Secretary of State was to commission an up-to-date psychological risk assessment, and it was envisaged that an independent one might be commissioned by the Applicant's solicitors on her behalf.

10. Matters were then held up by the COVID-19 restrictions, and the hearing fixed for 1 July 2020 was converted into a directions hearing. The psychological report commissioned by the Secretary of State had by then been obtained and added to the dossier. An independent psychological assessment had been obtained on the Applicant's behalf but had not been disclosed to the Board and the Secretary of State.

11. The OHP adjourned the directions hearing to enable the Applicant to decide whether the independent psychological report should be disclosed and whether to agree to the review being completed on the papers (the OHP thought she might do so in the light of the psychological assessment carried out on behalf of the Secretary of State: that assessment did not support a progressive move and recommended assessment for another offending behaviour programme specifically directed to the Applicant's risk of sexual re-offending).

12. The Applicant then (as was her right) decided that the independent psychological report should not be disclosed, and representations submitted by her solicitor on her behalf requested the OHP either to defer the hearing until face to face hearings were once again possible or to conclude this review on the papers.

13. The solicitor's representations made it clear that if the review was concluded on the papers the Applicant's application would not be for release but would be *"for support from the Parole Board in respect of [the Applicant] being transferred to a lower category establishment."*

14. The solicitor pointed out that a particular prison establishment (Prison **A**) boasts significant knowledge and support around LGBT prisoners, and that the Applicant felt that she would benefit greatly from being in a more supportive environment

than her present establishment. The Applicant had apparently stated that she would undertake assessments and offending behaviour programmes within a setting that has knowledge and experience of managing transgender prisoners; something that Prison **A** could offer.

15. The OHP decided not to defer the hearing but to conclude the review on the papers, which it did by its decision on 20 September 2020. In its decision the OHP stated, correctly, that transfer of the Applicant between prison establishments was outside the control of the Parole Board: decisions about the location at which a prisoner should be detained fall entirely within the administrative remit of the Secretary of State.

The Relevant Law

The test for release on licence

16. The test for 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 by the OHP at the end of the introductory section of its decision letter.

The rules relating to reconsideration of decisions

17. 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.

18. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by:
    (a) a paper panel (Rule 19(1)(a) or (b)); or
    (b) an oral hearing panel after an oral hearing (Rule 25(1)); or
    (c) an oral hearing panel which, as in this case, makes the decision on the papers (Rule 21(7)).

19. 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.

20. The OHP's decision in this case not to direct release on licence is thus eligible for reconsideration, and the application for reconsideration is made on both the above grounds.

21. The OHP's decision not to recommend a move to an open prison is not eligible for reconsideration.

Irrationality

22. 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.

23. 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.

24. The Board, when deciding whether or not to direct a reconsideration, adopts 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.

25. Mistakes of fact made by a panel of the Board are capable of rendering its decision irrational, but only if they are (a) proved by objectively verifiable evidence to be mistakes, and (b) of sufficient significance to enable a RAP to conclude that the decision might have been different if the mistakes had not been made. That this is the correct approach where a decision of a decision-making body like the Parole Board is being challenged is confirmed by decisions of the courts in **E v Secretary of State for the Home Department [2004] QB 1044** and **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295.**

Procedural unfairness

26. Procedural unfairness is not the same thing as procedural irregularity. A procedural irregularity may result in procedural unfairness but only if its consequence is to render the proceedings fundamentally flawed so as to produce a manifestly unfair result. The issue of procedural unfairness, which focusses on how the decision was made, is entirely separate from the issue of irrationality which focusses on the actual decision.

27. It has been established that the 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
    (e) Lack of impartiality.

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

Request for Reconsideration

28. The Applicant's solicitor, in her detailed representations in support of the request for reconsideration, makes a number of submissions.

29. The submissions in support of the ground of irrationality can be summarised as follows:

    (a) That the risk assessments made by the professionals were inaccurate and should have been disregarded by the OHP;
    (b) In particular, that one of the risk assessment systems used by professionals has been discredited and should not be relied upon;
    (c) That the OHP attached disproportionate weight to allegations against the Applicant which had not resulted in convictions;
    (d) that one risk factor ("sexual preoccupation") should not have been attributed to the Applicant;
    (e) That the panel attached too much weight to the fact that the Applicant had not completed any offending behaviour programmes designed to reduce her risk of sexual re-offending; and
    (f) That the panel attached insufficient weight to the likely effect of the gender reassignment treatment which the Applicant is planning to undergo.

30. In support of the ground of procedural unfairness it is submitted that *"as live evidence has not been received by the Panel, the decision is procedurally flawed."*

31. The representations include a series of submissions which appear to be directed to a complaint that the OHP, if it made a decision on the papers, should have recommended a transfer to open conditions. The representations conclude by stating:

    "We have submitted that [the Applicant's] risk of serious harm lacks imminence and can be controlled through the external provisions of the open prison estate. Therefore, we feel that a recommendation of a transfer to Category D Conditions is an appropriate direction at this time."

    "We request that the Parole Board decision be reconsidered as there is merit in [the Applicant's] transfer to a lower category establishment, namely open conditions. We submit that neither a direction for release or [sic] transfer to D-Cat is unreasonable."

Discussion

32. The starting point in any consideration of this application is that the Applicant's solicitor on her behalf expressly informed the OHP that she was not seeking a direction for release at this stage but was inviting the OHP either to defer the already long-delayed hearing until face-to-face hearings are possible again or to conclude the review on the papers.

    Procedural unfairness

33. Although it is not clearly spelt out in the solicitor's representations, the complaint of procedural unfairness appears to be based on the contention that the OHP should

have deferred the hearing so that live evidence could be given and considered at a later date. I cannot agree with that contention. It was entirely within the OHP's discretion whether or not to defer the hearing, and an indefinite deferral of an already long-delayed hearing would have been inappropriate and contrary to the Board's policy concerning deferrals and its obligation to conclude reviews speedily.

34. If the hearing was not to be deferred, the Applicant could have requested that it should take place without further delay, with oral evidence taken, but instead she invited the OHP to make a decision on the papers. In those circumstances there cannot be any merit in her present complaint that live evidence was not heard. There was therefore no procedural irregularity, let alone one amounting to procedural unfairness.

Irrationality

35. In inviting the OHP (if it did not defer the hearing) to conclude the review on the papers rather than to hold an oral hearing at this stage, the Applicant and her solicitors must have been well aware that on the evidence as it stood, a decision on the papers could not, realistically, be a decision to direct release on licence. Indeed, a decision to direct release on licence would almost certainly have been the subject of a successful application by the Secretary of State for reconsideration. The Applicant's decision not to seek a direction for release on licence was therefore sensible and realistic.

36. It is significant that the Applicant decided not to disclose the independent psychological report to the Board and the Secretary of State at this stage but (as her solicitor indicated in her representations to the OHP) to use it in support of a transfer to Prison **A** if the hearing was not deferred. The very clear inference from that is that the Independent Psychologist did not support release on licence at that stage but would support a move to lower category establishment.

37. In those circumstances the focus of the solicitors' representations to the OHP was limited, in the event of the OHP not deferring the hearing, to (a) seeking to correct 'inaccuracies' in the dossier and (b) inviting the OHP to support a move to Prison **A** (which, as pointed out above, was not within the OHP's remit).

38. Those representations contained no reference to a possible transfer to open conditions and presented no arguments in support of such a transfer. It is not surprising, therefore, that the OHP concluded that the Applicant had not made sufficient progress in reducing her risk to enable a recommendation for open conditions to be made. In any event, as pointed out above, a decision not to recommend a move to open conditions is not eligible for reconsideration.

39. I, therefore, have to focus on the question whether the decision not to direct release on licence was irrational. It is perhaps difficult to see how a decision which the Applicant and her solicitors must have recognised was inevitable could now be regarded as having been irrational. However, I will now consider in turn the various specific complaints of irrationality made by the solicitors in their representations in support of the present application.

40. I need to consider in respect of each complaint not only whether the complaint is well-founded but also, if it is, whether the panel's decision might have been different if the matter complained of had not occurred.

(a) The complaint that the risk assessments made by the professionals were inaccurate and should have been disregarded by the OHP

41. It is common for Parole Board decisions to refer to the various risk assessments by professionals and to state whether the panel agrees with them. In this case the OHP expressed its agreement with those assessments by professionals which suggested that the Applicant posed a low risk of general or violent re-offending but a high risk of sexual re-offending or intimate partner violence. The OHP clearly made its own assessment of those risks, which coincided with the assessments of the professionals (including the Psychologist whose report had been commissioned by the Secretary of State). There was ample evidence in the dossier to support those assessments.

42. As regards to the risk of serious harm likely to be caused by any future offending, probation's current assessment was that the risk to the public was very high, the risks to known adults and children were high and the risk to staff was medium. The assessed risk to the public had relatively recently been increased from high to very high. The OHP was clearly not convinced that that increase was justified and preferred to say that the risk to the public was *"at least high"*. Otherwise its own assessments coincided with probation's.

43. The panel's assessments that both the Applicant's risk of re-offending and her risk of serious harm to the public were both high cannot realistically be challenged. The Applicant had chosen not to disclose the psychological report which had been commissioned on her behalf, with the result that there was no expert psychological evidence to contradict that provided by the Psychologist instructed by the Secretary of State (an experienced Registered and Chartered Forensic Psychologist).

44. The Applicant specifically challenges the assessment of risk of serious harm to children as high. Various reasons were given by probation for that assessment, including the Applicant's conviction for unlawful sexual intercourse, the allegation that some of her index offences were said to have taken place in the presence of the victim's children and other allegations which are disputed by the Applicant.

45. Probation and the OHP were entitled to rely on these matters in assessing the risk to children, and it would have been open to the Applicant to give evidence in response to the disputed allegations. It may be that at a future hearing another panel, with the benefit of evidence from the Applicant and other sources, will conclude that the Applicant's risk to children is not as high as probation believe. However, it was certainly not irrational for the OHP, on the evidence placed before it, to make the assessment which it did; and even if it had taken a different view of this particular risk it is inconceivable that its overall decision would have been different.

46. The Applicant also challenges the assessment of her risk of serious harm to staff as medium. The justification put forward by probation for that assessment is that the

Applicant can present as aggrieved or aggressive when challenged. That might well be regarded as an inadequate basis for the assessment. However, this case is not really about any risk to staff: it is about the risk of sexual re-offending which the Applicant poses to members of the public (which the OHP, clearly justifiably, assessed as high). Again, therefore, if the OHP had placed the risk to staff at the low level it is inconceivable that its overall decision would have been different.

(b) That one of the risk assessment systems has been discredited and should not be relied upon

47. I was unaware that there had been any suggestion that this particular system, designed to predict the risk of sexual re-offending, had been 'discredited'; no notification has been issued to Parole Board members that that is the case. I therefore made some enquiries and discovered that a new system is being developed and may well be introduced to replace the one about which this complaint is made, but that that change has not yet been made. It is apparently thought that the new system may be more accurate than the original one but only time will tell whether that is the case. Unless and until the new system it is introduced the original one remains appropriate, and the OHP's reference to it cannot by any stretch of the imagination be described as irrational.

48. A further point is that there is another system, also used by professionals in this case and not apparently 'discredited' in any way, for predicting the risk of sexual re-offending, and the assessments made using both systems were the same: both indicated that the Applicant poses a high risk of such re-offending.

49. In the circumstances, the OHP's reference to the system currently approved cannot be regarded as irrational.

(c) That the OHP attached disproportionate weight to allegations against the Applicant which had not resulted in convictions

50. These allegations were of two kinds: some related to the period before the start of the Applicant's sentence and others to her behaviour during the sentence. The OHP mentioned them in its decision letter as part of its summary of the Applicant's progress, explaining that these allegations were the reason for probation's decision to increase the Applicant's risk of serious harm to the public from high to very high.

51. However, the OHP made a point of stating that the pre-sentence allegations had not led to any charges and that the more recent ones were disputed. Furthermore, in the section of the decision letter setting out the OHP's conclusions there was no reference to these allegations and (as pointed out above) the OHP did not adopt probation's assessment that the Applicant's risk of serious harm to the public was now very high as opposed to high. Other reasons, entirely rational and justified, were given for the OHP's assessment.

52. In the circumstances, this submission cannot be upheld.

(d) That one of the risk factors attributed to the Applicant ("sexual preoccupation") should not have been so attributed

53. Sexual preoccupation is a recognised risk factor for many sex offenders. It had been identified by professionals, the Secretary of State and Parole Board panels at various stages of the Applicant's sentence as one of the Applicant's risk factors. This was hardly surprising given the Applicant's own account of having had sex with three or four hundred women (usually in "*one-night stands*") and having at one stage in her life "*had sex with anything that moved*".

54. It is normal for Parole Board panels to list the risk factors which have at any stage been identified in an offender's case. It was in no way irrational for the OHP to follow the normal practice and to include sexual preoccupation in the list of the Applicant's risk factors.

55. The fact that a particular risk factor has been identified as being present in an offender's case does not necessarily mean that it remains currently active and needs to be addressed by further treatment. In this case, neither the OHP nor the Psychologist instructed by the Secretary of State included sexual preoccupation among the Applicant's current risk factors which required treatment in custody before the Applicant was safe to be released into the community.

56. In those circumstances, the OHP's decision would clearly have been exactly the same if sexual preoccupation had not been referred to at all.

(e) That the panel attached too much weight to the fact that the Applicant had not completed any offending behaviour programmes designed to reduce her risk of sexual re-offending

57. There is no doubt that at the start of this sentence the Applicant posed a high risk of sexual offending causing serious harm to victims. It is therefore necessary, to justify release on licence, that she should be able to demonstrate a reduction in that risk to a level which would be manageable on licence in the community.

58. The normal method of demonstrating such a reduction is by the successful completion of offending behaviour programmes and showing that the offender has absorbed and retained the learning from those programmes.

59. The Applicant's solicitor is correct in pointing out that that is not the only way in which an offender may be able to demonstrate the necessary reduction in risk. There is, however, little evidence in the Applicant's case of any substantial reduction in risk by other routes. The Psychologist instructed by the Secretary of State was of the clear opinion that the Applicant's risk remained too high to justify release into the community and that she continued to have outstanding treatment needs. It cannot be said to have been irrational, in the absence of any psychological evidence to the contrary, for the OHP to take the same view.

60. The Applicant's solicitor places reliance on the two programmes which the Applicant had completed. However, the OHP was well aware of the Applicant's completion of those programmes and was fully entitled to regard them as being insufficient to evidence the necessary reduction in her risk of sexual re-offending.

(f) That the panel attached insufficient weight to the likely effect of the gender reassignment treatment which the Applicant is planning to undergo

61. The Applicant has not yet embarked on this treatment. It is possible that if and when she does so, the treatment and its effects might be regarded as bringing about the necessary reduction in risk of sexual re-offending, but it is impossible to say at this stage that the mere prospect of that being the case would justify a decision to direct the Applicant's release into the community.

Decision

62. For the reasons set out above there was no procedural unfairness in this case and the OHP's decision cannot be said to have been in any way irrational. I cannot therefore accede to this application.

63. It may very well be that the Applicant would benefit from a move to a lower category establishment catering for offenders in her position and that recategorization to a lower security level might be justified. However, as explained above, these matters are not within the remit of the Parole Board. The Applicant would therefore be well advised to submit representations to the Secretary of State whose responsibility it is to make decisions on matters of this kind.

Jeremy Roberts
3 November 2020