

[2020] PBRA 177

Application for Reconsideration by Chubb

Application

1. This is an application by Chubb (the Applicant) for reconsideration of a decision of an oral hearing dated the 29 September 2020 not to direct release or recommend progression to open conditions.
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 dossier (including the decision letter) amounting to 349 pages and the grounds in support of the application.

Background

4. On the 8 September 2006, when aged 26, the Applicant was sentenced to an Indeterminate Sentence for the Public Protection, with a tariff set at 6 years less time on remand. He is now 40 years old.
5. The index offences concerned two counts of rape in respect of which he had been convicted by the jury, and an offence, to which he had pleaded guilty, of assault with intent to commit a sexual offence against a 16 year old girl.
6. The tariff expired on 21 February 2012.
7. On 14 November 2014, the Applicant was released on licence but was recalled on 3 July 2015. On 4 September 2017, he was released for a second time on licence but was recalled on 16 October 2019.

Request for Reconsideration

8. The application for reconsideration is dated 29 October 2020.
9. The grounds for seeking a reconsideration are on the ground of irrationality. The grounds are set out in narrative form and I have distilled from that narrative the following four grounds of challenge:

- (a) The panel placed insufficient weight on the recommendations of the three professional witnesses that the Applicant should be released;
- (b) The panel decided that the Applicant needed to do offending behaviour work prior to release. The professional evidence before the panel was (a) the work would be beneficial but not necessary, (b) it was not available in custody and (c) the opinion of the prison psychologist was that the Applicant's risk could be managed in the community regardless of whether this work was done or not;
- (c) The panel contradicted itself in the decision letter by saying that the proposed risk management plan was sufficient to manage the Applicant's risk in the community and also saying the absence of identified offending behaviour work in the community created a significant gap in that plan; and
- (d) The panel relied on the Applicant's attitude to his victims at the time of his offending and ignored the Applicant's current (improved) attitude.

Current parole review

- 10. On 7 November 2019, the case was referred to the Parole Board by the Secretary of State to consider whether or not it would be appropriate to direct the Applicant's release or if that was not appropriate, to recommend a transfer to open conditions.
- 11. The oral hearing took place on 28 September 2020 remotely by video-link due to the current restrictions imposed by COVID-19. The three-member panel included a psychologist. The panel heard from the Applicant and from his Offender Supervisor, Offender Manager and a psychologist commissioned by the prison service, who had prepared an assessment of the Applicant for the panel.
- 12. The Applicant's legal representative confirmed that the Applicant was seeking release.
- 13. The panel issued its decision letter on 8 October 2020.

The Relevant Law

- 14. The panel correctly sets out in its decision letter 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

- 15. 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)).

Irrationality

16. 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."

17. 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.

18. In **Benson [2019] PBRA 46**, Sir John Saunders said

"There are two matters which apply generally to all these applications. First, it is for the panel to assess the weight to be given to any piece of evidence, including the opinion as to risk given by the professional witnesses. It is for the panel to test the assessment and look at the reasons for it. So, even in a case where every witness is supporting release, it is for the panel to make their assessment taking into account all the evidence. The reverse is also true. If the panel disagrees with the evidence given by the professionals, it must give adequate reasons for doing so. Secondly, a decision letter is directed at the prisoner. While it has to descend to sufficient detail so that everyone, but particularly the prisoner, can understand the reasons for the decision, it is not necessary for every point which has been raised in the hearing to be discussed. What is necessary is that everyone is able to understand the reasons for the decision."

The reply on behalf of the Secretary of State

19. Secretary of State confirmed that he did not have any representations to make in response to this application for reconsideration.

Discussion

20. The grounds supporting the application have to be put into a factual context which raises real anxieties about the protection of the public from serious harm.

21. The Applicant had previous convictions. As the sentencing judge remarked, they were mainly in respect of antisocial behaviour; the exception, which the judge described as a "warning light", was a conviction in 2003 for indecent exposure with intent to insult a female. The victim on that occasion was a lone female whom he had asked for directions.

22. The index offences were offences of rape committed against a sex worker and during which gratuitous threats of violence were made. The assault had been directed at a 16 year old girl waiting entirely properly at a bus stop at 8 o'clock in the evening when other people were about. The offences were committed when the Applicant had consumed alcohol.
23. The Applicant was released on licence on 14 November 2014. He appeared to be doing well until he was recalled on 3 July 2015, following a complaint that whilst under the influence of an unknown substance, he had threatened and imprisoned his mother and her partner.
24. In November 2016, a psychological assessment of the Applicant's risk was commissioned by the Parole Board. The psychologist conducting the assessment noted that, since the previous oral hearing, the Applicant had completed a training course addressing decision-making and better ways of thinking. The psychologist said the Applicant had developed insight into the factors surrounding his reoffending; he had a good understanding of his risks and had strategies to manage them. In her opinion, his risk was not imminent and what he needed was an opportunity to test his strategies and skills in the community and to do some consolidation work.
25. On 4 September 2017, the Applicant was released on licence for the second time. He engaged well with his supervision and the fact he remained in the community for two years without incident confirmed that his risk was not imminent.
26. However, the circumstances of his second recall were deeply worrying. Late at night, on 5 October 2019, the Applicant was seen waiting outside a telephone box; inside there was a woman in a state of distress; the area, which was some 2 miles from the Applicant's house, was well known as an area frequented by sex workers. The Applicant gave an account to his partner as to why he was going out which differed from the account he gave the police. He had been drinking and the location was the same place where he had accosted the 16-year-old in 2006.
27. All the professional witnesses found his explanation as to why he was there and what he was up to unconvincing. The Applicant's behaviour was capable of being regarded as offence paralleling behaviour; it was also capable of demonstrating that, although the risk had not been imminent, the risk had not been contained by the Applicant's strategies. It raised the spectre that the risk reduction work had not been as effective as had previously been thought.
28. The Applicant had done no further risk reduction work in respect of sexual offending after his second recall. In those circumstances, it is not surprising that the panel approached the proposal that he should be released a third time with considerable caution.
29. The psychological risk assessment commissioned in July 2020 for the latest oral hearing again found the Applicant's risk was not imminent. The report made a number of other findings: (a) a recommendation that the Applicant undertook some individual work dealing with sexual problems, (b) such work was not available in custody, and (c) he may be able to access this sort of work in the community, but this would have to be on a voluntary basis.



30. The assessment concluded by saying that *"His licence compliance will be monitored by his probation officer, should he be released into the community"*. The report avoids addressing the fact that previous monitoring had not prevented the Applicant getting into a situation in October 2019 which was capable of being regarded as an immediate prelude to further serious sexual offending.
31. Turning to the first two grounds in support of the application, it should be remembered that the panel included a psychologist and so had the expertise to form its own opinion as to whether the work was necessary and whether it had to be completed prior to release, and there was sufficient evidence for the panel members to come to that conclusion if they so thought.
32. The third ground, in my view, does not establish that the panel contradicted itself. The relevant passages consist of three sentences, all of which have to be taken into account in relation to each other. They are:
- "As it stands, the risk management plan is sufficient to manage your risks in the community. However the panel remain concerned that the lack of confirmed psychological provision to specifically address your outstanding sexual risks was of significance."* And a little later: *"However at the present time, while there is significant offending behaviour work remains outstanding your risk of harm to the public also remains too high for release to be justified."*
33. I think that what the panel was saying is clear, that once the further work had been completed, the risk management plan would be sufficient to manage the Applicant's risk; but without that work, it would not be sufficient.
34. As to the last ground, the Applicant's attitude to sex workers at the time of the offending is summarised in the psychological assessment completed in July 2020. Immediately after that summary, the author of the report said:
- "Although there has not been any previous concerns about him being aroused by violence in intervention reports, I do question the level of aggression involved in the rapes and him being able to climax, which may be an indicator of him being aroused by such behaviour, although he has denied this."*
35. It seems clear that the Applicant's attitudes at the time of the offending constituted a problem which still exists.
36. The Applicant has to surmount a high hurdle in order to establish irrationality, which is something very different from simply a disagreement with the decision of the panel; on all the facts of this case, it seems to me it cannot be argued successfully that the panel's conclusion was one to which no reasonable panel could have reached on the evidence.

Decision

37. Neither taken individually nor collectively do the matters put forward raise an issue about the irrationality of the decision. For the reasons I have given, I do not consider

that the decision was irrational and accordingly the application for reconsideration is refused.

James Orrell
18 November 2020