[2020] PBRA 45

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Application for Reconsideration by Raw

Application

1. This is an application by Raw (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 27 February 2020 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 dossier consisting of 472 pages including the Decision Letter, the grounds in support of the application and an addendum report dated the 8 March 2020 from a consultant clinical forensic psychologist.

4. The Secretary of State has indicated he does not wish to make any representations.

Background

5. On the 20 August 2004, the Applicant was sentenced to life imprisonment for the murder of his partner's 13 month old son. The minimum term to be served before becoming eligible for parole was 15 years. That minimum term expired on the 20 August 2019.

Request for Reconsideration

6. The Application for Reconsideration was received on the 11 March 2020. The solicitor for the Applicant has provided a number of carefully drafted reasons in support of the allegation of irrationality. The written reasons were accompanied by the addendum report from one of the psychologists who gave evidence at the oral hearing and which supports the application for reconsideration. The purpose of the present application is whether the panel's decision was irrational on the material before the panel, and the application should be confined to that material. However, in one respect, the report raises what can be regarded as a further reason for reconsideration which I have set out in number [d] below.

7. Essentially, there are three passages in the Decision Letter which it is submitted evidence irrationality together with the submission introduced by the psychologist.

[a]Your maintenance of innocence leads the panel to conclude that you may have outstanding risk factors which need addressing and it cannot be confident that you have developed internal controls to manage your risk of harm to children

[b]The Panel cannot be confident that professionals can rely on external controls to manage your risk of serious harm. You have evidenced that your narrative of the difficulties you face and your past offending cannot be relied upon. This leads the Panel to believe that you do not have the ability to be fully open and honest with professionals over time. The Panel is also concerned that professionals will not have polygraph testing as a tool to monitor your narrative over time.

[c]Your risk of serious harm is not considered to be imminent but professionals agree it may escalate over a long period of time. This lack of warning signs regarding your index offence concerns the panel because it is unclear whether professionals will be able to identify whether your risks are escalating in the community.

[d] The panel set the Applicant targets that were unattainable.

Current parole review

8. The Secretary of State referred the case to the Parole Board in November 2018.

9. On the 8 August 2019, the panel heard evidence from the Offender Supervisor, the Offender Manager, two psychologists and the Applicant. All the professional witnesses supported release. The panel adjourned the hearing until the 20 January 2020 to hear further evidence directed at risk. The panel again adjourned the hearing but this time to a paper hearing in order to ascertain that the Applicant could be made subject to regular polygraph testing if on licence; in the event, through no fault of his own, it turned out he could not.

The Relevant Law

10. In order to be "irrational" within the meaning of Rule 28 (1) (a) the decision in question must be so outrageous as to defy logic, accepted moral standards or one at which no sensible person could have arrived. Moreover, in considering the assessment of the decision, due deference is to be given to the expertise of the Parole Board in making decisions relating to parole. It will also be borne in mind that in the case of oral hearings it is the panel members who saw, heard and assessed the evidence of witnesses before them: see **R (on the application of DSD and others) v the Parole Board [2018] EWHC 694 (Admin), CCSU v Minister for the Civil Service [1985] AC 374.**

11. Maintaining innocence, of itself, cannot be a bar to progression, including release on licence. Sometimes, the maintenance of innocence can hinder the correct assessment of risk; in such cases the panel has to have foremost in its considerations the future protection of the public. The position was helpfully described, in a case of the re-categorization of a prisoner by Gross LJ in **DM v The Secretary of State for Justice [2011] EWCA Civ 522,**

"Thirdly, reference has already been made to the concerns occasioned by the impasse capable of arising in the case of a prisoner who maintains a denial that he committed the offences of which he has been convicted…While, plainly, continued denial of guilt cannot of itself preclude re-categorisation, a matter which would compound injustice in the case of anyone wrongly convicted of (necessarily in this context) grave offending, denial of guilt will very likely be relevant as undermining any acceptance of responsibility for the harm done. Moreover, the … starting point can only be the correctness of the jury's verdict. Still further and realistically, there will be very, very, many more occasions where prisoners deny guilt for offences which they have in fact committed … As it seems to me, it is necessary to be alert to the possibility of injustice occasioned by an impasse of this nature; but, it must be accepted that on occasions such impasses will, unavoidably, occur – given the important public interest in risk reduction before an offender is released on a controlled basis into the community..."

Discussion

12. The Applicant had committed a number of serious assaults on the unfortunate child over a period of approximately 3 months culminating in the child's murder during the night of the 14 to the 15 December 2000.

13. The Applicant has always maintained his innocence and at times has suggested the child's mother was the perpetrator. It is noteworthy that care proceedings before a High Court judge in 2001 found that "the mother's protection of the victim did not fall below that of a reasonable parent".

14. The Applicant's conduct in prison has been excellent and he has completed successfully all the offending treatment programmes that have been made available to him.

15. In May 2017, an earlier panel recommended he should move to open conditions and on the 11 October 2017 he moved to an open prison.

16. The panel placed great weight on the fact the Applicant did not admit any part in the child's death. For the panel, a number of important factors flowed from this failure to admit what he had done.

17. These were:

    (i) The possibility that not all the risk factors had been identified;
    (ii) The Applicant's changes he had made through offender behaviour programmes may not be evidence of him addressing the full range of his risk factors;
    (iii) There is currently no understanding of the purpose behind the Applicant's violence towards the child;
    (iv) His inability to talk frankly about the circumstances surrounding the child's death and the earlier injuries makes managing his case difficult;
    (v) It is unclear whether the Applicant has developed the appropriate internal control to manage his risk of serious harm.

18. These findings were based on the evidence before the panel. By way of illustration, at page 3 of the Decision Letter, the panel remarked *"All the professionals and the panel agree that this stance [maintaining his innocence] has prevented those working with you to have confidence that they have identified your full range of risk factors... it is possible that there is a gap in everyone's understanding regarding your full risk factors."*

19. The panel accepted the progress the Applicant had made whilst in prison and acknowledged that the professional witnesses supported release.

20. Turning to the first ground in support of reconsideration, a number of subsidiary points are made on behalf of the Applicant.

21. It is submitted that the Applicant's maintenance of innocence should not be a bar to progression, that it is not directly linked to risk and the Applicant has demonstrated self-control in difficult prison conditions. All these factors were accepted by the panel.

22. It was also accepted by the panel that an earlier panel had said in its Decision Letter that the Applicant had completed all the necessary offending behaviour work. To say, as the Applicant does, that this is *"somewhat at odds to the decision of the Panel of the hearing 20th January 2020"* arguably misses the point. What the present panel did was not to identify a particular piece of necessary work which had not been done but to ascertain and quantify the possibility that some work, not yet identified, had not been considered because the Applicant's maintenance of innocence had prevented the professionals from identifying the whole range of his risk factors.

23. The psychologist in her addendum report argues that the Applicant's denial can be viewed as a protective factor as it enables him to maintain his support network. There are two points which have to be made. First, I believe there is no mention of this hypothesis in the psychologist's report actually before the panel, so it is unclear whether it was ever canvassed in evidence. This is not unimportant because the hypothesis that denial can be a protective factor is one which is not universally accepted.

24. The second point is the panel noted the Applicant's main area of support came from members of his family. The panel said this about them at page 4 of the Decision Letter, *"The panel agrees with professionals that your family and friends cannot be considered entirely protective. They all support you in your maintenance of your innocence and therefore if your risk factors escalate, for example you misuse alcohol, they may not notify professionals for fear that you may be recalled."*

25. The remaining subsidiary points under this head are uncontroversial examples of positive behaviour by the Applicant whilst in prison.

26. As to the second ground, again, many of the subsidiary points repeat the positive aspects of the Applicant's case before the panel. All the points had been accepted

by the panel and the Applicant's reliance on them is misconceived because, in essence, they support only the submission that the panel should have preferred an alternative, arguable case and come to a different decision. The reconsideration mechanism follows the practice and procedure of Judicial Review. The correct approach of the reconsideration process is not to ask whether the panel might have come to a different decision; the correct approach is confined to asking whether the Applicant has established that the panel's finding was irrational within Lord Diplock's definition.

27. The ground also relies on a passage in the addendum psychological report which suggests that, because the Applicant has maintained his innocence, it is unrealistic to expect him to change now. That may be the case but it is not a reason to direct his release if, because of his continuing stance, he still has to be regarded as presenting as an unmanageable risk.

28. The third ground repeats uncontroversial evidence that was before the panel, namely the professional witnesses supported release and the Applicant, if released, would have access to behaviour programmes which would help reduce risk. Again, these factors are the building blocks for an alternative decision but they are not evidence of irrationality.

29. The fourth ground contains two assertions which require particular attention. They are *"We would respectfully submit that it is impossible for further potential risk factors to be identified, unless [the Applicant] admits his index offence"* and *"[The Applicant]'s account of the circumstances surrounding the index offence will not change. Therefore the 'gaps in his risk' will not be identified, as confirmed in the addendum report..."*

30. The worrying corollary of this is that if an applicant maintains his innocence and as a consequence it is not possible to identify his full range of risk factors then provided the professional witnesses are satisfied he will never change his stance, he should be regarded as suitable for release, all other matters being equal.

31. The last point made on behalf of the Applicant namely that the panel has set future targets for him that are unattainable, ignores the fact that if he chose to, the Applicant could give more information and certainly sufficient information to ensure that his full range of risk factors is known and so long as that full range remains unknown, the panel is entitled to take the view it does.

32. A decision is irrational if it is unreasoned, lacks ostensible logic or comprehensible justification, is unintelligible or where there is an absence of a logical connection between the evidence before the panel and the reasons for the decision. It is a very high test. The Applicant has done extremely well whilst a serving prisoner and no doubt his hopes had been raised by the early recommendation that he should move to open conditions; however, as I have already said, the reconsideration process does not involve considering the rival merits of two possible decisions and preferring one over the other. The reconsideration panel has to ask whether the Applicant has met the high test described by Lord Diplock for irrationality and in this case, he has not.

33. 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
20 March 2020