[2020] PBRA 6

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Application for Reconsideration in the case of Simms

Application

1. This is an application by the Secretary of State for Justice (SoS) for reconsideration of a decision by a Parole Board panel to direct Simms's (the Respondent) 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 that the decision is irrational or that it is procedurally unfair, or both.

Background

3. The Respondent is now 63. In 1989 he was sentenced to life imprisonment for murder. His tariff was set at 16 years by the Home Secretary. In 2016 he was transferred to open conditions by the SoS. On 21 November 2019 a panel considered his case at an oral hearing. It ordered his release.

Request for reconsideration

4. The application is dated 10 December 2019. The grounds submit in summary that there was,

   (a) 'Erroneous conclusive reasoning' by the Board that the open conditions to release progression is automatic,
   (b) 'Erroneous conclusive reasoning' by the Board that good behaviour in prison is indicative of reduced risk,
   (c) An irrational conclusion that the Respondent's risk of serious harm is medium given the accepted fact that it is not possible to form an accurate dynamic assessment of his risk,
   (d) An 'erroneous equation' of an indication of warning signs of deterioration of mental health as a sign of escalation of risk, and
   (e) That these grounds, individually or together, should result in a finding that the decision was irrational and should be reconsidered.

5. The grounds are supplemented by written arguments to which reference will be in the **Discussion** section below.

The Relevant Law

6. In **R (on the application of 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 test was first 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 uses the same word as is used in judicial review demonstrates that the same test should be applied.

7. The Grounds submitted in support of the application refer in addition **to R (J) v the Parole Board [2010] EWHC 919** and **R (ex parte Wells) v Parole Board 2019 EWHC 2710** and the test set out at paragraph 32 of that decision.

8. Submissions were received from the Respondent's legal representative, who had represented him at the hearing. In summary that:

- The panel was composed of a former 'senior' Judge, an experienced psychiatrist and a lay member with relevant knowledge.
- All witnesses, including those representing the SoS, supported release.
- The written evidence contained structured risk assessments and also supported release.
- The SoS was represented at the hearing. That representative did not oppose release or raise issues as to the conduct of the hearing.

Discussion

9. Before dealing with the individual grounds it will be helpful to summarise the information in the 704 page dossier relevant to the grounds submitted which was before the panel at the 3 hour 45 minute oral hearing. This summary is just that, and does not purport to rehearse the whole content of the 704-page dossier. There were:

- Psychiatric reports from 2011, 2014, 2015(3), 2019;
- Psychological reports from 2012, 2013, 2014(2), 2015(3), 2019(5);
- Mental Health reports from 2018, 2019;
- Offender Supervisors' Reports from 2017, 2018, 2019;
- Offender Managers' reports from 2017 and 2019;
- Assessment of risks and their origin reports from 2017, 2019;
- Previous Parole Board decisions – or summaries thereof - of 2003, 2004, 2007, 2009, 2011 and 2016;
- Written representations from the SoS and the Respondent's legal representative, including a helpful skeleton argument which had been directed

by the panel on the question of the issues concerning "*denial of the offence and failure to reveal what happened to the body of the deceased*"; and

- Adjournment directions and directions to oral hearing of this review dating from April 2018 until 29 May 2019.

10. **Ground (a):** The SoS relies in particular on a passage in the Decision Letter (DL). *"...(T)he purpose of that transfer was to pave the way for your release by re-integrating you gradually into society."* It is submitted that *"this wording suggests that there is an automatic progression from open conditions to release, whereas, in fact, a period in open conditions is primarily to "test" the prisoner in conditions of lower security in order to inform the future decision whether the prisoner might be safely released*."

11. There is nothing in this ground. The DL, an unusually long one, dealt at great length with the factors which might support, or militate against, release on licence and made it crystal clear that release was not 'automatic' following a problem-free period in open conditions.

12. **Ground (b):** This too is a surprising contention. Parole panels are invariably presented by the SoS with prison records which set out in detail direct or indirect evidence of the presence or absence of bad behaviour, whether proved or suspected, whether violent or not, while serving a sentence. Frequently an accumulation of adjudications for violent behaviour and/or of non-violent infractions of prison rules is cited by Offender Supervisors/Managers and others as one of, if not the main, ground for opposing release; either as direct evidence that the risk of serious harm to public has not been reduced sufficiently, or that the fact that the offender has failed to comply with rules suggests that he or she may well fail to do so on release and thereby increase his/her risk of serious harm to the public. Likewise, the absence of such behaviour is frequently cited by the same professionals as lending support to a recommendation that a prisoner can safely be released.

13. The ground comes close to suggesting that if the index offence is denied – as it is in this and many other cases – the conduct of the offender while in prison should be disregarded. It is fair to say that his continued denial must already have contributed substantially to the fact that he is still in prison nearly 16 years after his 'tariff' sentence expired.

14. **Ground (c):** It is normally a given that the 'static' risk of serious violence of those convicted and sentenced for offences of serious violence will be assessed as high until they have been released, and have been given, and used, the opportunity to remain offence-free for a significant period. In this case, however, the risk assessment had been reduced – as the DL states – by a combination of a lack of previous convictions for such offences and the 30 years which have passed since the index offence. The ground effectively suggests that those who deny their index offence should automatically be assessed as posing a high 'dynamic' risk of reoffending, and in the case of a serious violent offence, serious violent offending. The two psychologists, whose evidence is correctly summarised in the DL, were of the opinion that such risk as he would pose on release:

    (a) Is not a risk to the family of the victim,
    (b) Is either 'low' – or – 'medium' and in any event not 'imminent' to members of the public, and

(c) Would manifest itself in time for the professional(s) charged with the Respondent's management to take appropriate action, whether by imposing additional licence conditions or recommending his return to prison.

His Offender Manager (since August 2015) and his Offender Supervisor reached the same conclusion and repeated it at the hearing. These conclusions underpinned the recommendations made by all four that the offender should be released under strict licence conditions which would be able to identify any changes in the Respondent's attitudes and behaviour which suggests an increase in his risk of causing serious harm to members of the public.
The Panel spent much of the hearing testing the assessments and the ability of the proposed licence conditions to identify any increase in the risk posed by the offender. There was no procedural irregularity in the way the hearing was conducted, and counsel instructed for the Respondent did not seek to cast serious doubt on their conclusions.

15. **Ground (d):** The Respondent's mental illness had been diagnosed many years earlier and had since been treated so that there had been no recent problems to indicate that it had returned. However, during the early years of the sentence there had been outbreaks of violence which may have been in part the result of that yet undiagnosed illness. The recurrence of the illness was only one of seven possible indications set out in the DL that the risk posed by the Respondent might be increasing and for which those responsible for his management would need to watch out for and, if necessary, take appropriate action. There are many cases in which a deterioration of mental health has led either to an adjustment of licence conditions or the recall of an offender on licence. There is nothing in this ground.

16. **Ground (e):** It follows that whether the grounds are considered individually or together there is no reason for ordering that this decision be reconsidered.

17. However, it is perhaps worth pointing out that the absence of submissions at the hearing from the Applicant's representative opposing release is not by any means a deciding factor when the application is, as it is here, for reconsideration on the grounds that the decision was irrational.

Decision

18. It is therefore impossible to characterise the Decision Letter, its reasoning and conclusions as 'irrational' within the definitions set out above. Accordingly, the application for reconsideration is refused.

19. Finally, the issue which has dominated press reports since the decision became known was not part of the grounds for seeking a reconsideration and has therefore not been referred to except in passing in this Decision.

Sir David Calvert-Smith
8th January 2020