[2020] PBRA 85

the Parole Board
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Application for Reconsideration by Appleyard

Application

1. This is an application by Appleyard (the Applicant) for reconsideration of the decision of the Parole Board dated the 26th May 2020 (following a remote hearing on the 21st May 2020) declining to direct his further release on licence.

Background

2. The Applicant is serving an 8-year extended sentence of imprisonment for robbery. The sentence comprises a custodial term of 5 years with an extension set at 3 years. His SED is the 7th April 2021. The Applicant was released on licence first in April 2017 and almost immediately recalled. He was released on licence again on the 17th April 2018 and recalled after just 4 days. In each case there was no suggestion he had committed any further offence, but there was evidence of his inability to comply with the basic conditions of his licence. A single member panel reviewed this second recall, on the papers, on the 19th June 2018 [Dossier, p.108] and concluded that the recall was justified and that it was necessary for him to remain in custody. The panel commented that "unless and until [the Applicant] [is] properly motivated to engage with the risk management plan and take steps to address [his] impulsive behaviour or consequential thinking, the plan will not be effective in managing [his] risk. The Applicant had made no representations that this panel should come to any different conclusion and he did not seek an oral hearing at that time.

3. On the 2nd August 2019 the Parole Board agreed at next review that his case should be considered at an oral hearing. On the 1st November 2019 a direction was made for a psychological risk assessment and his panel hearing was deferred (for five months) to allow for this.

Request for Reconsideration

4. The application for reconsideration is dated the 8th June 2020.
On behalf of the Applicant it is submitted that the decision not to direct his further release on licence was *irrational* in that:

- the panel failed to properly consider the Applicant's evidence and submissions;
- the panel do not appear to have considered the imminence of reoffending within the decision letter;
- the panel failed to consider the evidence of professional witnesses during the hearing;
- the panel have not given reasons as to why they disagreed with evidence of the expert witness;
- the panel were wrong to conclude that the Applicant had not completed sufficient core offending work in custody and ignored evidence that the Applicant had been referred to the wrong course; and
- the panel failed to properly consider the Applicant's submissions.

The Relevant Law

5. Rule 25 (decision by a panel at an oral hearing) and Rule 28 (reconsideration of decisions) of the Parole Board Rules 2019 apply to this case.

6. Rule 28(1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is *irrational* and/or (b) that it is procedurally unfair. This is an eligible case.

7. 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 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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

8. The grounds submitted in support of the application refer to **R (ex parte Wells) v Parole Board 2019 EWHC 2710** at 40 and the observations made in relation to the duty to give reasons for rejecting expert evidence which has been provided to it.

Discussion

9. Before dealing with the individual grounds it may be helpful to refer very briefly to some of the information in the dossier which was before the Panel in the course of the hearing.
    - The OS report dated 4th April 2019 – in which the author notes, "[The Applicant] *has not completed any offending behaviour work which could evidence risk reduction and his custodial behaviour is problematic. It is my assessment that [the Applicant] needs a period of stability in order to be able to access the programmes he needs to complete".*

- The Release & Risk Management Report dated 9th May 2019 – in which the author in submitting that the Applicant should undertake a named training course addressing the use of violence and sex offending commented that "*the Applicant had not completed any work to address his consequential thinking and problem solving skills, which leaves concerns that if faced with another situation that requires him to make a decision that would not mean he breached his licence he may not possess the skills to do so*."
- OS report dated 9th September 2019 indicating the Applicant had declined to undertake until after his parole board hearing and concluding, "[The Applicant] needs a period of stability, where he can demonstrate improved custodial behaviour, engage with programmes and complete work set by his Offender Manager."
- The Psychologist's report dated 29 January 2020. "*The main findings are that [the Applicant] has shown increased insight, however at times of stress and crises, his capacity to 'hold' his insight appears to be overwhelmed by his negative beliefs about others and self that drive his aggression and self-harm behaviours*." The author noted, "*over the last five months he has shown improvement in his behaviour and responses and maintaining this progress since his transfer in November 2019 to HMP Oakwood.*" The author concluded that if released to designated accommodation, undertook a named training course addressing the use of violence and sex offending and also 1:1 work with a psychologist, "*could* provide sufficient supervision and support to manage and reduce his risks", sufficient for him to be released.
- The Release & Risk Management Report dated 2nd March 2020. The author supported release but reported that designated accommodation was not available to the Applicant, nor was the training course addressing the use of violence and sex offending available in the community.
- The OS Report dated 6th March 2020. The author reported that a referral for the training course addressing the use of violence and sex offending had been made to the relevant prison, it having emerged that a previous reference had been for the "wrong strand". Although this course had not been undertaken, he concluded, *"I find no reason to oppose the recommendations of fellow professionals and also support release".*

The Grounds relied on by the Applicant

10. "*The panel failed to properly consider the Applicant's evidence …".* I can find nothing in this complaint. As the author of the Applicant's Representations concedes "*the Panel may of course have its own opinion*" as to whether the Applicant had adequately explained the two drugs tests he failed in December 2019. Moreover, evidence that the Applicant was further involved with drug misuse (a significant risk factor in his case) was not displaced, as is submitted, by the dismissal of the charges (on technical grounds). It is clear from the DL that there was a contradiction between what was being submitted by his legal representative for the Applicant (a denial any drugs had been consumed and an intention to seek a confirmatory test) with what the Applicant was admitting (drugs consumed but only because his food spiked). There were other areas of the Applicant's evidence considered by the Panel in the DL where his credibility was put in doubt. The Applicant asserted, for example, that he had been told that the named training course addressing the use of violence and sex offending was "not available until [his] Parole Review had been determined but there was ample evidence in the dossier to contradict this. The Panel had the advantage of seeing and hearing the Applicant (who was represented) and had ample material before it upon which to make a valid assessment of the Applicant's credibility and thus the reliability of anything he said touching on risk.

11. "*The panel do not appear to have considered the imminence of reoffending within the decision letter".* I can find nothing in this complaint. In discussing the psychologist's evidence the Panel referred at p.5 of the DL to her assessment (Report @ 7.2.2) in the context of a robust risk management plan, of a kind which she erroneously thought was available, that the Applicant's *"future risk of violence in the community could be considered medium and not imminent*". Although the term is not expressly referred to elsewhere in the DL, the issue of imminence of risk is clearly covered in the Panel's later discussion of risk (at para. 6) and in the Panel's conclusions (at para. 8) where the Panel concludes that he poses a high risk of causing serious harm to the public and where it goes on to discuss his volatility, recent involvement with drugs and his continuing inability to cope with the normal stresses of life.

12. *"The panel failed to consider the evidence of professional witnesses during the hearing".* There is nothing in this complaint. Quite clearly the Panel considered the evidence of the professional witnesses from whom it heard but it had clearly also properly considered the reports of other professional witnesses who had dealt with the Applicant in the last year or so. Paragraph 5 of the DL sets out over five pages the evidence from professional witnesses as well as that of the Applicant. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in ***DSD***, they have the expertise to do it. This was an experienced panel which importantly included a psychologist member.

13. *"The panel have not given reasons as to why they disagreed with evidence of the expert witness'.* There is nothing in this complaint. The Panel made a detailed analysis of the evidence from the expert witness identifying that the opinion she had expressed in her report as to the suitability of the Applicant for re-release was based on substantial misunderstanding as to what would be available to him on such release. Having had these pointed out to her the Panel noted in the DL [at page 7] that the expert witness offered further alternatives which she said would meet the Applicant's needs instead, at least one of which it transpired was also not available a named community-based specialist intervention for offenders and others. . The Panel was entitled to note that having said in her report, and initially in her oral evidence, that the RMP for the Applicant incorporating these unavailable proposals "could" be sufficient to manage the Applicant's risks, she later changed this to "would" to cover the less rigorous proposals she was now aware were possible. In such circumstances it is obvious in the DL why the evidence from the expert witnesses did not convince the Panel to adopt that which she was submitting and the reason for that did not need to be spelled out more explicitly.

14. *"The panel were wrong to conclude that the Applicant had not completed sufficient core offending work in custody and ignored evidence that the Applicant had been referred to the wrong course".* There is nothing in this complaint. Dealing with the second of these points first, the evidence such as it was that the Applicant had been referred to the wrong course was largely irrelevant, because the Applicant had made clear in September 2019 he would not undertake any such course before his Parole panel hearing, and whether or not it was true (that he had been referred to the wrong course) would not affect the assessment of his risk. The issue in the Applicant's case was whether there was outstanding core risk reduction work still to be undertaken by him. A number of professionals (including the expert witness had in the last year expressed the view that there was. Notwithstanding some evidence that the Applicant's behaviour had shown some sign of improvement it was patently open to the panel to conclude that the Applicant had not completed core offending work in custody and to take that firmly into account in deciding whether he was suitable for release.

15. *"The panel failed to properly consider the Applicant's submissions".* I can find no evidence to support this complaint. In the extensive DL it is clear this panel considered very carefully the evidence which was put before it in the evidence of the witnesses from whom it heard directly and in the numerous reports within the dossier. The panel made a very careful assessment of the arguments advanced on behalf of the Applicant based on evidence that there had been some improvement in his behaviour in recent months. It was entitled to conclude that the Applicant had not displayed a consistent period of good behaviour. He clearly had not. Instances of "good behaviour" such as that displayed by the Applicant on hearing of his aunt's death (which were recognised by the Panel in its summary of the evidence put before it) cannot displace and have to be balanced against the number of instances of bad, questionable or volatile behaviour in and around the same period; and they do not undermine the reasonableness of the conclusion reached by the Panel.

16. The panel rightly noted at the beginning of the DL that it could direct Applicant's release only if it were satisfied that it was no longer necessary for the protection of the public that he remain confined to prison. It also correctly identified (at

paragraph 8) that the panel needed to consider the Applicant's risk to the public if he were to be released at the time of the Panel hearing. To this question his SED was not a relevant consideration.

Decision

17. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that it saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel. For the reasons I have given, I do not consider that there are any such reasons. The decision of this Panel in the case of this Applicant was not irrational and accordingly the application for reconsideration is dismissed.

Martin Beddoe, HHJ

10 July 2020 July