

[2021] PBRA 193

Application for Reconsideration by Muggleton

Application

1. This is an application (the application) by Muggleton (the Applicant) for reconsideration of a decision by a Panel of the Parole Board dated 14 November 2021 not to direct his release. The decision was made following the oral hearing of the Applicant's on-tariff life sentence review conducted on 2 November 2021.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on the basis that the decision is (a) irrational or (b) procedurally unfair.
3. I have considered the Application on the papers. These comprise of: The Application for reconsideration with representations; the decision letter; email from PPCS dated 13 December 2021; and the case dossier.

Background

4. On 30 March 2012, having pleaded guilty to the attempted murder of his ex-partner, the Applicant was sentenced to imprisonment for public protection. The minimum custodial term was set at 8 years 24 days, after time spent in prison on remand had been taken into account, and the Applicant's tariff accordingly expired on 24 April 2020. His appeal against sentence was dismissed by the Court of Appeal on 1 November 2012.
5. The Applicant was 27 at the time of the index offence which was committed on 24 April 2011. The victim was 18 weeks pregnant with the Applicant's child. She had ended their relationship and had threatened not to involve him in the baby's life. Having established in advance that no other residents would be at the property where the victim was living, the Applicant went there, told the victim he was going to kill her, and attacked her many times with a Stanley knife.
6. The Applicant had one previous conviction recorded against him, namely for causing death by dangerous driving on 3 June 2006 for which he was sentenced, on 12 June 2007, to 30 months' imprisonment.
7. This was the Applicant's first review. His case had been referred to the Parole Board to consider whether or not it would be appropriate to direct his release. If the Board did not consider it appropriate to do so it was invited to advise the Secretary of State whether he should be transferred to open prison conditions.



8. Having considered the reports before it, the oral evidence, and the submissions made by Applicant's legal representative, the Panel decided that the Applicant's risk remained too high for him to be safely managed in the community. It concluded that it remained necessary for the protection of the public for him to be confined and therefore did not direct his release. The Panel went on to decide that his risk could be safely managed in open prison conditions including on licensed temporary release and recommended a transfer accordingly.

Request for Reconsideration

9. The application for reconsideration is dated 6 December 2021 and contains detailed representations by the Applicant's Solicitors.
10. It is submitted that the decision is irrational in that the panel had:
 - i. Failed to acknowledge that three different psychologists recommended release.
 - ii. Placed too much weight on the Applicant building support outside his family which is not in reality achievable in open conditions.
 - iii. Asserted that the Applicant is a high risk whereas his risk is not deemed imminent.
 - iv. Appeared not to have taken the Applicant's cognitive difficulties sufficiently into account.
11. It was confirmed on behalf of the Secretary of State that he did not wish to make representations in response to the Application.

Current Parole Review

12. The Applicant's case was referred to the Parole Board by the Secretary of State to decide whether to direct his release. The terms of reference included an invitation to advise, in the event of release not being directed, whether the Applicant should be transferred to open conditions. Such advice is not within the remit of a reconsideration application.
13. The case was initially set down for hearing in September 2020 but was adjourned to allow sufficient time for the Applicant to undertake one to one work with a psychologist which had been delayed as a consequence of coronavirus restrictions. An oral hearing then took place in December 2020 but unfortunately the subsequent illness of the panel Chair prevented a decision from being issued. A hearing before a fresh panel (the Panel) eventually took place on 2 November 2021.
14. The Panel considered a dossier running to 683 pages ending with a comprehensive Assessment of Risks (OASys) Report dated 27 October 2021. The latest Prison Offender Manager (POM) and Community Offender Manager (COM) Reports were dated respectively 14 and 25 October 2021. The dossier also included Risk Assessment Reports by a prison psychologist and a psychologist instructed on behalf of the Applicant. At the hearing, both psychologists and the COM recommended the Applicant's release on the basis that this would initially be to the controlled environment of designated supervised accommodation.



15. In her addendum report, the prison psychologist concurred with the view expressed in the previous psychological assessment that the critical risk factors in the Applicant's case are alcohol use, poor coping/emotional management and difficulties with cognitive functioning. She considered that it is the interplay of these factors which heightens the Applicant's risk of future violence. She did not consider the Applicant's risk of violence to be imminent.
16. In her addendum report, the psychologist instructed by the Applicant expressed the view that his ability to utilise the skills he had developed needed to be tested. She considered Approved Premises to be suitable for that purpose. His difficulties in considering the perspectives of others, without support, and his rigid thinking and his own perspective taking remained a concern. It was considered possible that, due to a historic head injury, these issues might not be amenable to further change. The Applicant's primary risk factors related to being in an unhealthy intimate sexual relationship. She considered that the Applicant did not present an imminent risk of violence and that warning signs would be evident prior to any escalation of risk.
17. In his 27 April 2021 Report, the COM acknowledged that the Applicant had demonstrated learning from the offending behaviour work he had undertaken and that his insight had improved. The COM recommended that, after a long period in closed conditions, the Applicant should progress to open prison conditions where he could try out and consolidate his coping techniques in an environment with more freedom and different pressures to navigate. In her 21 April 2021 Report, the Applicant's POM concurred.
18. There was no dispute that the Applicant's recent custodial behaviour had been of a high standard and that he had a positive record of compliance. He had coped well with all the delays in the review process. He had maintained contact with close members of his family who were a potential source of protective support in the community. His plan was to move in to live with one of them on release.
19. By the time of the delayed hearing, both psychologists, the COM and the POM were accordingly of the view that all core risk reduction work had been completed and that the Applicant's risks could now be managed with a robust risk management plan in the community in the designated accommodation. There was also support for release from a third psychologist who had been unable to attend the hearing.
20. Having reviewed the written and oral evidence of the professional witnesses and the evidence given by the Applicant, the Panel concluded that, at the current time, the Applicant presented a high risk of serious harm to the public and to a known adult and that his assessment should be reviewed once he had been tested for a considerable period of time in the community and had demonstrated his skills in managing his emotions, alcohol use and other relevant risk factors.
21. The Panel concluded that the Applicant's risks had been reduced to the extent that it was no longer necessary for him to remain in closed prison conditions. It acknowledged that a combination of circumstances had led to the index offence and that *"combinations of circumstances in the form of alcohol, emotional and day to day difficulties and relationships are likely to present themselves in the*



community such that a period in open conditions is considered necessary for public protection prior to release". The Panel declined to direct release.

The Relevant Law

22. The decision letter correctly sets out the test for release.

Parole Board Rules 2019

23. Under Rule 28(1) of the Parole Board Rules 2019, the only type 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)).

Procedural unfairness

24. The issue to be decided under this ground would be whether there is evidence that the correct process was not followed either in the application of the Parole Board Rules or in the fair conduct of the hearing.

Irrationality

25. 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."

26. This test had been earlier 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 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 proceedings demonstrates that the same test is to be applied.
27. The application of this test has been confirmed in decisions on applications for reconsideration under Rule 28: **Preston [2019] PBRA 1** and others.
28. The importance of giving adequate reasons in Parole Board decisions has been made clear in two High Court cases. In **Wells [2019] EWHC 2710 (Admin)** it was suggested that, rather than ask 'was the decision being considered irrational', the better approach is to test the decision maker's ultimate conclusions against all the evidence received and ask whether the conclusions reached can be safely justified on the basis of that evidence, while giving due deference to the panel's experience and expertise.



29. Panels of the Board are wholly independent and are not obliged to adopt the opinions or recommendations of professional witnesses. A panel's duty is to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence and decide what evidence it accepts and what evidence it rejects. Once that stage has been reached, following the guidance provided by cases such as **Wells** and also **Stokes [2020] EWHC 1885 (Admin)**, a panel should explain in its reasons whether or not it is going to follow or depart from the recommendations of professional witnesses.
30. It follows that, in reaching a decision about irrationality on this Application, I am required to decide first, whether I am satisfied that the conclusions reached by the Panel were justified by the evidence and second, whether I am satisfied that the conclusions are adequately and sufficiently explained.
31. In considering the amount of detail needed to be included in a decision letter, there has been guidance from the High Court, in **Oyston [2000] PLR 45**. At paragraph 47 Lord Bingham said *"It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to require elaborate or impeccable standards of draftsmanship."*

Discussion

32. The Applicant submits that the decision was irrational on the bases set out in paragraph 10 above.
33. The Applicant's compliance and excellent conduct, as a Class C prisoner holding Enhanced Status under the Incentives and Earned Privileges Scheme was not in dispute. Nor was the fact that he had completed a great deal of work to address his offending behaviour and had spent a considerable amount of time consolidating that work.
34. The decision letter provides a detailed analysis of the Applicant's offending behaviour, a review of his risk factors and an assessment of current risk after consideration of the material available to the Panel by way of reports and in oral evidence at the Hearing. The Panel expressly had regard to the opinions expressed by the professional witnesses, but it was entitled, as an independent judicial body, to reach its own conclusions. These were set out in the decision letter as follows: *"... the panel do not discount your positive and commendable behaviour particularly given the circumstances of your hearing in December 2020 but have to take a more holistic view and are not able to attribute such significant weight to it when considering the very real challenges you will encounter in the community against the absence of being tested in a less restricted environment to date. The panel also noted that professionals' recommendations were balanced in favour of what was suitable for you in the first instance rather than public protection as the overriding factor"*.



35. The Panel noted that the recommendations of the psychologists were very much centred on the Applicant's risk being manageable while at the designated premises. It concluded that the Risk Management Plan lacked depth in respect of the period following this and that, despite the recommendation of all professional witnesses, the Applicant's risk remained too high for him to be safely managed in the community.

Decision

36. The Panel expressly acknowledged the progress made by the Applicant, the evidence of positive change and the reduction of his risks. It further acknowledged the appropriateness of initial release to designated premises. However, there was insufficient evidence about the move on arrangements. The Decision Letter noted that *"although you had clearly planned to move from the [designated premises] to your [family member's] address this has not yet been visited by probation..... and it is the COM's intention to ask someone from the local probation office to carry out this visit."*
37. In explaining its conclusion, the decision letter stated that *"..... the Panel found the risk management plan to be lacking in depth once you move from the [designated premises]. Your [family member's] address has not been formally visited and probation have never met your family, your new current COM has never spoken to you and is unlikely to meet you in person, a transfer of probation request has not been made, the area you are being released to is completely unfamiliar to you, you currently have no community support aside from your family the professionals in recommending your release appear to have heavily focused on risk being manageable at the [designated premises] rather than in the longer term..... As at October 2020 both psychologists were supporting release with the provision of a robust risk management plan but as above the Panel noted their recommendations were very much centred on the risk being manageable while in [designated premises] and for the reasons given above the Panel do not consider that the proposed risk management plan is sufficiently robust."*
38. Based on the evidence before the Panel and applying the test set out in case law, it would be difficult to find that the decision not to release was irrational. A panel is not bound to follow the recommendation of professional witnesses. It applied its independent judgment, applying the evidence which it did have to the issue of risk and reached its own decision on an objective basis.
39. However, the decision-making process was compromised by the lack of evidence from the COM in the crucial area of the Applicant's plans for settlement beyond any period in the tightly controlled Approved Premises environment. The Parole Board Rules require the risk management report by a COM to include (inter alia) details of the prisoner's address, family circumstances and family attitudes towards the prisoner. It was the lack of sufficient evidence in these areas which underpinned the Panel's decision not to release.
40. The Panel should have considered whether or not to adjourn for a further report but failed to do so.



41. The application for reconsideration is accordingly granted on the basis of procedural unfairness.

HH Judge Graham White
24 December 2021

