[2021] PBRA 33

the Parole Board
working with others to protect the public

Application for Reconsideration by Dutton

Application

1. This is an application by Dutton ('the Applicant') for reconsideration of a decision of an oral hearing panel of the Board ('OHP') which on 28 February 2021, after an oral hearing on 15 February 2021, decided not to direct his release on licence.

2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.

3. The following documents have been provided for the purposes of my consideration of this application:

- The 388-page dossier provided by the Secretary of State for the purposes of this case, which contains a copy of the OHP's decision letter;
- Representations submitted on 4 March 2021 by the Applicant's solicitor in support in support of this application; and
- An email dated 17 March 2021 from PPCS stating that they offer no representations on behalf of the Secretary of State in response to the application.

Background

4. The Applicant is aged 40. On 17 April 2008 he received a sentence of imprisonment for public protection ('IPP') for wounding with intent (the "index offence"). His minimum term was set at 2 years less the time which he had spent in custody on remand. He was 26 years old at the time of the index offence.

5. He has been released four times and recalled to custody four times during this sentence. All of his recalls have been related to misuse of alcohol. His latest recall was on 19 November 2018. His case was then referred by the Secretary of State to the Board to decide whether to direct his re-release on licence and, if not, to advise the Secretary of State about his suitability for a period in an open prison. On 8 September 2019 a panel of the Board declined to direct his re-release but recommended a move to an open prison. The Secretary of State accepted that recommendation and accordingly the Applicant has been detained in an open prison since 11 December 2019.

6. In agreeing to the Applicant's transfer to an open prison the Secretary of State set out the following objectives for him to achieve whilst there, for the purpose of

evidencing a reduction in his risk of serious harm to the public to a level which would justify his re-release on licence:

(1) To further develop the progress made to date by the Applicant to demonstrate reduction in his risk;
(2) To test his ability and commitment to remain drug and alcohol free and subsequently reduce the level of risk posed;
(3) To consolidate his learning and skills learned to date, practice those skills and test relapse prevention plans

7. In ordinary circumstances it would have been expected that the Applicant would have the opportunity to achieve these objectives by a series of temporary releases on licence including overnight releases to his partner's address. Regrettably, the restrictions resulting from the COVID-19 pandemic have frustrated that expectation.

8. In May 2020 the Secretary of State referred the Applicant's case again to the Board to decide whether to direct his re-release on licence and, if not, to advise the Secretary of State about his continued suitability for detention in an open prison.

9. In September 2020 it was directed that the case should proceed to an oral hearing, and in due course the case was allocated to the OHP.

10. At the hearing on 15 February 2021 the OHP took oral evidence from the Applicant and the two probation officers responsible for managing his case in prison and in prospectively in the community respectively. Both probation officers supported re-release on licence.

11. Having considered the written evidence in the dossier and the oral evidence of the witnesses the panel decided not to direct the Applicant's re-release on licence but to advise the Secretary of State that he was suitable to remain in an open prison.

The Relevant Law

The test for release on licence

12. The test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the OHP at the start of their decision.

The rules relating to reconsideration of decisions

13. Under Rule 28(1) of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.

14. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by:
    - a paper panel (Rule 19(1)(a) or (b)) or
    - an oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or
    - an oral hearing panel which makes the decision on the papers (Rule 21(7)).

15. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both of two grounds: (a) that the decision is irrational or (b) that it is procedurally unfair.

16. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. It is made on both grounds.

Irrationality

17. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin) (the "Worboys case")**, 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 was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.

18. 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.

19. The Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under rule 28: see **Preston [2019] PBRA 1** and others.

Procedural unfairness

20. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed, and as a result producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate from the issue of irrationality which focusses on the actual decision.

21. It has been established that the things which might amount to procedural unfairness include:
    (a) A failure to follow established procedures;
    (b) A failure to conduct the hearing fairly;
    (c) A failure to allow one party to put its case properly;
    (d) A failure properly to inform the prisoner of the case against him or her; and/or
    (e) Lack of impartiality.

    The overriding objective is to ensure that the case was dealt with fairly.

Disagreement with professional witnesses

22. One situation which may give rise to a finding of irrationality or procedural unfairness is where a panel has made a decision contrary to the recommendations of the professional witnesses and has failed to give adequate reasons for doing so.

23. A panel of the Board is not bound to follow the recommendations of professionals: its responsibility is to make its own independent assessment of the prisoner's risk and its manageability on licence in the community. However, if its assessment differs from that of the professionals is has a duty to explain the reasons for that disagreement.

24. The reason for requiring adequate reasons had been explained in a number of decisions including:

R v Secretary of State for the Home Department ex parte Doody (1994) 1 WLR 242;
R (Wells) v Parole Board (2009) EWHC 2710 (Admin);
R (PL) v Parole Board and Secretary of State for Justice (2019) EWHC 306; and
R (Stokes) v Parole Board and Secretary of State for Justice (2020) EWHC 1885 (Admin).

25. The principal reason for the duty to give reasons in any case is said to be the need to reveal any error which would entitle the court to intervene: without knowing the panel's reasons the court would be unable to identify any such error and the prisoner's right to challenge the decision by judicial review would not be an effective one. In **Wells,** Mr Justice Saini pointed out that the duty to give reasons is heightened when a panel of the Board is rejecting expert evidence.

Request for Reconsideration

26. In support of the Application, the Applicant's solicitors advance the following two grounds in support of their contention that the OHP's decision was irrational or procedurally unfair:

Ground (1)

27. The OHP had been clear throughout that the Applicant is compliant in custody (including temporary releases on licence) and that the real test will be once he has moved from designated accommodation following release.

Ground (2)

28. The OHP were aware at the outset of the hearing that temporary releases on licence had not been completed and therefore had already made the decision not to release prior to the hearing having taking place, as such the Applicant did not have a fair hearing.

29. In addition to the request for reconsideration, the solicitors request an amendment to the decision letter to correct what they submit is an error of fact. The decision letter, in referring to one of the Applicant's previous recalls (in 2012), stated that a charge of assaulting his then partner was dismissed at court when she declined to give evidence. The solicitors submit that she did attend court, but the case was dismissed on the basis that there was no intent to cause harm.

30. The solicitors very properly and sensibly do not suggest that this error by the OHP, if such it was, affords a ground for reconsideration of the OHP's decision not to direct the Applicant's re-release on licence. An error of fact may afford a ground for reconsideration but only if (a) it is established by evidence to have been an error and (b) there is a real possibility that the panel's decision would have been different if the error had not occurred.

31. I have not seen any evidence to show that the panel's understanding of the reason for the charge being dismissed was incorrect. The same understanding was shared by earlier panels which had considered the Applicant's case in 2015 and 2018, and the current OHP may well simply have followed what was stated in their decisions which were in the dossier and therefore part of the evidence. In any event it is clear that the OHP's decision would have been the same if it had understood the position to have been as submitted by the solicitors.

32. Although I cannot treat the suggested error as a ground for reconsideration of the OHP's decision, the Secretary of State may wish to have the matter investigated and to have any error corrected in future dossiers. The absence of an intent to harm is not a defence to a charge of assault, but if the alleged victim's evidence suggested that any contact was accidental that would of course have been a defence.

Discussion

33. This is a case in which the OHP was departing from the recommendations of the professional witnesses, so before considering the specific grounds advanced by the Applicant's solicitors, I have examined the question whether the OHP gave adequate and defensible reasons for its disagreement with those recommendations.

34. The OHP set out their reasons very clearly in their decision letter. There can be no doubt that at the time of his latest recall the Applicant presented a high risk of serious harm to the public which required his confinement in prison. The question which the OHP was required to consider was whether that risk had been reduced sufficiently to enable it to be managed safely on licence so that his continued confinement in prison was no longer necessary.

35. Regrettably the Applicant has not been able to demonstrate the necessary reduction in risk. That was very clearly explained by the OHP. It was not his fault that he had not been able to achieve the objectives set for him by the Secretary of State. There have been many cases during the pandemic in which panels of the Board have been confronted by cases in which a prisoner detained in an open prison has been unable to go through the normal progression through temporary releases on licence. In some cases, panels have been able to conclude on the rest of the evidence that the prisoner's risk has nevertheless been reduced to a level justifying release on licence:

in others that has not been possible. The decision in each case depends on a careful analysis of the facts of that case. Where the panel cannot find that there has been the necessary reduction in risk the law requires them not to direct release (whatever sympathy they may have for the prisoner).

36. In this case the panel examined all the relevant evidence with great care. They acknowledged the various points relied upon on the Applicant's behalf. However, they concluded that despite those points the Applicant's risk of serious harm to the public remained too high to justify a direction for re-release on licence. They explained their reasons very fully and clearly. Other panels might have reached a different conclusion but the OHP's decision cannot be categorised as irrational.

37. In making its own assessment of the Applicant's current risk of serious harm, as they were required to do, the OHP referred to the assessments made by the previous panel in 2019 and by probation, all of which suggested a high risk of serious harm. The OHP added that in their view (which was clearly justified by the evidence) any return to alcohol and or substances and any scenario which required emotional control and not following the Applicant's instinctive past problematic behaviour could quickly turn into a situation in which risk became imminent.

38. The OHP went on to state that good custodial behaviour had not been an issue for the Applicant but the objectives of being in open conditions remained outstanding as his key risk factors of alcohol, substances and relationships in the community had not been tested and the evidence needed for the OHP to apply the test for public protection was not present. They pointed out that warning signs had not been evident during the Applicant's four recalls and on the last occasion he had committed a further act of unprovoked violence which was unpredictable and impulsive. They stated that they could not be confident that the imminence of risk of serious harm if the Applicant were to be re-released at this time would be manageable, particularly as there would be significant community stressors which he would have to deal with.

39. In these circumstances I am satisfied that this is not a case where the panel failed to give adequate and defensible reasons for its departure from the recommendations of the professional witnesses. I can now turn to the two specific complaints made by the solicitors in their grounds.

Ground (1) The Panel has been clear throughout that the Applicant is compliant in custody (including temporary releases on licence) and that the real test will be once he has moved from designated accommodation following release.

40. This is undoubtedly correct but does not mean that the test for re-release on licence was met. A panel of the Board is not concerned only with an offender's risk to the public in the short term: it is required to decide whether his risk in the longer term will be manageable safely in the community. In this case the proposal made by the professional witnesses was that on release the Applicant should spend a relatively short period in designated accommodation before moving on. The OHP correctly approached the case by assessing the risk that after moving on and being subject to the stressors of life in the community he would commit a further offence causing serious harm to somebody. Their decision that that risk was too high to meet the

test for re-release was fully justified by the evidence and cannot be regarded as irrational. Nor was it in any way unfair.

Ground (2) The OHP were aware at the outset of the hearing that temporary releases on licence had not been completed and therefore had already made the decision not to release prior to the hearing having taking place, as such the Applicant did not have a fair hearing.

41. I am afraid that this ground is based on a misunderstanding. The case having been referred by the Secretary of State to the Board and then directed to proceed to an oral hearing, the OHP were obliged to conduct such a hearing, to test the evidence of the Applicant and the professional witnesses and then, after examining the whole of the evidence, to decide whether this was one of those cases where, although temporary releases on licence had not been completed, the rest of the evidence justified a direction for release on licence. As pointed out above, sometimes that will be the case and sometimes not: it all depends on an analysis of the facts of the particular case.

42. It is not therefore fair to say that the OHP had already made a decision prior to the hearing taking place. On the contrary, the OHP fulfilled its obligation to conduct the hearing, assess the evidence and then decide whether on the facts of this particular case the test for re-release on licence was met. Its conclusion that the test was not met cannot be faulted, and there was no unfairness in the procedure followed.

Decision

43. For the reasons which I have set out above I cannot allow this application. There was no irrationality or procedural unfairness in the OHP's decision, which must therefore stand.

Jeremy Roberts
18 March 2021