[2021] PBRA 38

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Application for Reconsideration by Graves

Application

1. This is an application by Graves (the Applicant) for reconsideration of a decision of an oral hearing dated 3 February 2021. The application is made by his legal representatives and the outcome of the hearing was not to direct release and not to recommend transfer to open conditions.

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, the decision letter (the decision) and the application for reconsideration.

Background

4. The Applicant is serving a sentence of Imprisonment for Public Protection (IPP) imposed in 2007 for sexual offences against a child under 16. His tariff of 5 years and 4 days expired in June 2012. He was 45 years old at sentence. He was released on licence in December 2013 and recalled in January 2020.

Request for Reconsideration

5. The application for reconsideration is dated 25 February 2021.

6. The grounds for seeking a reconsideration are as follows:

Irrationality

a) That a number of key pieces of information that favoured the Applicant's case were not given due weight or any weight whatsoever. If it had been, the decision would have been a different/fairer one;
b) That the Panel failed to fully appreciate the status of the Applicant's Mental Health in the community at the time of his alleged non-compliance;
c) That the Panel failed to sufficiently consider that the Applicant had not committed any further offences whilst in the community; and

d) That the Panel considered that the main reason the Applicant's risk cannot be managed in the community is due to his previous non-compliance, which is not the strict test for release.

Current parole review

7. The Secretary of State's referral directed the Parole Board to consider whether to direct the Applicant's release or, failing that, to consider whether the Applicant was read to move to open conditions. The Applicant was 58 years old at the time of the review. After being sent to an oral hearing, the case was adjourned for a case conference. Following that, the hearing was re-listed.

8. The three member panel considered the Applicant's case at an oral hearing over a video link on 3 February 2021. They considered a dossier of 334 pages, and evidence was taken from the Prison and Community Offender Manager, a police service witness and the Trainee Forensic Psychologist who had provided a recent psychological risk assessment. The panel also took evidence from the Applicant.

The Relevant Law

9. The panel correctly sets out in its decision letter dated the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019

10. Under Rule 28(1) of the Parole Board Rules 2019 the only kind 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)).

11. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

12. 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."

13. 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.

14. The application of this test has been confirmed in previous decisions on applications for reconsideration under Rule 28: **Preston [2019] PBRA 1** and others.

15. 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 prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

The reply on behalf of the Secretary of State

16. The Secretary of State, by email dated 9 March 2021 indicated that no responses were made in relation to the Application

Discussion

17. I will consider each part of the complaint separately, although inevitably there might be some overlap in my discussion or analysis of each issue.

a) That a number of key pieces of information that favoured the Applicant's case were not given due weight or any weight whatsoever. If it had been, the decision would have been a different/fairer one.

18. In the Application, the following 'key pieces of information' are given:
    (i) All professional witnesses supported the Applicant's re-release.
    (ii) That two of the witnesses confirmed that the release test was met and that the Risk Management Plan (RMP) was sufficient to manage risk.
    (iii) That two of the witnesses confirmed that any risk in the community would not be imminent – and they also challenge the assessment of risk;
    (iv) The psychologist witness confirmed there was no further offence focused work to do in custody.

19. The Application also indicates that undue weight was given to an assessment of the Applicant's compliance and dishonesty while on licence and they did not consider the forensic psychologist's assessment that further offence focused work might present a risk of *'over treatment'*. The Application also indicates that the panel did not consider whether the Applicant may not be suitable for any further offence focused work (in custody) because of his stance of maintaining innocence of the index offence. They also indicate that even if he was to be offered the relevant core work, this would only take a further 5 weeks and therefore a negative decision was not appropriate (I presume they are suggesting an adjournment for completion of

this work). They also complain that the panel did not take properly into consideration that the Applicant had mental health problems in the community and how that may have impacted on his behaviour, and that they did not take into account evidence that he had learned from his recall and was motivated to succeed on a future licence.

20. I will begin by expressing some key principles. Just because the decision is not what the Applicant wanted does not make it automatically irrational. The decision must meet what is a high bar for the test of irrationality, and I refer to paragraphs 12 and 13 above which set out this test.

21. Another key principle is that 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.

22. However, if they depart from the recommendations of professional witnesses, they must clearly explain their reasons for doing so.

23. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they 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.

24. Lastly, the availability or lack of offence focused work is not directly relevant to the consideration of the panel's analysis of the test for release. It is of course regrettable if a prisoner is for any reason unable to undertake work that has been recommended for them by professionals, but not being able to complete work because it is not available is not a reason to recommend release.

25. Having expressed these key principles, I sought the reasons given for the panel for their decision. The decision letter sets out in great detail what every professional witness gave in evidence, including their recommendations and their reasons for it. The panel also took evidence from the Applicant and of course he was represented throughout the hearing. I find that the panel has properly taken into consideration the recommendations of the professionals.

26. They explored, in particular, the reasons for the psychologist's recommendation, and I note that on a number of occasions, the psychologist accepted certain issues that may not have been fully explained in their report. For example, they accepted that there was, additional to a risk already identified, some offence paralleling behaviour that they had not explored. They also accepted that warning signs would not be spotted if the Applicant chose to deceive. The psychologist had already expressed concerns about the Applicant's tendency to '*impression manage'*.

27. Further to this, the psychologist indicated that there were a number of other concerns relating to risk and manageability of risk, these are fully explored in the letter. They however continued to state that despite these concerns, risk could be managed with a robust risk management plan.

28. Other professional witnesses included the prison and community offender manager, who had in previous reports not supported release, but now did. Significantly, one witness agreed that the change in their recommendation was arrived at on reading the psychologist's report, rather than making their own analysis of any change since an earlier recommendation that release was not suitable. They were also concerned about a lack of available offence focused work in custody. As I have already explained, not being able to undertake offence focused work is not relevant to the panel's decision and cannot be a reason for release.

29. The other professional witness, like all the other witnesses, indicated that she had heard a considerable amount of evidence from the Applicant given at the hearing that contradicted what she had been told by him, and she provided the panel a number of other concerns relating to the Applicant's risk and management of risk in the community, including possible risk to children. She was concerned at the level of deception during the Applicant's time in the community on licence and indicated that it would be difficult to spot warning signs of rising risk. The decision indicates that she confirmed that her recommendation for release was 'guarded'.

30. The decision details a number of areas where the Applicant had given differing account of his actions in the community and continued to do so in the hearing. In its concluding section, the panel clearly expresses its concerns about the Applicant's ability or motivation to be honest with those supervising him and made a finding that the Applicant had been dishonest to the panel when giving evidence.

31. With the challenge on the imminence and assessment of risk, I note that the panel accepted the assessment of the Community Offender Manager (COM) that the risk of serious harm to children was high, and risk to females with whom the Applicant might form relationships with was medium. I also note that the COM gave evidence that the actuarial scores were underestimated, and that risk could be imminent if the Applicant were to be released. The panel, taking the evidence before them into account, accepted her assessment of risk and its imminence, and they give a reason

for it in the penultimate paragraph of section 6 of the letter. The panel is entitled to prefer one professional's evidence over another, as long as they explain their reasoning.

32. I consider that there is little to add in relation to the limb of the complaint with respect to the risk management plan and the test for release. I cannot find, in the panel's explanation of why they consider the plan insufficient to manage risk or in their conclusion, any failure that would make the decision *'outrageous in defiance of logic'.* Lastly in relation to whether or not the psychologist decided that there was no further offence focused work to be undertaken in custody, it is for the panel to decide whether or not core work remained to be undertaken and again, having taken all the evidence into consideration, they decided that it did. Considering the areas of risk, they continued to be concerned about, which the panel stated more than once in the decision letter, I consider that they fully explained and justified their decision.

b) That there was a failure to take into account the Applicant's mental health while he was in the community.

33. I note that evidence pertaining to the Applicant's mental health emerged more completely after recall and return to custody, when the Applicant sought to explain his behaviour in the community. He engaged with mental health services in custody following recall and told the panel that the counsellor had told him that he had had a 'breakdown' while in the community. While the Applicant's mental health may or may not have had any bearing on his behaviour, it is the behaviour itself – as long as it is relevant to risk – that is the key consideration of any panel when it has to consider the circumstances of recall itself and any risk going forward. The panel made clear findings about his behaviour in the community and his openness at the time he was in the community and to the panel, and also risks going forward. I do not consider that the panel needed to go further in their exploration of issues with respect to mental health.

34. With respect to the complaint that the Applicant had not committed any further offences, I note that the police had investigated a possible breach of his Sex Offender Register (SOR) requirement, as well as other matters. The decision letter indicates that a) a Caution had been authorised in relation to a breach and that b) the Applicant admitted to the panel that he had additionally breached the terms of the SOR in that he had stayed overnight at the address of others without seeking permission. These breaches are separate to the breach the Applicant had already admitted by accepting a Caution. The police had provided evidence as to why charges were not pursued for the second breach(es) that were to do with non-cooperation of the people with whom the Applicant stayed. Whether or not there is a conviction with respect to any allegations, the panel is entitled to take into account any evidence of breach of licence, breach of orders and conditions, possible further

offending and possible offence paralleling behaviour. The panel must of course exercise care in what weight they give any allegations and ensure that they take into account all the relevant information including any account of the Applicant. I can see that this panel did so in as thorough a way as can be reasonably be expected, and they came to a reasoned conclusion that the Applicant had been dishonest and had broken the terms of his SOR and licence conditions on several occasions.

35. Finally, the complaint is that the panel did not properly apply the test for release, placing too much emphasis on previous non-compliance. Firstly, consideration of past behaviour is extremely important in assessing future behaviour, as long as evidence of change is taken into account. Therefore, past non-compliance is frequently and fully justifiably part of the consideration of any panel in its approach to making a decision on the test for release. I accept that one paragraph of the conclusion indicates that the risk is not manageable because of past non-compliance and breach of licence conditions. However, I also note that in the same conclusion the panel finds that core work remains to be undertaken; that the risk of harm to children was high; that the Applicant lacked an understanding of that risk; and also expressed concerns with respect to dishonesty. I consider that this concluding section fully explains the reasons that the panel had for finding that the Applicant did not meet the test for release. Some slightly clumsy use of paragraphs does not make this decision irrational.

Decision

36. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

Chitra Karve
9 April 2021