

[2021] PBRA 77

Application for Reconsideration by Stead

Application

1. This is an application by Stead (the Applicant) for reconsideration of a decision by a panel of the Parole Board (The Panel) dated 7 May 2021 not to direct his release (the Decision) following a hearing held remotely on 29 April 2021.
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. This is an eligible case.
3. I have considered the application on the papers. These include the dossier which runs to just over 200 pages and the application for reconsideration itself submitted by the Applicant's solicitors dated 27 May 2021 which includes submissions made by the Applicant himself.

The Background

4. The Applicant is now 60 years of age. He was sentenced in July 2010 to an indeterminate sentence in respect of which he was ordered to serve a minimum of two and a half years less time spent in custody on remand. His tariff expiry date is recorded as being 14 June 2012. The judge in passing sentence noted that between 1996 and 2010 the Applicant had appeared before the courts on no less than six occasions for offences of assault against partners. He had pleaded guilty to two offences, one of wounding with intent by the use of a knife committed in December 2009 and a second of assault committed that same month but on a different occasion.
5. The Panel first considered the Applicant's case at a hearing in January 2021 when the case was adjourned for further information to be obtained regarding the allegations that led to his recall. The case was finally concluded in April 2021.
6. The Applicant's offending dates back to 1983 when he was 23 years old. The Panel noted that so little had changed in the understanding of his offending for some time that it was appropriate to adopt the analysis contained within the decision of another panel which had directed his release on licence in May 2015. It is important for the purpose of the resolution of this application to examine this aspect of the Applicant's background in a little more detail.

7. The Panel noted in particular that the 2015 panel had stressed that his offending was largely against female partners in the context of relationships that represented what was described as a prolonged cycle of excessive drinking and violence. The most concerning assault had involved the use of a knife albeit inflicting only a relatively minor head injury. It was also noted that the Applicant had no further convictions for violence outside the context of a relationship since the latter part of the 1980's.
8. The Panel summarised the Applicant's current risk factors as being:
- a) A willingness to be violent and a previous use of a weapon;
 - b) Alcohol misuse;
 - c) Attitudes that condoned violence in a domestic setting;
 - d) Friends and associates that use alcohol to excess; and
 - e) Poor problem solving skills, a lack of victim empathy and a problem managing his emotion within relationships.
9. Prior to release on licence the Applicant had completed an appropriate programme and had spent some months completing some one to one psychological work focusing on his attitude to violence and the taking of responsibility.

Recall

10. The Applicant was released from prison in June 2015 and his licence was revoked for the first and only time in May 2020. Information was received by Probation from the police that an allegation had been made against the Applicant by his then long term partner. The information was that up to that point while on licence the Applicant had been managing his alcohol use relatively well, had engaged in some one to one work on his drinking while on licence, and had secured paid employment. The new allegation was regarded by professionals as being offence paralleling and serious and it was felt that his risk could no longer be managed in the community. In addition there were two further serious allegations by different complainants made against him whilst he was on licence.
11. While on licence, the Applicant received a further sentence by way of a Community Order for drink driving having been found to be significantly over the legal limit. It is important to record that in relation to all three allegations, no further police action was taken. The Applicant denied all three.
12. At the hearing there was some support for release from the professional witnesses one of whom at least accepted that little or nothing had changed in relation to risk reduction. It was the view of the witnesses that the risk management plan proposed was reliant on external controls and that the three allegations made at the time of recall were of particular concern. As far as risk assessment was concerned, the Panel found that the Applicant's likelihood of being violent within a relationship classified him as posing a high risk.

The Request for Reconsideration

13. The application for reconsideration made on the Applicant's behalf by his solicitors is dated 27 May. If I have understood the submissions correctly they appear to suggest that the decision not to release was irrational on three grounds:

- a) That without making any findings in respect of the allegations that were made at the time of the Applicant's recall they played an inappropriately significant part in determining the outcome of the hearing;
- b) The Panel appeared to place too much emphasis on the previous release decision and the evidence that the Applicant gave to that panel in 2015; and
- c) There was an insufficiency of evidence to justify the decision that was made.

The Relevant Law

Parole Board Rules 2019

14. 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)).

Irrationality

15. 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."

16. 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.

17. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28. See for example the case of **Preston [2019] PBRA 1 and others**.

The reply on behalf of the Secretary of State

18. No submissions have been made on behalf of the Secretary of State.

Discussion

19. Before dealing with the Applicant's grounds it is appropriate to consider aspects of the parole and reconsideration process which are raised in this application.

Allegations

20. Allegations of criminal conduct made but not adjudicated upon by a court which are relevant to a panel of the Board are those which could affect the panel's risk analysis and may be relevant to the review process in one or more ways. This will include allegations of risky behaviour, in other words, allegations of behaviour associated with risk factors, for example, mixing with negative peers whilst on licence or allegations relating to a prisoner's ability and/or willingness to comply with licence conditions.

21. Panels may need to make findings of fact regarding any allegation that has been made when it is relevant to the parole review by considering a reasonably sufficient body of evidence on which it can make findings of fact. If a panel cannot make findings of fact it is encouraged nevertheless to consider "*the level of concern*" raised by the allegation. To make an assessment of the level of concern the panel would have to decide:

- a) What, if any, relevance the allegation has to the parole review; and,
- b) The weight to be attached to the concerns arising from the allegation

and then form a judgment as to what, if any, relevance and weight is to be fairly attached to these concerns and the impact it may have on the panel's overall judgment. A variety of factors can be considered by a panel when it is considering an allegation. These will include whether the source of the information can be tested and assessed; what material there is to support the allegation; the nature of the allegation itself, the context in which it occurred, and of course the prisoner's own evidence about it.

22. A relevant and significant allegation is likely to be a matter of concern to a panel and as a result impact on its judgment regarding parole. It is not the law that a panel of the Board can only proceed on an allegation where it has been proved in a criminal or civil court. It is not the law that a panel of the Board must put itself in a position where it was equipped and prepared to try the allegation itself. A panel of the Board is an expert body, with the responsibility to act fairly. It can be expected to and it will reject allegations unsupported by any material or evidence and will consider matters in context and in light of facts established in the case (see **R v Morris [2020] EWHC 711**).

Recall

23. A panel has a duty to consider whether a prisoner's recall was appropriate. This is done before a panel goes on to consider risk (see **R (Calder) v Secretary of State for Justice [2015] EWCA Civ 1050**). This is not an assessment of its lawfulness but only its appropriateness. The test for release is unaffected by the case of **Calder** and so remains a separate issue. Regardless of how the panel decides the question of the appropriateness of the recall, it must go on to carry out a separate analysis of re-release in which the identification and management of risk remains the focal point for the panel's consideration. In circumstances where a panel finds that the

recall was inappropriate and/or there was no breach of the prisoner's licence, it still needs to assess current risk, taking into account the reasons for recall and all other risk factors.

24. In approaching the appropriateness of a recall, the panel will need to consider a variety of factors including what was known at the time and any other information subsequently obtained.

Giving Reasons

25. The importance of giving adequate reasons in decisions of the Board has been made clear in the cases of **Wells v The Parole Board [2019] EWHC 2710 (Admin)** and **Stokes v The Parole Board and the Secretary of State [2020] EWHC 1885 (Admin)** which contain helpful guidance which I am bound to follow on the correct approach to deciding whether a decision made by a panel in the face of evidence from professional witnesses can be regarded as irrational.

26. In the case of **Wells** it is suggested that rather than ask whether the decision being considered was irrational the better approach is to test a panel's ultimate conclusions against all of the evidence placed before it 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.

27. Panels of the Board are independent and are not obliged to adopt the opinions and recommendations of professional witnesses. It is the responsibility of panels to make their own assessment and to evaluate the likely effectiveness of any proposed risk management plan. If a panel is going to depart from recommendations of experienced professionals, it is required to explain its reasons for so doing and ensure as best it can that its stated reasons are sufficient to justify its conclusions.

My Approach

28. The reconsideration mechanism is not a process where I am required to indicate whether or not I would have reached the same or a different conclusion from that reached by the Panel in this case. What lies at the heart of my determination of this application is whether I am satisfied that the conclusions reached by the Panel are justified by the evidence they considered and whether those conclusions are adequately explained.

The Applicant's Grounds

29. In their first Ground, the Applicant's legal representatives submit in effect that the allegations made against the Applicant that led to his recall played too big a part in determining the outcome of the review.

30. The panel found that the Applicant had a long and concerning history of violence against partners when in drink. One of the three allegations that were made that led to his recall was thought by one professional witness at least to have been offence paralleling behaviour. In addition it was noted that the allegations of offending came from three different sources not connected to each another. The

panel heard a good deal of evidence regarding these matters which included evidence from the Applicant himself.

31. The complaint made in this ground is that while making no findings against the Applicant in respect of any of the allegations and while noting that none had resulted in any proceedings being taken against him, they were nonetheless "*clearly a part of the formulated decision*". The fact that they clearly were taken into account by the Panel in its decision is nothing more than the application of the Guidance on Allegations issued by the Parole Board which I have summarised in paragraphs 20 to 22 above. The Panel in the Decision Letter makes it perfectly clear that they had a duty to consider each of the allegations which of course is the position. They go on to indicate that although they did not make any findings of fact they explained how and why they were taking them into account in finding them to be of some relevance to the Applicant's risk of harm and relevant to its conclusion that the Applicant still had further risk reduction work to complete. They went on to stress that their conclusion that the Applicant did not meet the test for release did not depend wholly or mainly on the conclusions they had reached regarding the recall allegations.
32. In my judgment the Panel applied the appropriate guidance and reached safe and fair conclusions taking the allegations into account in the manner they described.
33. The second Ground is in effect that the Panel placed too much emphasis and/or reliance on the release decision made in 2015.
34. The Panel explained why it felt able to repeat and adopt the findings of the earlier panel. Essentially it was because for some time little or nothing had changed in the opinion of the professional witnesses regarding the understanding of the Applicant's offending. One of the routes whereby a panel may test and assess the evidence it receives from a prisoner is by examining what he and others have said on other occasions. References to the evidence given to and conclusions to be drawn from earlier Parole Board decisions is well understood, tried, tested and entirely acceptable. The characterisation that the panel made what is described as "*a moral judgment*" with regard to one answer is not only misjudged but in my judgment entirely wrong.
35. The third Ground is a general submission that there was a lack of evidence to support the decision not to release.
36. In reading the Decision Letter as a whole, the Panel clearly demonstrate that they took into account all of the available evidence; took the earlier panel decision in 2015 as an appropriate starting point; reached conclusions regarding the recall allegations; identified and assessed the Applicant's risk and considered the possibility of a progressive move to open conditions.
37. I found the Decision Letter to be a balanced and fair minded analysis of the Applicant's case and I am entirely satisfied that it succinctly set out its reasons which in my judgment were fully justified by the totality of the evidence.



38.I should add that I am grateful for the submissions made by the Applicant himself all of which I have of course taken into account along with the further information his solicitors wished me to consider.

Decision

39.For the reasons set out above I am not persuaded that the decision in the case was irrational and accordingly the application for a reconsideration is refused.

HH Michael Topolski QC
7 July 2021