[2022] PBRA 30

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Application for Reconsideration by Smith

Application

1. This is an application by Smith (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 7 February 2022 not to direct his release.

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 decision letter, the dossier, and the application for reconsideration. I have also listened to part of the audio recording of the oral hearing.

Background

4. The Applicant was sentenced to imprisonment for public protection on 26 February 2010 following conviction for conspiracy to rob and conspiracy to possess firearms with intent to commit an indictable offence. A minimum term of 12 years (less time spent on remand) was set and this expired on 18 May 2020. This was the Applicant's second parole review.

5. The Applicant was aged 51 at the time of sentencing. He is now 63 years old.

Request for Reconsideration

6. The application for reconsideration is dated 12 February 2022 and has been submitted via solicitors acting on behalf of the Applicant. The application has been written by the Applicant and his solicitors have sent it on to the Parole Board with their endorsement and a copy of their closing written submissions (which were already paginated within the dossier).

7. The Applicant submits that the panel's decision was irrational for a number of reasons. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No matters of procedural unfairness were raised in the application.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State in April 2021 to consider whether or not it would be appropriate to direct his release.

9. The case proceeded to an oral hearing on 31 January 2022 before a three-member panel, including a psychologist specialist member. Oral evidence was taken from the Applicant, his Prison Offender Manager (POM), his Community Offender Manager (COM), the psychologist instructed by Her Majesty's Prison and Probation Service (HMPPS) to complete a psychological risk assessment (PRA) dated 17 December 2021, and a representative of an organisation offering the Applicant support in transitioning back into community life. The Applicant was legally represented throughout. He sought a direction for release.

10. Closing legal submissions were made in writing.

11. The Applicant's POM, COM and the prison psychologist all considered that the Applicant did not meet the statutory test for release, but all supported a recommendation for a move to open conditions. The panel did not direct the Applicant's release but recommended a move to open conditions.

The Relevant Law

12. The panel correctly sets out the test for release in its decision letter dated 31 January 2022.

Parole Board Rules 2019

13. 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)).

14. 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

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: **Preston [2019] PBRA 1** and others.

The reply on behalf of the Secretary of State

18. The Secretary of State has submitted representations in response to this application to which reference will also be made in the **Discussion** section.

Discussion

19. The Applicant has helpfully provided six numbered points which form the basis of his application. Before examining these in further detail, I note that the Applicant appears to be testing the panel's decision against the Oxford English Dictionary definition of "irrational", namely *"not logical or reasonable".* The legal test of irrationality from **DSD** as set out above sets a much higher bar such that, essentially, a panel's decision is only irrational if no other sensible panel could come to the same conclusion. It is the legal test of irrationality that must be applied.

20. Moreover, irrationality, in the context of an application for reconsideration, applies to the overall decision not to direct release and not the decisions made along the way (unless, of course, any such decisions taint the overall rationality of a panel's conclusion).

Ground 1: Risk scores

21. The Applicant first submits that it was irrational for the panel to state that the various statistical risk assessment scores indicate a low probability of general reoffending, non-violent re-offending, and violent reoffending but that he was assessed as presenting a high risk of serious harm to the public.

22. The various scores referred to by the Applicant are generated by a probation service assessment tool to inform the panel's assessment of risk. As the Secretary of State points out, probation practitioners are instructed to use their clinical judgement in reaching their final assessment of an offender's risk of serious harm level, and this may involve clinical risk factors that do not form part of other risk assessments.

23. There is an important distinction to be drawn between scores indicating likelihood of reoffending and the risk of serious harm to the public. It is entirely possible (and not uncommon, as the Secretary of State notes) for an offender to have a low probability of offending score but nonetheless present a high risk of serious harm.

24. The Applicant also notes that his COM supports temporary release in the community. Temporary release is qualitatively different to full release on licence. In recommending open conditions, the Applicant's COM anticipates periods of release on temporary licence (ROTL) as part of staged testing for full release. It does not follow that meeting the risk criteria for ROTL means that an offender automatically meets the statutory test for release. The panel's analysis of the scores was not irrational.

Ground 2: Robustness of risk management plan

25. The Applicant next submits that it is irrational for the panel to say that the risk management plan was "*robust*" but not sufficient to manage his risk of serious harm. He argues that a risk management plan is either robust or not and it cannot be both.

26. While a risk management plan may be robust in the sense that it contains a great number of proposed additional licence conditions, it does not follow that a robust risk management plan is automatically capable of managing an offender's risks in the community. "*Robust*" does not always equate to "*robust enough*". It would be possible to place every feasible external community control on an offender but still fail to protect the public. It is a matter for the panel to determine whether a "*robust*" plan is "*robust enough"* and it was not irrational for the panel in the Applicant's case to conclude that the plan was insufficiently robust for the reasons set out in its decision.

Ground 3: Applicant's progress in custody

27. The Applicant next submits that it was irrational for the panel not to direct release after acknowledging that he had made progress since his last parole review.

28. At that review, the panel recommended that the Applicant should transfer to open conditions. Its recommendation was rejected by the Secretary of State who considered that there was not a wholly persuasive case for transfer. The Applicant remained in closed conditions.

29. While the panel acknowledges the Applicant's clear progress since the last hearing, it does not follow that it must conclude the Applicant meets the test for release. The current panel must, and has, conducted its own standalone risk assessment: the recommendation of the last panel has no bearing on its decision. The Applicant may well have made progress since the least hearing, but it was not irrational for the panel to determine that his progress was not sufficient for him to meet the test for release.

Ground 4: Applicant's progress in custody

30. The Applicant next submits that it was irrational for the panel to conclude that there was a risk of disengagement from supervision in the community.

31. In support of this, he points out three paragraphs in the decision which refer to his compliance in the custodial setting and his awareness of how much was at stake if he were to abscond.

32. The panel made these points in its discussion of the Applicant's suitability for open conditions as part of the balancing exercise between benefits and risks. By this point in its analysis, the panel had already concluded that the Applicant did not meet the test for release.

33. Even if it had not, it does not automatically follow that compliance in the strict regime of a custodial setting will necessarily translate into sustained compliance in the community. The panel considered that a period in designated accommodation would not be an adequate substitute for a staged return to the community via open conditions. The Applicant is an indeterminate sentenced prisoner who has been in custody for a considerable time and has not yet been tested in open conditions or the

community. It was not irrational for the panel to conclude that there is – currently – too great a risk of disengagement from supervision.

Ground 5: Applicant's relationship with wife

34. The Applicant next submits that it was irrational for the panel to conclude that the status of the relationship between the Applicant and his wife was unclear. He notes that his wife sent a letter regarding their relationship to the Parole Board received on 19 January 2022 and, indeed, her letter now forms part of the dossier before me.

35. It appears that the letter was added to the dossier and sent to the panel on 3 February 2022 and was therefore seen by the panel before its decision was issued. The letter was added to the dossier along with correspondence from other parties and the decision records that four pages of correspondence were received after the hearing (although does not explicitly state that the correspondence included the letter from the Applicant's wife).

36. The letter from the Applicant's wife sets out the status of their relationship. It is therefore difficult to see why the panel said the status of that relationship was unclear.

37. However, the panel discussed the Applicant's relationship status in the context of the benefits to him in a move to open conditions. It was not a material consideration in its decision not to release the Applicant. Even if the panel was mistaken in its assessment of the Applicant's relationship, or it had overlooked the letter from his wife, I do not find that this affected the rationality of its decision not to direct his release. The decision not to direct release had already been made and the Applicant's relationship status was not a material consideration in the panel's analysis leading to that decision.

Ground 6: Release test

38. The Applicant finally submits that it was irrational for the panel to conclude that he did not meet the test for release since the prison psychologist and COM stated that risk was not imminent, and his POM said that open conditions would be beneficial but not necessary. He argues that these statements infer that he has clearly met the test for release, as he could be trusted in the community on temporary release and therefore, by extension, in the community.

39. I have listened to the audio recording of the hearing, as I was invited to do by the Secretary of State.

40. The Applicant's legal representative asked his POM "*But it's not necessary for [the Applicant] to go to open, but beneficial?"*. The Applicant's POM answered "*Yes"*.

41. The Applicant's COM and the prison psychologist agreed risk was not imminent, but both recommended open conditions.

42. 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.

43. A non-imminent risk is not the same as no risk, and the Applicant has been assessed as presenting a high risk of serious harm to the public. This means there are identifiable indicators of risk of serious harm which could manifest themselves at any time and the impact would be serious.

44. A non-imminent risk of serious harm combined with one witness's opinion that open conditions is not necessary must inexorably lead to the single logical conclusion that the statutory test for release is met. It was not irrational for the panel to conclude otherwise.

Decision

45. For the reasons I have given, I do not consider that the decision not to direct the Applicant's release was irrational. No matters of procedural unfairness were raised. Accordingly, the application for reconsideration is refused.

Stefan Fafinski
07 March 2022