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[2022] PBRA 48

Application for Reconsideration by Reilly

Application

1. This is an Application (the Application) by Reilly (the Applicant) for reconsideration of a decision by a Panel of the Parole Board dated 16 March 2022 not to direct his release. The decision was made following the oral hearing of his imprisonment for public protection (IPP) post tariff review on 10 March 2022.

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. The reconsideration provisions apply only to decisions to release or not to release a prisoner. They do not apply to recommendations for or against a transfer to open prison conditions.

3. I have considered the Application on the papers. These comprise: the application for reconsideration with representations; the Decision Letter; a letter dated 7 April 2022 from the Public Protection Casework Section of HM Prison and Probation Service on behalf of the Secretary of State; and the Case Dossier running to 606 pages.

Background

4. On 12 June 2009, the Applicant was sentenced to Imprisonment for Public Protection on two counts of arranging or facilitating the commission of a child sex offence contrary to S14(1) of the Sexual Offences Act 2003. He denied the offences when interviewed by the police but pleaded guilty at the Crown Court after a maximum sentence indication sought from the judge when his trial was about to commence. The judge referred to the established nature of his offending with a significant degree of sexual pre-occupation involving predatory behaviour and a distorted sexual interest in children combined with a threat of violence to them. The minimum custodial term under the IPP sentence was set at 2 years 3 months, less time spent in custody on remand, and the Applicant's tariff accordingly expired on 14 April 2011.

5. The index offences were committed when the Applicant was aged 42. He had initially approached two girls under the age of 14 outside a chip shop and engaged them in conversation. A few days later, on 4 January 2008, he saw them again near a public house. He re-introduced himself, asked if they would like to go for a spin in his car and, when they declined, he offered to buy them alcohol which they also refused. After making a number of inappropriate suggestions, the Applicant secured their agreement to meet him again and told them not to tell their parents. However, they did so, and he was arrested.

6. The Applicant had previous convictions in another jurisdiction. In 1998 he was sentenced to 12 years' imprisonment for two offences of raping a female under the age of 13. This was reduced on appeal to 6 years' imprisonment with a further 6 years suspended. In October 2003, he was sentenced to a total of 6 years' imprisonment for sexually assaulting a female under the age of 14 and a 58 year old woman.

7. There were many other earlier convictions in the other jurisdiction for non-sexual offences including theft, burglary, handling stolen goods, criminal damage, disorderly behaviour, and being drunk in a public place. He also had a conviction for indecent exposure which he has explained relates to urinating in public.

8. The Applicant came to the United Kingdom shortly after his release in February 2008 and on 1 May 2008 he attacked a 13 year old girl as she was going about her early morning paper round. He was intoxicated at the time and threatened to rape and kill her. It appears that the Crown Court judge who sentenced him to 12 months' imprisonment for attempting to take the child without lawful authority had not been made aware of the foreign convictions. The Applicant has used three different surnames, of which Reilly is one, and four different dates of birth. He was in the community on licence under the 12 month sentence when he committed the index offences.

Request for Reconsideration

9. The application for reconsideration is dated 29 March 2022 and contains detailed representations by the Applicant's Solicitors.

10. It is submitted on the Applicant's behalf that the Decision is irrational in that the Panel's assessment of his risk as imminent was based on an incorrect fact namely that he had committed three offences whilst on licence. He had never been on licence in location A because licence provisions do not apply to sentences there of less than 8 years. He had committed offences only when subject to the licence under the sentence imposed on 13 October 2008.

11. It is further argued that the Decision is irrational because the Panel applied the wrong legal test for release by referring to the risk of the Applicant re-offending whereas the test should relate to the risk of occasioning causing serious harm.

12. It is also submitted that the Decision was procedurally unfair because the Panel did not require further evidence to be provided by the psychologist witness about the availability of risk reduction programmes in the community, although limited evidence about this was given by the Community Offender Manager (COM) and the Prison Offender Manager (POM).

13. It was further argued that there had been procedural unfairness because the Psychologist's evidence was constrained by the fact that she felt obliged to seek the approval of her supervisor before considering additional material which had been added to the dossier.

14. Further submissions that the Psychologist admitted not having considered the benefits of open conditions, progression to which is said to have been a central part of the Applicant's case, are not relevant to this Application.

Current Parole Review

15. 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 also included an invitation to advise, in the event of release not being directed, whether the Applicant should be transferred to open conditions. As indicated, such advice is not within the remit of a Reconsideration Application.

16. The Panel considered a dossier running to 606 pages. The latest COM Report was dated 9 November 2021. It contained what the Panel described as a comprehensive risk management plan and confirmed that support could be accessed in the community. However, the author of the report did not recommend release. The latest POM Report was dated 5 November 2021 and its author also did not support release. Included in the dossier was a report by a Prison Psychologist in which she expressed the opinion that the Applicant's risk was not presently manageable in the community.

17. Oral evidence was given at the hearing by the POM, by the COM by the author of the Psychologist Report and by the Applicant himself. The Applicant's conduct and motivation in custody were confirmed as positive. He held Enhanced Status under the Incentives and Earned Privileges Scheme and was described as having changed for the better.

18. The Applicant had completed a number of programmes in custody to address his risk of sexual offending. These included Enhanced Thinking Skills, the Thinking Skills Programme and the Becoming New Me adapted programme for domestic violence, sex or other offending. He had also undertaken counselling to address childhood issues and had engaged with Inclusion on alcohol abuse. His insight was reported to have improved but, in the view of the Psychologist, he still needed to learn how to cope with change and other challenges.

19. The Panel concluded on the evidence that the Applicant's risk of serious harm was high/very high, with a very high risk of sexual re-offending which could be imminent on release. It was not satisfied that the risk management plan would be sufficient to manage his current risk of harm.

20. The view of all three professional witnesses was that core risk reduction work remained to be undertaken within closed conditions. The COM and the Psychologist recommended that the Applicant transfer to another prison to complete the Living with New Me Programme adapted programme for domestic violence, sex or other offending.

The Relevant Law

21. The Decision Letter correctly set out the test for release at the outset and its final conclusion was expressed in that context.

Parole Board Rules 2019

22. 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

23. 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

24. 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."*

25. 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.

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

27. 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.

28. 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.

29. 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.

30. 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

31. The Applicant submits that the decision was irrational on the basis set out in paragraphs 10 and 11 above. As to paragraph 10, I do not consider that the Panel's error in referring to the Applicant being on licence in the other jurisdiction when he was not can undermine its evaluation of risk. It remains the case that he was still in the shadow of a sentence imposed for a serious sexual offence each time he committed a further one.

32. I do not accept the argument referred to in paragraph 11. The Decision incorporates the correct test at its outset and the subsequent narrative and conclusion should be interpreted in that context.

33. As part of the submission that the Decision was procedurally unfair, it is argued that the Panel declined to adjourn the hearing in order to direct the provision of further evidence as sought by a request dated 22 November 2021 and repeated on 14 March 2022. In particular, the Applicant sought a direction for a short statement from the Psychologist confirming "*whether the recommendation for Living as a New Me Programme is necessary for the Applicant to complete in closed conditions or whether it is preferable. The statement should provide further clarification as to whether there are any alternative treatment pathways available in open conditions or in the community*".

34. In my judgment, such evidence would have been highly relevant to the issues the Panel was required to consider. Without it, the Panel could not have made a full assessment of the Applicant's current risks and their management. The issue whether undertaking the programme in the community could be regarded as part of a viable risk management plan following release was an essential one to resolve.

35. As a result of the Application, the COM has now provided further information to PPCS which is included in the PPCS representations as follows: "*Public Protection Casework Section on behalf of the Secretary of State have contacted (the COM) who was able to confirm that the additional material was taken into consideration within discussion with her supervisor. (The COM) was also able to confirm that similar material had previously been disclosed by (the Applicant) at the time of interview and was taken into consideration when completing her original assessment".*

36. There was no evidence before the Panel that additional material had been taken into consideration by the COM.

Decision

37. Based on the evidence which was before the Panel and applying the test set out in case law, I do not find that the decision not to release the Applicant was irrational. However, the failure to direct further evidence and to adjourn for that purpose deprived the Applicant and the Panel of the opportunity to explore all relevant avenues of enquiry, in particular with the COM.

38. The Panel failed to follow a fair procedure and thereby deprived itself of the ability to make a judgement on all the facts which ought to have been before it on the issue of current risk.

39. The application for reconsideration is accordingly granted on the ground of procedural unfairness, and I make the following further directions.

HH Judge Graham White
14 April 2022

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