

[2022] PBRA 66

Application for Reconsideration in respect of Wass

Application

1. The Secretary of State (the Applicant) seeks the reconsideration of a decision of the Parole Board to direct the release of Wass (the Respondent). The panel directing release was a three-member panel who considered the matter at an oral hearing on the 25 June 2021 and subsequent hearings.
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 of 1809 pages including the decision letter, the representations on behalf of the Secretary of State and the representations on behalf of the Respondent.

Background

4. On the 3 May 1996, the Respondent, then aged 36, was convicted of the murder of his partner and the manslaughter of their baby daughter. He had violently shaken his six weeks old daughter causing fatal haemorrhaging to the brain. Whilst on bail, he strangled his partner and then slashed his wrists and took drugs in an attempt to take his own life.
5. He was sentenced to life imprisonment for the murder and a concurrent 4-year determinate sentence for the manslaughter. The minimum term under the life sentence was set at 15 years. He became eligible to apply for parole on the 26 May 2010.
6. The Respondent is now aged 62.

Request for Reconsideration

7. The application for reconsideration was received on the 10 May 2022.
8. The grounds for seeking a reconsideration under the ground of irrationality are as follows:



Ground 1: It was irrational to find that a few months of increased compliance was sufficient to meet the test for release.

Ground 2 - Irrationality – insufficient weight is given to the former Community Offender Manager (COM A)'s view.

Ground 3 - Irrationality – release presented as the only option, and overreliance on licence conditions.

Current parole review

9. The Secretary of State's referral was in August 2018. The review was complex and took nearly four years to complete. The Respondent's medical condition which was relevant to risk contributed to the delay. The panel convened five hearings: four evidential hearings and one directions hearing. The Secretary of State was represented at each hearing.

The Relevant Law

10. The panel correctly sets out in its decision letter dated the 11 April 2022 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.

Irrationality

11. 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."

12. The solicitor for the Respondent relied on the observation of the court in **DSD** at paragraph 133, *"A risk assessment in a complex case such as this is multi-factorial, multi-dimensional and at the end of the day quintessentially a matter of judgment for the panel itself. This panel's reasons were detailed and comprehensive. We are not operating in an appellate jurisdiction and the decision is not ours to make. We are compelled to conclude that the decision of the panel must be respected."*

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.

The reply on behalf of the prisoner

14. The Respondent submits that the application does not begin to approach the very high threshold for irrationality. The Secretary of State is unable to identify any procedural irregularity and does not suggest that the reasoning is inadequate. This is unsurprising given the exceptionally thorough and balanced approach of the panel to this case and the care taken over the evaluation of all the evidence presented to them. The submissions made by the Secretary of State amount to nothing more than a request for the reconsideration process to conclude that the risk assessment in this case was "*wrong*".

Discussion

Ground 1: It was irrational to find that a few months of increased compliance was sufficient to meet the test for release.

15. The decision letter sets out the history of the case. The review started in August 2018. The case involved information about unconvicted wider offending. Mindful of the **Worboys** case, the panel decided to conduct the review in two stages, the first to decide the question of the unconvicted wider offending and the second to deal with the Secretary of State's referral.

16. The first oral hearing took place on the 9 October 2019.

17. On the 19 May 2020, the panel issued its findings on the allegations of wider offending.

18. The Secretary of State takes no point on the decision to conduct the review in two stages nor on the findings made during the first stage.

19. The adjourned hearing took place by video link on the 2 December 2020. It was plainly a long hearing, finishing at 6:45 pm with the closing submissions of the legal representatives being provided in writing afterwards. The Respondent, the prison offender manager, the prison psychologist, a psychologist instructed on behalf of the Respondent and the outgoing community offender manager, gave evidence. The Respondent was represented as was the Secretary of State.

20. The two psychologists and the prison offender manager were of the view the Respondent's risk could be managed in the community. The outgoing Community Offender (COM A) did not challenge the psychologists' assessment of the Respondent's risk, but was concerned that his attitude and lack of trust in probation made it unlikely that he would be willing to comply with the supervision and that his risk would therefore not be manageable in the community.

21. It is convenient to interpose here some observations about the Respondent's mistrust of probation.

22. Undoubtedly this was in part due to his personality and a tendency to work with professionals who did not disagree with him and not to work with those who did.

23. However, there was also history of quite serious disagreement between the Respondent on the one side and the previous community offender manager and the local Multi Agency Public Protection Arrangements (MAPPA) panel on the other.
24. Put shortly, COM A and MAPPA had strongly opposed the Respondent's progression to open conditions. Once at open prison and after four successful escorted day releases, MAPPA made representations to the prison governor which were accepted not to allow the Respondent unescorted release. As the Parole Board panel put it, the Respondent's progress through the open prison regime was halted in its tracks.
25. More recently there had been a disagreement about the area to which the Respondent might be released. COM A and MAPPA wanted the Respondent to be released into the Humberside area where the Respondent felt at risk. The panel deals with the problem at paragraphs 2.52 and 2.73 of the decision letter,
26. *"A major stumbling block in the way of building an effective relationship between them was a fundamental disagreement about the release and risk management plan proposed by [COM A]. He and Humberside MAPPA were insistent that if and when [the Respondent] was released he should spend an extended period at Approved Premises in Hull, and [the Respondent] was insistent that he should not be required to go there.*
27. *When asked by the panel what would be the benefit of moving [the Respondent] to an area where he did not want to be and where there would be a huge exclusion zone, [COM A] said: "Effectively the rationale is that the local MAPPA know the case so well". The panel understood the desire of [COM A] and Humberside MAPPA to retain control of the case, but believed that the advantage of that continuity might have been outweighed by other factors."*
28. The panel's decision following the oral hearing on the 2 December 2020, was that it could not direct release on the evidence as it then stood because the Respondent had not achieved either of the objectives which had been set for him by the Parole Board review in 2017. However, the panel found that his failure to achieve those objectives was to a large extent not his own fault and that fairness required he should be given the opportunity to achieve them.
29. Prior to the hearing, it had become apparent that the approved premises in another location could not accommodate the Respondent. The other development was the appointment of a new Community Offender Manager (COM B).
30. An adjourned hearing took place by video link on the 25 June 2021. Oral evidence was taken from the Respondent, COM A, the prison offender and the prison psychologist. COM B had not been able to attend.
31. The panel's conclusion at the end of the hearing is set out at paragraph 2.87.
32. *In its post-hearing discussion, the panel carefully considered whether direct evidence was required from [COM B]. They bore in mind the particular importance in [the Respondent] case of the professional working relationship between himself and his Community Offender Manager, his willingness to be open and honest with her and her ability to ascertain and understand any warning signs suggesting an increase in his risk or its imminence.*

33. *Whilst a further adjournment will inevitably cause further delay to this already protracted review, the panel concluded that it was essential to have some direct evidence from [COM B] to enable it to make its assessment of the manageability of [the Respondent's] risk in the community at this time. The case is therefore again adjourned, this time for a relatively short period to enable [COM B] to submit a report ... and for any further submissions to be made by the legal representative and Secretary of State's representative.*
34. It is interesting to note that the Secretary of State did not challenge the reason for the adjournment but simply pointed out the delay would be unusual, something the panel accepted. The Secretary of State invited the panel to consider issuing a negative decision on the papers and to leave it to the next panel to make a decision about suitability for release.
35. Quite apart from fairness to the Respondent, the advantages of this panel staying with the case and concluding it, albeit with delay, rather than delivering a mosaic of information to a fresh panel at a future date seems overwhelmingly self-evident.
36. In her report dated the 27 July 2021, the COM B wanted between 6 and 12 months to test the Respondent's engagement and ascertain whether he was likely to comply with licence conditions. In the report, she said,
- "As mentioned within this report, whilst it is acknowledged that there has been a difficulty with engaging [the Respondent] both in terms of engagement with Probation and the proposed resettlement plan, there has been a recent improvement in terms of his attitude since the transfer of manageability. As I have advised, whilst it is still very early on, my intention is to continue working closely with him now to build a positive rapport and grasp a better understanding of his willingness to comply and the overall likelihood of his successful management in the community".*
37. A panel chair direction dated the 22 September 2021 stated that in the panel's view a negative decision on the papers would be unfair to the Respondent and he should be given the opportunity to make the progress which COM B hoped he would make. The matter was adjourned until the first date after the 14 February 2022.
38. Unfortunately, COM B was not able to continue as the Respondent's community offender and was succeeded by a further Community Offender Manager (COM C) who produced a report dated the 18 January 2022.
39. In the event, two probation officers assessed the Respondent's interactions and attitude to supervision. It is clear from the report both regarded the Respondent as engaging satisfactorily and likely to be compliant.
40. On the 11 April 2022, the panel concluded the case on the papers by directing release.
41. I have distilled the following propositions from the decision letter:

- a) Historically, the Respondent had a plethora of problems many of which formed obstacles to his release but, after 2017, not to his progression to open conditions.
- b) Progress in the case was difficult and slow.
- c) By the 4 July 2020, the preponderance of the professional evidence was that the Respondent was close to meeting the test for release.
- d) In her report dated the 27 July 2021, COM B wanted between 6 and 12 months to test the Respondent's engagement and ascertain whether he was likely to comply with licence conditions.
- e) Of the professional witnesses, COM B and COM C were in the best position to make those assessments and the Secretary of State offered no reason, either at the time or now, while the panel should not have accepted their evidence.
- f) The shorter end of the time scale suggested by COM B would have taken the case to January 2022.
- g) The panel directed the case should be listed as an oral hearing after the 14 February 2022 but indicated the matter might be concluded on the papers.
- h) On the 18th January 2022, COM C, agreeing with COM B, concluded the Respondent had shown the sort of engagement that COM C had been looking for and was likely to be compliant. Implicit in that opinion was that both community offender managers must have considered they had had sufficient time to make the assessments.

42. In the circumstances the panel had accepted the evidence of the best placed professional witnesses to deal with the topics (a) as to how long was needed to make the assessments and (b) the actual assessments.

43. The Secretary of State states at paragraph 9 of the submissions,

"it is submitted that it is irrational that the panel found the evidence present six months later justified release, when the evidence present at the time of the adjournment from the last 25 years did not."

44. What the Secretary of State does not say is why the panel was not entitled to accept and act on the evidence of the key professional witnesses on this topic.

45. It is correct that the Respondent had spent a long time without demonstrating sufficient engagement, that he was manipulative, displayed some psychopathic traits and deflected questions but to rely on these is simply to re argue the case and fails to identify a defect in the panel's approach that could be stigmatised as irrational.

46. This ground has to fail.


Ground 2 - Irrationality – insufficient weight is given to Community Offender Manager A's view

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47. The decision letter makes frequent references to the COM A's. It is clear the panel took his concerns seriously.
48. The Secretary of State makes one point in support of the suggestion the panel gave insufficient weight to COM A's views. It is suggested that the Respondent had to demonstrate engagement and compliance over a longer period of time than six months before the panel could have dismissed COM A's concerns. This may be the view of the author of the legal representations, but it is simply not the view of the two subsequent community offender managers who did not suggest that the time they had had was insufficient to make the assessments they did. It must follow as well that it was not the view of the other professional witnesses all of whom save COM A supported release.
49. The decision of the panel was entirely consistent with the evidence of the witnesses other than COM A.
50. This ground also must fail.

Ground 3 - Irrationality – release presented as the only option, and overreliance on licence conditions

51. There are in fact two separate grounds. The first is that the panel in effect proceeded on the basis release was the only option. The Secretary of State's referral required the panel to consider three options, (i) release, (ii) remain in open conditions, or by implication, (iii) return to closed conditions.
52. The live issue over four years was whether the Respondent met the test for release or should remain in open prison. COM A did not suggest the Respondent was unsuitable to remain in open conditions.
53. Sensibly, the panel focused on that principal issue.
54. If the panel forgives me, it consisted of three members, each of whom had attained some distinction in their chosen careers and who brought a wealth of experience to the case. They went about their business with awe inspiring commitment, and it is simply impossible to imagine they were unaware of the options open to them. If they had thought release was the only option, it is curious that at the beginning of the decision letter they set out the test for remaining in open conditions as well as the test for release.
55. The submissions extract a single sentence from the middle of paragraph 3.3, "*his testing will now have to take place in approved premises.*" The Secretary of State suggests that that sentence supports the contention the panel considered release to be the only available option.
56. My reading of the entire paragraph is the panel was saying that, having considered all the factors and having decided the Respondent met the test for release, further testing of him would have to be done in approved premises rather than in open conditions (as envisaged by the 2017 panel).
57. Nothing turns on this submission.

58. The second ground is that the panel expected the Respondent to reside in approved premises for 12 months and would have some concern if a significantly shorter period in approved premises were being proposed.
59. The Secretary of State's representative submits that this is highly significant and that only very few offenders spend so long in approved premises. There is no evidence in the dossier to suggest that the Respondent will not or is unlikely to remain in approved premises for that length of time. On the contrary, the evidence is that he will be accommodated for 12 months and that was the panel's expectation. No doubt, out of an abundance of caution, the panel wanted to stiffen probation's resolve to provide the accommodation by expressing their concern if the Respondent did not spend that sort of length of time in the premises.
60. The submission continues by saying there is an over reliance on external controls in this case. This is highly generalised and vague. The plain fact is all the professional witnesses with the dogged exception of COM A supported release. There is no reason why this panel should not have accepted the evidence of the majority and no reason why they should not have come to the conclusion on their evidence that the Respondent met the test for release.
61. The decision letter runs to 25 pages and is comprehensive, informative, insightful and written with pellucid clarity; it contains no finding that is unsupported by evidence as accepted by the panel. In my view the decision is quite simply unassailable.
62. The application fails.

Decision

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

James Orrell
25 May 2022