

Application for Reconsideration by Jennison

Introduction

1. This is an application by a prisoner, Jennison ("the Applicant"), for reconsideration of the decision of a panel of the Board which considered his case at an oral hearing on 21 November 2019.
2. The Applicant is serving an Extended Determinate Sentence ("EDS") imposed on 9 January 2018 for falsely imprisoning and assaulting his partner, causing her actual bodily harm. The sentence is made up of a 39-month custodial term and a 3-year licence extension period. Time served on remand was ordered to count towards his sentence.
3. On 18 January 2019 (the Applicant's "Parole Eligibility Date") he became eligible for early release on licence on the direction of the Board. The Board could only direct release if it concluded that his continued confinement in prison was no longer necessary for the protection of the public: that is the statutory test laid down by Parliament. The Oral Hearing Panel which considered the Applicant's case on 21 November 2019 ("the OHP") concluded that that test was not met, and accordingly could not and did not direct his early release.
4. The Applicant will therefore remain in prison until 2 September 2020 (his "Conditional Release Date") when he will be automatically released on licence, having served two thirds of his custodial term. His sentence will not expire until 3 September 2023, so he will remain on licence until that date and will be liable to be recalled to custody if he breaches any of his licence conditions.
5. The Applicant's case has been reviewed by a Reconsideration Assessment Panel ("RAP") which has considered the following material:
 - Dossier running to 491 pages, which includes the OHP's decision;
 - Application dated 9 December 2019 by the Applicant's solicitors on his behalf; and
 - Representations dated 17 December 2019 on behalf of the Secretary of State.

Background

6. The Applicant is aged 54. He has a long history of violence against (or harassment of) intimate partners and anyone associated with them. The offences for which he is serving his present sentence were serious ones committed against his partner.



7. This review of his case began with a referral by the Secretary of State in April 2018. It has been substantially delayed, through no fault of the Applicant. The oral hearing was originally fixed to take place on 13 June 2019. However, on the day before the hearing, the OHP was informed that there was to be a non-disclosure application by the Secretary of State, and the hearing therefore had to be adjourned. The panel took the opportunity, when adjourning the hearing, to direct a psychological risk assessment by a Prison Psychologist. The non-disclosure application was not proceeded with, and the panel reconvened on 21 November 2019.
8. At the hearing the panel took oral evidence from several professional witnesses, namely:
 - The Prison Officer responsible for supervising the Applicant in prison;
 - The Probation Officer who will be responsible for supervising him in the community when he is released on licence;
 - The Prison Psychologist who carried out the assessment directed by the OHP; and
 - An independent psychiatrist instructed by the Applicant's solicitors.

In addition, the OHP considered a report by an independent psychologist who had assessed the Applicant at the request of the Applicant's solicitors. That psychologist was not called to give oral evidence.

9. The psychiatrist had originally not supported release on licence but had changed his recommendation and now supported it. None of the other professionals (including the independent psychologist) supported release on licence: they all considered that the Applicant's risk was too high to be safely managed on licence in the community.
10. The Prison Officer and the Prison Psychologist had made enquiries about the possibility of the Applicant being able to undertake an offending behaviour programme (designed to reduce a prisoner's risk of violence towards intimate partners) at a prison where such a course was available. This course can also be undertaken in the community, but the professionals (with the exception of the psychiatrist) were all of the opinion that the Applicant's risk to the public meant that it would not be safe for him to be released in order to undertake it there.
11. According to the evidence of the Prison Officer and Prison Psychologist, their enquiries had revealed that a place on the programme commencing in January 2020 was "*as close to being guaranteed as it could be*". The Applicant's legal representative questioned whether that was in fact the case.
12. In a detailed and carefully reasoned decision the OHP concluded - in line with the evidence of all the professionals except the psychiatrist - that the Applicant's risk to the public remained too high to be safely manageable on licence in the community. Thus, it was that, applying the statutory test, the OHP did not direct his early release on licence.



13. The Applicant has not been transferred to the other prison to undertake the programme, as the Prison Officer and the Prison Psychologist had understood would almost certainly have been the case. The reasons why that has not happened will be discussed below.

The Relevant Law

14. The OHP's decision not to direct the Applicant's early release on licence is eligible for reconsideration under Rule 28(1) of the Parole Board Rules 2019.

15. The only two grounds for reconsideration under Rule 28(1) are irrationality and procedural unfairness. Procedural unfairness is not alleged in this case. The application is based on what is submitted to be the irrationality of the OHP's decision.

16. Irrationality is a concept well known in judicial review proceedings in the High Court. In **R (on the application of 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 paragraph 116 of its judgment:

'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'.

This was the test set out in a different context by Lord Diplock in the House of Lords in **CCSU -v- Minister for the Civil Service [1985] AC 374**.

17. 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.

18. The fact that Rule 28 uses the same word as is used in judicial review cases clearly demonstrates that the same test should be applied when considering an application for reconsideration of a panel's decision.

Representations on behalf of the Applicant

19. The representations by the Applicant's solicitors are based on their understanding that the reason why he had not been transferred to the other prison to undertake the proposed programme was due to a failure of some kind (or a change of mind) on the part of the prison service. The solicitors submit that when the OHP made their decision they believed that it would be possible for the Applicant to be transferred to the other prison to complete the proposed programme, and that if they had been aware that that was not the case, they would have directed his release on licence so that he could complete the course in the community.

Representations on behalf of the Secretary of State

20. On behalf of the Secretary of State, it is stated that the Prison Officer witness has been contacted in regards to this matter and that he has reported that, although



the Applicant was due to be transferred to the other prison in December 2019, he was not because he sent a letter to the other prison stating that “*he was not in the correct place mentally to attend the programme*” and requesting not to move.

Discussion

21. There is no reason to disbelieve the account provided on behalf of the Secretary of State. However, even if it had been the case that the reason for the Applicant not being transferred to complete the programme was some failure or change of mind on the part of the prison service, this application for reconsideration of the OHP’s decision could not have succeeded.
22. If part of the evidence considered by a panel of the Board turns out to have been mistaken, that is not a ground for concluding that the panel’s decision was irrational. A panel has to reach its conclusions and decision on the basis of the evidence presented to it. If there is fresh evidence showing that the evidence presented to the panel was significantly inaccurate or incomplete, that is not a ground for finding that the panel’s decision was irrational. When formulating Rule 28(1) the Secretary of State did not, as he could have done, include fresh evidence as a ground for reconsideration.
23. In any event the RAP is not convinced that in this particular case the OHP’s decision would have been any different if they had been aware that the Applicant was not going to be transferred to the other prison to complete the programme. The OHP’s task was to assess the Applicant’s risk and to decide whether it would be safely manageable on licence in the community. They reached the clear conclusion that that was not the case, and that the Applicant’s continued confinement in prison was therefore necessary for the protection of the public. Once they had reached that conclusion, they had no option but to decide against early release (the test for release not being met). Knowledge that the Applicant was not going to undertake the proposed programme in custody could not properly have made any difference to their decision.
24. The OHP’s conclusion on risk was carefully explained and fully supported by the evidence. The Prison Officer, Probation Officer, Prison Psychologist and independent psychologist all reached the same conclusion. The OHP were fully entitled to prefer the views of those witnesses to that of the independent psychiatrist. Their conclusions and decision were in no way irrational within the meaning explained above.

Decision

25. For the reasons explained above, this application must be refused. The OHP’s decision was not irrational and the RAP therefore has no power to direct reconsideration of the case.

Jeremy Roberts
18 December 2019