[2020] PBRA 179

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Application for Reconsideration by Joyce

Application

1. This is an application by Joyce (the Applicant) for reconsideration of a decision by a Panel of the Parole Board dated 18 September 2020 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 dossier comprising 366 pages, which includes the Oral Hearing Decision Letter dated 18 September 2020, and the Reconsideration Application. The Secretary of State did not make any formal representations in response to the application.

Background

4. The Applicant was sentenced in February 2006 to Imprisonment for Public Protection for offences of Wounding with intent and Assaulting a Police Officer, to which he had pleaded guilty. The judge referred to this as a grave offence of violence following a trivial incident in a nightclub. The Applicant also had previous convictions for offences of violence.

5. The minimum term of 2 years (less remand time) expired in December 2007 and the Applicant was released for the first time in May 2013. He was recalled 12 months later following allegations by his partner (A) of domestic abuse/harassment but was acquitted of these allegations after trial and, following consideration of his case by the Parole Board, he was released for a second time in October 2014.

6. The Applicant then spent a period of almost 3 years in the community before he was recalled for a second time in August 2017 due to multiple reported negative behaviours, including a conviction for driving with excess alcohol, relapse into substance misuse, failing to reside as directed and allegations of domestic abuse. In due course he pleaded guilty and was sentenced to 18 months imprisonment for offences of Stalking causing serious alarm or distress (i.e. the "enhanced" form of stalking) and 3 counts of Criminal Damage, all offences committed against his partner (B). His case was considered by an oral hearing panel of the Parole Board which, in a decision letter dated 15 December 2018, concluded that he did not meet the test for release and that core risk reduction work remained outstanding. The panel also stated that it would support an early re-review of his case if he could

access and successfully engage in an intervention such as one targeted at domestic abuse.

7. The Applicant's case was next heard by the Parole Board panel whose decision is subject to the current application for reconsideration. This panel also concluded that core risk reduction work was outstanding (for a number of reasons the Applicant had not completed any interventions addressing domestic abuse) and that his continuing detention remained necessary for the protection of the public.

Request for Reconsideration

8. The application for reconsideration is dated 9 October 2020.

9. The grounds for seeking a reconsideration are that the decision not to direct release was irrational as:

   (i) The Panel considered that risk could not be managed as the Applicant had not undertaken an intervention to address domestic violence but the Applicant had been trying unsuccessfully for 18 months to undertake such an intervention, which is not available to him in custody, but which he could complete in the community;

   (ii) The Panel gave insufficient weight to the Applicant's own evidence of change and the stabilising factor of age and maturity;

   (iii) More consideration should have been given to the significant evidence of change from the Prison Offender Manager and the Community Offender Manager;

   (iv) The panel erred in its findings on some of the disputed issues in the case, relating to

      (a) the Applicant's links to alcohol in custody;
      (b) a proven adjudication for possession of a weapon;
      (c) assessment of the Applicant's custodial behaviour since recall;
      (d) the reason for the Applicant's transfer to another prison; and
      (e) the protective factors available in the community.

Current Parole Review

10. The oral hearing took place on 14 September 2020, when evidence was given to the panel by the Applicant, his Prison Offender Manager ("POM"), Community Offender Manager ("COM"), and a prison appointed Psychologist. The Psychologist's evidence was limited to assessing whether the Applicant had outstanding treatment needs and where and how such work could be delivered; the Psychologist was not providing a risk assessment or a recommendation as to the Applicant's suitability for release.

11. The Applicant was represented throughout by his legal representative, who also made submissions. The Secretary of State was not represented and did not submit any written view. The Applicant's application was for release and both the POM and COM supported that application. The panel decided that the Applicant did not meet the test for release (nor did it recommend a transfer to open conditions, but that aspect of the panel's decision is not subject to challenge).

The Relevant Law

Parole Board Rules 2019

12. 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

13. 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."*

14. 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.

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

Discussion

16. The key challenge to the rationality of the Panel's decision not to direct release is the Panel's conclusion that core risk reduction work is required to address outstanding risk factors relating to domestic violence but, the Applicant submits, such work cannot be undertaken by the Applicant in custody.

17. The Application sets out the difficulties the Applicant has faced in accessing certain accredited offending behaviour programmes in custody. Following assessment by the prison Psychologist, a specific programme has now been identified which could meet his outstanding needs. The evidence before the panel from the POM was that this programme was not available at the Applicant's current prison. The Applicant now asserts for the first time in his Reconsideration Application that he cannot undertake that programme in custody, at all, and (or, perhaps, because) he "*isn't suitable for the same".* No evidence is provided in support of that unexpected proposition. Such evidence was not before the oral hearing panel. Omitting to put information before a panel cannot give rise to an argument that the panel's decision was irrational or procedurally unfair. That has been confirmed in the reconsideration application in **William [2019] PBRA 7**.

18. The Applicant, however, goes further and asserts that the panel indicated in its decision that it considered that "*an intervention to address relationships is necessary at this point*" and "*risk could not be managed within the community as he had not undertaken an intervention to address domestic violence during this sentence*" (emphasis added). This is to misunderstand the Panel's decision. The Panel's assessment of the Applicant's current risk was that he was a moderate risk of committing a further violent offence, most probably within the context of a relationship, and if this occurred the risk of serious harm was high. Of significant concern to the Panel was the absence of work to reduce the risk of further abuse within relationships and the Panel was not convinced that this work could be left until the Applicant was in the community. It considered it to be core risk reduction work and therefore it remained necessary for the protection of the public that he remained in custody.

19. The panel did not prescribe any form that the outstanding work should take. That is not within the remit of the panel. The applicant points to the authority of **R(Gill) v Secretary of State for Justice [2010] EWCH 364 (Admin)** that offending behaviour programmes are neither necessary nor sufficient to found release. That is clearly the case – it is not necessary for all offenders to complete programmes as a precondition to release, nor is it sufficient to secure release that a programme has been completed. There are, the court recognised, "*other recognised pathways"* to reduce risk and achieve release. This is a long-established principle dating back at least to the case **of R v Parole Board ex p Oyston [2000] EWCA Crim 3552.** The current Applicant may have fallen into error in equating the Panel's reference to outstanding work with outstanding offending behaviour programmes. On a careful reading of the decision letter I can find no evidence that the panel made that error. It was entirely within the range of reasonable decisions to find as this panel did as, indeed, did the 2018 oral hearing panel – that the Applicant's risk of serious harm had not been reduced to a level at which he could be safely released.

20. The Application also submits that the panel gave insufficient weight to the evidence of change from the Applicant and more consideration should have been given to the evidence of change from the POM and COM. However, the panel had the benefit of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant and the witnesses and to assess the appropriate weight to be attached to their evidence. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. They must make up their own minds on the totality of the evidence that they hear. As was observed by the Divisional Court in **DSD**, they have the expertise to do that.

21. The Reconsideration Mechanism is not a process whereby the judgment of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as found by the panel unless, of course, it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel. This panel to a large extent accepted the opinion of the professional witnesses that the Applicant had outstanding treatment areas which needed to be addressed. The panel disagreed with the witnesses that risk could safely be managed in the community before the Applicant had addressed the issues that have led to domestic violence within relationships. That was also the view of the previous panel. I cannot conclude that the panel's decision was outside the range of reasonable decisions available to it on the evidence or that it fell into error in assessing the weight to be placed on the evidence before it.

22. The Reconsideration Application sets out in some detail the Applicant's submissions that a number of issues that were considered by the panel were misunderstood, incorrectly recorded, failed to reflect the evidence or were plainly wrong. I have summarised these challenges in paragraph 9(iv) above and it is helpful if I address these individually. In doing so, I remind myself that the oral hearing Panel was properly placed to consider all the evidence, both written and oral, before making it's findings. I am prepared however to treat this aspect of the Application on the basis that the panel either disregarded or incorrectly noted the evidence regarding the disputed issues of fact and therefore, in effect, produced an irrational decision. The disputed issues are as follows:

(a) <u>The Applicant's links to alcohol in custody</u>

Alcohol has been identified as a significant risk factor for the Applicant. He denies any evidence of alcohol consumption in prison. However, the panel was informed of three recent occasions in custody – in February 2020, April 2020 and July 2020 - when liquid described as hooch was found in the Applicant's cell. The panel explored this in evidence with the Applicant and the POM and noted that none of the finds resulted in proven adjudications. The panel also noted that various explanations had been put forward by the Applicant, including apparently contradictory accounts. The panel stated expressly that it did not believe the Applicant's account about possession of the liquids. The panel clearly considered all the evidence and formed its own assessment of the credibility of this part of his evidence. That was one of the functions of the panel. It is not open to me to take a different view – I am not

a second reviewing panel. On any assessment it cannot be said that the panel was irrational in making this finding.

(b) Proven adjudication for possession of a weapon

The Applicant complains that the panel referred to an adjudication for possession of a weapon but failed to explain that this was a piece of metal which was used to tighten hair clippers. The decision letter records that the offending item appeared to have been a piece of metal fashioned into a weapon. The decision letter is not intended to be a verbatim record of the evidence heard. It cannot record every aspect of the evidence. The Applicant's explanation for having the piece of metal is not recorded in the decision letter but I cannot conclude from this that the panel was led into significant error on this aspect of the evidence.

(c) Assessment of the Applicant's custodial behaviour since recall

The Applicant challenges the panel's assessment of his progress in custody as poor. He points to favourable entries in prison records and the Applicant's recent attainment of Enhanced status. The decision letter, in fact, specifically records this positive evidence of recent behaviour but also outlines other evidence of negative behaviour. The panel's overall assessment of custodial progress over a longer period was a balanced assessment which this panel, hearing all the evidence, was entitled to make.

(d) Reason for Applicant's transfer to another prison

The complaint here is that the panel were wrong in stating that the Applicant had been transferred to another prison due to security concerns. It appears that the Applicant misunderstands this part of the decision letter which, in fact, records – properly - that the reason for the prison transfer was the Applicant reporting being under threat and unable to engage with the regime. Later, in its conclusion section, the panel in summarising custodial progress refers to the Applicant having been "*moved for security reasons*" but this is entirely consistent with evidence before the panel of the Applicant having been moved *within* the prison for security reasons. I cannot see, therefore, that there is anything in this complaint.

(e) The protective factors available in the community

The panel records in its Decision Letter that it is unclear what, if any, protective factors, exist for the Applicant in the community. The Applicant, however, objects that he discussed these in detail and they included his family, friends and employment. The decision letter does indeed record the evidence of both the Applicant and the COM as to what would possibly be available for the Applicant in the community. It is, however, entirely open to the panel to form its own view as to the feasibility and likely effectiveness of the Applicant's release plans and for the panel to form its own assessment on all the evidence as to how protective those factors would be. It was open to this Panel to find that this aspect of his case was unclear.

23. In conclusion, I am satisfied that this panel carefully considered the evidence before it and set out in the decision letter a clear and comprehensive analysis of the risk

factors and current levels of risk and why it disagreed with the opinions of the POM and COM that risk could be managed in the community. The Panel correctly focussed on risk throughout and explained how it weighed and balanced competing factors. In it's summary, the panel set out why it had concluded that it was necessary for the Applicant to remain confined. The decision logically follows from the stated reasons.

Decision

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

Elaine Moloney
24 November 2020