the Parole Board

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[2020] PBRA 32

Application for Reconsideration in the case of Webber

Application

1. This is an application by the Secretary of State for Justice (the Applicant) for reconsideration of a decision of an Oral Hearing Panel on 23 January 2020 to direct the release of Webber (the Respondent).

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 were the Dossier (now 211 pages including the decision under review), the Application for Reconsideration submitted on behalf of the Applicant dated 18 February 2020, and representations on behalf of the Respondent dated 25 February 2020.

Background

4. In October 2015 he was sentenced to an Extended Determinate sentence comprising a three year custodial element and a 3 year extended licence for 4 counts of breaching a Sexual Offences Prevention Order, 1 count of Causing a child to engage in prostitution and 4 counts of Making indecent photographs of children.

5. On 4 May 2017 a Parole Board Panel declined to direct his release. On 26 April 2018 he was released on licence automatically having served the custodial portion of his sentence. On 22 May 2019 he was recalled to prison. On 23 January 2020 a Parole Board Panel considered his case at an Oral Hearing. It ordered his release. His Sentence Expiry date is in April 2021.

Request for Reconsideration

6. The application for reconsideration is dated 18 February 2020.

7. The grounds for seeking a reconsideration are as follows:

i. The panel's decision was opposed by both the Offender Supervisor (OS) and Offender Manager (OM). In particular:

ii. With respect to the OM, she submitted to the Panel that the Respondent's risks cannot be managed in the community given that he is not able to recognise or appropriately manage risky situations, evidenced by the Respondent's behaviour leading to recall, namely alleged unsupervised contact with the children of his then partner. The OM noted that this parallel's previous behaviour, specifically when the Respondent was recalled in March 2014 on a previous sentence wherein, he formed a relationship with a female with children, over which there was a lack of clarity.

iii. The OM also confirmed at the hearing that there are ongoing concerns of sexual preoccupation which directly links to his risks, acknowledged by the Panel in their Decision Letter: *"[The Respondent] had been having sexualised contact, over the internet, with nine females who reside abroad. Although these relationships were considered to be age appropriate, it is of concern that six out of the nine females have children. [The Respondent's] OM raised her concern that due to the fact that these women reside abroad, it would be difficult to implement the necessary safeguarding actions to protect them and their children from risk of harm, particularly of a sexual nature."*

iv. With respect to the OS, he submitted to the Panel that he *"could not assess that there has been a reduction in risk [and he] was concerned that [the Respondent] remain effectively untreated as a sexual offender and it was [his] enduring sexual risk which remained the greatest concern."*

v. The OM and OS both assess core risk reduction work to be outstanding, as reflected in the absence of completion by the Respondent of any sexual offence focused work. The OM was further of the opinion that it is necessary for such sexual offence focussed work to be completed in custody, prior to re-release (clarifying her previous opinion that "*it would be better*" for such work to be so completed prior to re-release).

Grounds that the Panel did not place sufficient weight on significant evidence available

vi. In other evidence presented to the Panel concerning the Respondent's risk of reoffending, the Respondent is assessed as posing a very high risk of further sexual offending according to his Risk Matrix (RM2000) score. The Panel appears to have accepted this evidence in its assessment that there "*was a credible concern that [the Respondent is] in a position where [he] could imminently reoffend*", despite then directing his release.

vii. There is also significant evidence that, notwithstanding the Panel's direction to release the Respondent subject to compliance with numerous licence conditions, there is a risk he will not comply with such conditions. This includes:

a. Evidence of the Respondent retracting his willingness to complete offence-focused work from previous occasions both whilst in custody and the community;

b. The circumstances giving rise to his recall in May 2019;

c. A history of non-compliance, dishonesty and a lack of openness with Probation and;

d. The evidence of the OM, who notes that due to his non-compliance, dishonesty and his lack of understanding of his restrictions, there is a need for greater reliance on external control methods in management of risk.

viii. Again, the Panel appears to have accepted this evidence and the impact on the Respondent's propensity for non-compliance in their Decision Letter, noting he has "*a poor attitude to compliance, making it hard to believe that you will adhere to licence conditions*".

ix. The Panel did not give enough consideration to the alternative plan for the Respondent to complete a training course addressing the use of violence and sex offending at another facility. There is a lack of exploration by the Panel as to why this plan was not an appropriate alternative, given that the OM had contacted the prison to explore this option and they confirmed there was enough time left on his sentence to complete this work and they could make arrangements for additional support.

Grounds that the weight attached by the Panel to the points supportive of release are misplaced and/or have been applied inappropriately against the test for release

x. The Decision Letter states that: "*The evidential points supportive of your release were: the fact that you had not reoffended for over a year when you were last in the community, the fact that there will be little over a year left on your sentence if you are re-released, the comprehensive licence conditions that you will be subject to and the fact that you are now in the extension period of your licence and the Judge would have anticipated you spending that time on licence in the community unless there was clear evidence of you posing an unmanageable risk in the community.*"

After a summary of the factors that concerned the Panel it states that: "*On balance, the Panel concluded that, with the ending of your last relationship and with the strengthening of the Risk Management Plan (RMP), it was possible to assess that you met the public protection test for the period until your Sentence Expiry Date (SED).*"

xi. With respect to the reference that there will be less than a year left on the Respondent's sentence, we submit that is irrelevant and not an appropriate application of the public protection test, which should focus on evidence supporting that risk is both reduced and manageable on release rather than the time left of a person's sentence upon their release.

xii. With respect to the reference to the comprehensive licence conditions and 'strengthened' Risk Management Plan (RMP), as the Panel acknowledge, this is essentially the same RMP in place when the Respondent was recalled in May 2019 with the addition of GPS tagging. We would submit this cannot be considered to be robust strengthening to the point that the Respondent can now be managed. Furthermore, given the Respondent committed the index offences whilst residing at Designated Accommodation and there is evidence of non-compliance with previous licence conditions, there is little to suggest the current RMP will offer more sufficient monitoring than before.

xiii. With respect to the Panel's acceptance that the Respondent's relationship with his partner has ended, this is only on the basis of evidence provided by the Respondent which itself is less than certain (stating that he only 'believes' they are no longer in a relationship) and confirms that there is still contact, albeit reduced. It is argued it would be irrational to place significant weight on this evidence given both the vague nature of the statement from the Respondent, the lack of corroboration and the dishonesty on the part of the Respondent. This is further exacerbated by the fact the recall was linked with the unsupervised contact with children, itself evidence of non-compliance.

xiv. Finally, with respect to the Panel's observation that a Judge would have anticipated the Respondent spending time on licence in the community unless there was clear evidence of his posing an unmanageable risk, this is contrary to the Panel's own acceptance of certain evidence. For instance, its agreement with key witnesses' assessments of the Respondent and the further work he has to complete and the Panel's reflection that the Respondent has "*not therefore developed the internal skills required to reduce [his] risks".* Further, a sentencing judge's anticipation cannot be relevant to the application of the release test.

xv. The sentence provides for a licence period and the power to recall during the licence period where the offender is liable to detention to end of sentence unless released by the Board in accordance with the test. A judge cannot anticipate if an offender will behave appropriately and remain on licence and the Board erred in taking this into account.

Grounds of failure to address, and inconsistency with, previous recommendations of the Parole Board

xvi. The Panel which directed the Respondent was to remain in custody in March 2017 concluded that "*there is core risk reduction work that remains outstanding*" and that "*Any future panel considering [his] case will want to understand what progress [he has] made in reducing [his] sexual risks and improving [his] attitude towards compliance in the community*".

xvii. The present Panel does not appear to have considered these recommendations or observations in its Decision Letter. This is despite the evidence referred to in its

Decision Letter supporting that these remain unchanged or unmet. By failing to address these, the Parole Board is acting inconsistently and, arguably, irrationally.

The Relevant Law

Irrationality

8. 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."

9. 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.

10. 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 prisoner

11. The Respondent, by his legal representative, submits as follows:

i. He complains that the application for reconsideration was submitted on the last day for service, thus ensuring that his client will in any event remain in custody significantly longer than he would have done.

ii. The Parole Board's remit is to consider the evidence and attach what weight it deems appropriate to the written and oral evidence of the professionals. The opinion of professionals 'is such' and the Parole Board, which is of course an independent body must be allowed to exercise its judicial function when considering what weight to attach.

iii. The Applicant has not factored into their application the lengthy live evidence given by both Offender Manager and Offender Supervisor which was challenged by those who represented the Respondent.

iv. Furthermore, they have not considered that the Panel Chair asked numerous questions of both Offender Manager and Offender Supervisor over a considerable period of time. He also took live evidence from the Respondent, none of which has been factored into the Applicant's application.

v. Simply because professionals do not support release, it cannot follow that the Parole Board cannot conclude after an Oral Hearing that they disagree with the conclusions of professionals.

vi. Furthermore, as the Applicant was not represented at the Oral Hearing, they cannot be aware of what was said to the Panel Chair in evidence and the questions that were asked. The decision of the Parole Board is not a contemporaneous record of the whole hearing, but a summary of the salient points.

vii. **Irwin J** (as he was then) in ***O'Sullivan v The Parole Board [2009] EWHC 2370 (Admin)*** stated at paragraph 18

> "*Even on the basis of the panel's recited version of what they were told by the experts who appeared in front of them, it seems to me that there is no good reason given in the decision as to why the necessary further work could not be done and should not be done in open conditions. Of course, there was a full basis on which the panel could decline to recommend immediate release, but there had been a consensus before them that transfer, at least to open conditions, was appropriate. Of course, it is open to any panel to disagree with all of the expert evidence which is placed before them. Any properly constituted tribunal could do that, particularly one containing a reservoir of expertise and knowledge such as the Parole Board. But they simply failed to explain in this decision any full or appropriate reasons why transfer to open conditions should not take place.*"

viii. The Court in the case of ***R (on the application of D'Cunha) [2011] EWHC 128 (Admin)*** stated "*It is clear… that the Parole Board is, and must be, free to accept or to reject particular evidence put before them. That is so even if the evidence is expert evidence*"

Grounds that the weight attached by the Panel to the points supportive of release are misplaced and/or have been applied inappropriately against the test for release

12. The Applicant has overlooked that as part of the application the Panel Chair was invited to consider the validity of the recall in the first place per the dictum of their Lordships in ***R v Calder*****.**

13. The Respondent was recalled on the strength that he had breached his licence conditions by not notifying his Offender Manager of a developing relationship and that he had had unsupervised contact with a child under 16.

14. The Offender Manager could provide no evidence rebutting the assertion that the Respondent had had several Offender Managers over a short period of time whilst the previous Offender Manager was on leave and then rendered unwell. The Offender Manager could not confirm that the Respondent and his now ex-

partner had not liaised with Probation Services. In fact, evidence was given by the Respondent that he and his now ex-partner had spoken to Probation Services on several occasions as well as the Police and Social Services.

15. The Panel Chair was entitled to attach what weight he deemed necessary to this submission from both oral evidence and closing submissions emailed to Parole Board.

16. Furthermore, the allegation that he was alone with a person under the age of 16 could not be corroborated. The Panel Chair was aware of the non-disclosure element of this case.

17. The issue of the misapprehension of the test was considered by **Lord Phillips of Worth Maltravers CJ** (as he was then) at paragraph 10 in ***The Queen on the application of Brooke and others v The Secretary of State for Justice [2008] EWCA Civ 29.***

> *The Parole Board, since its creation, has existed to consider whether prisoners should be released before serving the full term of their sentences. Originally the Board provided advice on this matter to the Secretary of State, who took the decision whether or not prisoners should be released. He it was who also decided, in the case of life sentences, the minimum term to be served by prisoners before being considered for release ('the tariff'). Progressively, under the influence of decisions of the European Court of Human Rights, decisions on release have been made the responsibility of the Parole Board and decisions on tariffs the responsibility of the judiciary."*

18. **Saini J in R (on the application of Wells) [2019] EWHC 2710 (Admin)** also considered the above dictum of **Lord Phillips of Worth Maltravers CJ** stating that the dictum was "important Judicial Guidance" as to the test for release.

19. It is submitted that the Applicant is attempting to erode the function and independence of the Parole Board.

Grounds of failure to address, and inconsistency with, previous recommendations of the Parole Board

20. The Applicant is aware that the future panels are not bound by the assessment of previous panels and each review must be *de novo*. The Applicant is not therefore entitled to rely on this point.

21. It is respectfully submitted that the Panel Chair has appropriately considered the test for release, based on a balance of probability.

> *"The evidential points supportive of your release were: the fact that you had not reoffended for over a year when you were last in the community, the fact that there will be little over a year left on your sentence if you are*

re-released, the comprehensive licence conditions that you will be subject to and the fact that you are now in the extension period of your licence and the judge would have anticipated you spending that time on licence in the community unless there was clear evidence of you posing an unmanageable risk in the community. The factors that concerned the panel were: the lack of any accredited offending behaviour work to address your sexual risks since conviction for the index offence, your variable attitude towards engaging in offending behaviour work, your failure to disclose on time when your friendship became an intimate relationship, your failure to discuss your internet sexual relationships until these were discovered by police and the fact that you placed yourself in a high risk situation spending a lot of time in a family home where children were present. On balance, the panel concluded that, with the ending of your last relationship and with the strengthening of the Risk Management Plan, it was possible to assess that you met the public protection test for the period until your SED. The Panel noted the professional concerns about your lack of insight but assessed the full Risk Management Plan to be adequate to manage the enduring risk that you pose."

22. These three paragraphs demonstrate that the Panel Chair has considered both the negative and positive aspects of the case, and in line with the power confirmed upon him under **s256 CJA 2003** (As amended).

> *"Review by the Board*
> *(1) Where on a reference under section **255B (4) or 255C (4)** in relation to any person,*
> *the Board does not direct his immediate release on licence under this Chapter, the Board must either - (a)fix a date for the person's release on licence, or (b)determine the reference by making no direction as to his release."*

23. It is abundantly clear that the Applicant has only extracted from the Decision all the points that highlight their application and failed to consider the whole application made by the Respondent and the 14-page decision made by the Parole Board. It is submitted that the Applicant is in this case attempting to use the 21-day reconsideration period to circumvent the impartiality of the Parole Board simply because they do not agree with the Decision.

24. There is no evidence with the decision to support the claim of irrationality as submitted by the Applicant.

25. The test for irrationality was considered by **Lord Diplock** in the case of ***Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9.***

> *"By "irrationality" I mean what can by now be succinctly referred to as "**Wednesbury** unreasonableness" **(Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223).** It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards*

that no sensible person who had applied his mind to the question to be decided could have arrived at it."

26. The test was also considered by **Sir Brian Leveson P** at paragraph 117 and in ***The Queen on the application of DSD and others v The Secretary of State for Justice [2018] EWHC 694 (Admin)*** who stated,

> *"The evaluation of risk, central to the Parole Board's judicial function, is in part inquisitorial. It is fully entitled, indeed obliged, to undertake a proactive role in examining all the available evidence and the submissions advanced, and it is not bound to accept the Secretary of State's approach. The individual members of a panel, through their training and experience, possess or have acquired particular skills and expertise in the complex realm of risk assessment. The courts have emphasised on numerous occasions the importance and complexity of this role, and how slow they should be to interfere with the exercise judgment in this specialist domain.* ***In R (Alvey) v Parole Board [2008] EWHC 311 (Admin)****."*

27. There is nothing within the application made by the Applicant that justifies their application that the Decision was irrational. The Panel Chair has clearly and concisely weighed all the evidence before him and reached a decision based on probability, which is the correct test that is to be applied when considered whether continued detention is necessary for public protection.

Discussion

28. The mere fact that a decision is contrary to the recommendations of the professionals, as is correctly stated in the Respondent's notice, is neither here nor there. The reason for the existence of the Parole Board and its conduct of hearings is to provide independent scrutiny and independent decisions. It is by no means uncommon for panels to direct - or not to direct - release against the recommendations of the OS and OM – in particular following an oral hearing at which the professionals and the prisoner give evidence and both parties have the chance to make oral submissions. In this instance the hearing lasted for more than two hours. The Respondent answered questions for more than half an hour, the OM for more than an hour and the OS for 15 minutes. And in this case – unusually – the Chair of the panel had sat on the Panel for the Respondent's previous hearing.

29. The bases for the application are therefore in summary that the Panel failed to draw the only rational conclusion from the facts:

i. That the Respondent's previous behaviour, in particular his behaviour on previous licences, as well on the current sentence, makes it unlikely that he will comply with the proposed conditions, Grounds i-viii.

ii. That the Respondent's proven inability to comply with conditions may expose members of the public to the risk of serious harm at his hands during the remaining portion of his sentence. This is not specifically set out

although it must be implicit in the application since that is the relevant applicable test.

iii. That there is work, already identified by 2017 when a previous panel refused to direct his release, which can be done in custody – a training course addressing the use of violence and sex offending – and which could reduce that risk significantly before he is released. Ground ix.

iv. That the Decision Letter fails to explain why those considerations, separately or together, did not result in a negative decision, and finally,

v. That the Panel was wrong to infer from the terms of the sentence, what the sentencing judge would have had in mind, and to reflect that in the Decision.

30. As to the above basis (i and ii), the Panel accepted that there was indeed a risk that he would not comply with licence conditions in view of the fact that he had not done so in the past. This is true of almost any case in which a prisoner has been released and then recalled. The question was – what was the scale and degree of the risk and, what steps could be put in place to manage it and take action if the risk looked like becoming a reality? At paragraphs 6-8 of the Decision Letter and in the extensive licence conditions at its conclusion the panel recognised the risk and came to a measured conclusion about it. The possibility or even the probability that a prisoner will break the terms of his licence is only relevant to the Decision of the Parole Board if the consequence of such breaches would be that the public would be put at risk of serious harm from him. The conditions imposed previously did in fact operate so as to protect the public and to provoke the Respondent's recall. In addition, as was confirmed at the Hearing, the Respondent has never been convicted of a contact offence.

31. As to the above basis (iii). The question of the work to be done was thoroughly aired at the hearing. It is somewhat surprising that this need had apparently not been identified while the Respondent was serving the tariff part of his sentence. Although it had been identified by the time of the hearing in 2017 – the decision to which the Decision Letter referred at page 8 and to which, as was made clear during the instant hearing, the current Panel Chair had been a party - no steps had been taken since to address it. Nothing that has happened since – bearing in mind that the child with whom the Respondent may have had contact with while on licence was of a different age to those in respect of whom he has in the past offended – has caused the need for such work to be done in custody. A condition was imposed requiring compliance with the requirements of such a course if directed by the supervising officer. It is also the case that the existence of the SOPO means that the Respondent is currently 'on licence' indefinitely.

32. As to the above basis (iv), at Paragraph 8 of the Decision Letter the panel explained clearly and carefully how and why it had reached the decision it did.

33. As to the above basis (v), the reference back to the Judge's intentions when passing sentence, the thoughts of the judge, when passing sentence, beyond the decision to pass an Extended Sentence with a built in licence period, are indeed effectively irrelevant when the Parole Board is considering the existence and severity of the risk posed by the prisoner. It might be more accurate to say that parliament, by enacting the legislation which created the sentence with an extended licence period envisaged that offenders receiving this sentence would spend a period on licence after they had served the custodial period imposed, and that the judge in selecting that sentence was merely carrying out the intention of parliament. In any event as the application correctly states, the question for the Parole Board concerns the degree of risk posed at the time of the Parole Board hearing. However, it is clear that this panel's decision was based on the findings that although there remains a risk it can be managed by tough licence conditions backed by the existence of the other orders (SOPO and registration) made at the time of sentence and not on the judge's perceived intention at the time of sentence. However, the period before the expiry of the sentence did closely match the period during which he had been on licence without committing any substantive criminal offence, as the Decision Letter pointed out. This was a relevant factor.

xvii. This was an anxious case which received anxious consideration. The application effectively ignores the fact that the Decision was only taken after a hearing which lasted more than two hours at which, in addition to the OS and OM, the panel heard from the Respondent and the submissions made on his behalf, the Applicant having chosen not to be legally represented. The Respondent has frequently been his own worst enemy and taken risks and committed offences which have resulted in his convictions and most recently in his recall to prison. The judge's perceived intentions at the time of sentence were not relevant and would have been better omitted. However, the reference to the judge's intentions properly understood is nothing more than an indication that release on licence, as it had been behind the now abolished IPP sentence, was part of the intention behind the creation of the Extended Sentence. The panel noted that it was a "finely balanced decision". It undoubtedly was, and the Respondent would have found it hard to complain, having rightly, as the panel found, been recalled to prison, if the Respondent had been refused a further release on licence. However, the fact that a decision might have "gone the other way" comes nowhere near reaching the necessary condition for "irrationality".

Decision

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

Sir David Calvert-Smith
05 March 2020