

[2020] PBRA 65

Application for Reconsideration in the case of Harvey

Introduction

1. Harvey (the Respondent), who is now 63, was, in October 2009, sentenced to 16 years' imprisonment and made subject to indefinite sex offender registration, for specimen sexual offences against a child.
2. This is an application by the Secretary of State (the Applicant) for reconsideration of the decision made by a Panel of the Parole Board (the Panel) which conducted a paper hearing on 6 April 2020 and who subsequently issued a release decision (the Decision) on 7 April 2020.
3. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case.
4. I have considered the application on the papers. These are the Dossier, the Decision dated 6 April 2020 and representations made on behalf of the Secretary of State dated 28 April 2020.

Background

5. The offending for which the Respondent was convicted occurred between 1985 and 1991 and involved a female under the age of 16. The Respondent has always maintained his innocence of the offences.

Current parole review

6. This was the Respondent's third parole review. The first, which was heard by way of an Oral Hearing took place in October 2017 when no direction for release was made. The second took place in February 2019 and was sent to an Oral Hearing but was, at the request of the Respondent's solicitors, concluded on the papers, the Respondent having indicated that he wished to remain in custody until his automatic release date which is 28 June 2020.

The Relevant Law

Parole Board Rules 2019



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7. 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

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 Applicant's Representations

11. The Applicant applies for a reconsideration on the basis that the decision to direct release was irrational. In general terms, the Applicant submits that (a) it was irrational on the evidence to conclude that the Respondent was safe to release; (b) that there should have been an oral hearing; and (c) with particular reference to the decision of the High Court in **R (ex parte Wells) v Parole Board [2019] EWHC 2710 (Admin)**, the Panel failed to provide sufficient and/or adequate reasons why it decided not to follow the unanimous recommendations of the professional witnesses.
12. The Applicant's submissions are set out in three Grounds which may be summarised as follows:

Ground 1: There was a lack of evidence to support a finding of sufficient risk reduction or release.

Ground 2: The weight attached by the Panel to matters said to be supportive of release were misplaced and/or applied inappropriately when set against the test for release.



Ground 3: The Panel failed to effectively explore relevant matters by not conducting an oral hearing and failed to give sufficient and/or adequate reasons in support of its decision.

13. In developing these grounds in written submissions the Applicant submits:

In respect of Ground 1:

- (a) That the preponderance of the evidence before the Panel demonstrated that the Respondent did not have a comprehensive understanding of his offence, its impact nor how to prevent future offending. It is submitted that the Decision failed to consider how the risk management plan sufficiently addressed the Respondent's lack of understanding.
- (b) That the Panel failed to link the Respondent's lack of interest in, or compliance with, offending behaviour work in custody with his likelihood for compliance in the community.
- (c) That the Panel failed to give detailed reasons why it had decided to disagree with the views of all of the professional witnesses who did not support release.

In respect of Ground 2:

- (d) That the Panel relied too heavily on historic evidence and gave insufficient weight to evidence of an imminent risk if released.
- (e) There was over reliance by the Panel on the risk management plan in support of release in circumstances where its author had given evidence that the Respondent was unlikely to comply.
- (f) That the length of the early release period is irrelevant for the purposes of determining whether the test for release has been met.

In respect of Ground 3:

- (g) That while it is accepted that the Panel is entitled to reach a decision contrary to the recommendation of all the professionals, the decision in **R (Wells) v The Parole Board** makes it clear that where that happens the Panel are required to give detailed reasons why it is disagreeing. It is submitted that the Panel failed in this regard.

The reply on behalf of the Respondent

14. Solicitors on behalf of the Respondent have confirmed that they do not wish to make any representations regarding this application.

Discussion

15. I recognise that there is a significant difference between the facts of the case of **Wells** and the present case. Nevertheless, the decision in **Wells** is one which I am obliged to follow. It contains helpful guidance on the correct approach to deciding whether a

decision made by a panel in the face of unanimous evidence from professional witnesses can be regarded as irrational.

16. Panels of the Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that.

17. If, however, a panel is going to depart from the recommendations of experienced professionals, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions.

18. I have therefore examined closely the reasons expressed by the Panel for rejecting the views of the professionals that the Respondent's risk could not be managed in the community. The Panel gave its reasons for its decision to release in the following terms:

"...the panel is mindful of the nature of the index offences with no evidence offered of further similar offending over the lengthy period before conviction in 2009. A robust risk management plan is offered which includes residency in a hostel and the period of early release is now less than three months. Taking all this into account, the panel is satisfied that it is no longer necessary for public protection that you remain confined".

19. In **Wells** it is suggested that a proper approach to deciding whether a decision is irrational is to test a panel's ultimate conclusions against the evidence before it and to ask whether the conclusion can be safely justified on the basis of that evidence while giving due deference to the Panel's expertise. Therefore, the key questions I am required to answer in this application are (a) do the conclusions of the Panel follow from the evidence and (b) is there an unexplained evidential gap which fails to justify the conclusion?

20. A convenient place to begin is with the decision to decide this case on the papers. I remind myself that this was the Respondent's third parole review which coincided with the circumstances arising out of the current health crisis. The first review in October 2017 had heard evidence at an oral hearing. The second review in February 2019 was concluded on the papers. The Panel observed in paragraph 5 of the Decision that little had changed since the last review in February 2019 which resulted in no direction for release. The essential question that confronted the Panel therefore was to decide what, if anything, had changed so as to justify a different outcome.

21. Essentially, the evidential differences between the second and third reviews were the introduction of what was said to be a "robust risk management plan" and the offer of a residency for the Respondent at Designated Accommodation. The Decision made clear that the Respondent was maintaining his innocence; was continuing to minimise the extent of his sexual offending; was continuing to show little regard for the impact of his behaviour; was continuing to make statements that laid the blame for his offending at the door of his victim and finally was continuing to maintain his stance of refusing to engage in any risk reduction work that had been identified by all the professionals as essential.

22.I should make two further observations as to the state of the evidence considered by the Panel when it decided to conclude the matter on the papers:

- (a) No further psychological assessments had been requested which left the Panel with only the two psychologists reports from April and November 2018 neither of which supported release because in the opinion of both psychologists, the Respondent's risks had not been fully addressed and there was further work to be done in custody; and
- (b) The Offender Supervisor had filed reports in July and November 2019 not recommending release. The Offender Manager reported in July 2019 not recommending release and indicating that there were several risk factors which remained outstanding and furthermore, that the risk of serious harm was both high and imminent on release. There appears to be just one further communication from the Offender Manager to the Panel in September 2019 dealing with additional proposed licence conditions, further details of potential support in the community and confirmation that the Respondent had not attempted to contact the victim directly or indirectly.

Decision

23.I am concerned at the decision made by the Panel to decide this case on paper. While understanding perfectly well the desire of a panel not to call witnesses to a hearing unnecessarily, I have real doubts whether this was a case that should have been decided on paper. So little having changed since the previous review just over a year before and with no contemporaneous psychological assessments, the task before the Panel was to examine whether there was a sound evidential basis for release. In the light of the consistent views of the professionals I would have expected an oral hearing to have occurred in order that the true level of risk could be assessed.

24.The Decision itself does not consider nor explain how the risk management plan would address the Respondent's lack of understanding of his sexual offending, its impact and how to prevent it happening in the future. Furthermore, in placing so much reliance upon the potential efficacy of the risk management plan, it is regrettable that the Panel did not address at all the evidence of the Offender Manager, the author of the plan, that there was a low likelihood of compliance given the Respondent's refusal to engage. The failure of the Panel to address the link between the Respondent's lack of interest in or compliance with offending behaviour work in custody and his likelihood of compliance in the community is in my view significant. The Decision makes clear that neither the Offender Manager nor the Offender Supervisor supported release primarily because of the lack of reduction in the Respondent's risk. In the opinion of the Offender Manager outstanding core reduction work remained key to risk management. In the light of all of this evidence there was, in my judgment, an obligation on the panel to give detailed reasons why it disagreed with the professional witnesses. I am driven to conclude that a failure to sufficiently explain its decision must lead to a finding that there are several unexplained gaps in the Panel's reasoning which fail to justify the conclusion it reached.

25.In giving its brief reasons in support of release the Panel appeared to rely on the fact that the abuse in this case took place within the family, was historic and had not been repeated (see paragraph 18 above). As I read the Decision, the implication appears to

be that the Respondent's offending was in the Panel's view located and isolated in place and time and was unlikely to be repeated. It is in my judgment correctly submitted on behalf of the Applicant that such a finding must not only be considered and explained on its own merits, but also in relation to other evidence, such as the evidence that the Respondent's risk of serious harm to children on release was professionally assessed as being both high and imminent.

26. One matter of importance to the Panel (it is specifically mentioned in its brief reasons) was the fact that the Respondent's period of early release was less than three months away. Because this factor was not developed in the Decision it is impossible to know what weight it was given and what impact it had upon the ultimate decision. In my view it is certainly appropriate for a panel to have it in mind; it is clearly not "irrelevant" (the submission of the Applicant) because it is the period of release that the panel is being asked to grant before the prisoner becomes entitled to his liberty. That said, the test for release remains the same across all factors and in my judgment it was important that the Decision made clear to what extent (if at all) the Panel took it into account.
27. Stepping back and considering the matter as a whole, I accept the submission made on behalf of the Applicant, that the Panel failed to fully explore the evidence and failed to provide adequate and sufficient reasons for its conclusions.
28. Therefore, the application for reconsideration must be granted.
29. Other points have been made on behalf of the Applicant but in the light of the conclusions I have reached, it is unnecessary to consider those any further.

Directions

30. I have given careful consideration to whether this case should be reconsidered by the original panel or whether it should be considered afresh by another panel.
31. I have no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, the question of justice being seen to be done arises. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was wrong. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh panel.
32. The following further directions are now made:
- (a) The re-hearing should be expedited. I well understand that this may be very difficult in the present circumstances but I am confident that every effort will be made;
 - (b) The original decision must be removed from the dossier and must not be seen by the new panel;
 - (c) The new panel should be told that this is a reconsideration but not made aware of the reasons why it was ordered;
 - (d) The new panel should also be advised that the fact that this is a reconsideration should not in any way affect their decision. It is a complete re-hearing; and

(e) The panel chair may wish to consider whether any further evidence by way of update is required.

Michael Topolski
14 May 2020