the Parole Board

working with others to protect the public

[2023] PBRA 44

Application for Reconsideration by Owens

Application

1. This is an application by Owens (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 29 January 2023 not to direct his release.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the **Parole Board Rules**) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair. This is an eligible case, and the application was made in time.

3. I have considered the application on the papers. These are the decision, the dossier, and the application for reconsideration.

Background

4. The Applicant was sentenced to life imprisonment on 24 February 2004 following conviction for murder.

5. His tariff expired on 24 August 2019. The Applicant was 40 years old at the time of sentencing and is now 59 years old. This is his second parole review.

Request for Reconsideration

6. The application for reconsideration is dated 17 February 2023 and has been drafted by solicitors acting for the Applicant.

7. It argues that the decision was irrational. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No submissions were made regarding procedural unfairness or error of law.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State in November 2021 to consider whether or not it would be appropriate to direct his release. If the panel did not direct release it was invited to advise the Secretary of State whether the Applicant should be transferred to open conditions.

9. It proceeded to an oral hearing on 17 January 2023, before a panel consisting of two independent members and a psychologist specialist member. It was held

remotely by video conference. The Applicant was legally represented throughout the oral hearing. Evidence was taken from the Applicant, his Prison Offender Manager (**POM**), his Community Offender Manager (**COM**), and a prison psychologist.

10. The panel did not direct release but made a recommendation for a transfer to open conditions.

The Relevant Law

11. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019

12. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

13. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

14. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

15. 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."*

16. 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.

17. 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 Secretary of State

18. The Secretary of State (the Respondent) has submitted no representations in response to this application.

Discussion

19. The application puts forward six points which, it argues, renders the panel's decision not to direct release irrational. These are:

    a) The prison psychologist assessed that the Applicant's risk could be managed in the community;
    b) The panel gave too much weight to the length of time the Applicant had spent in custody and consequently considered a staged release via open conditions to be essential;
    c) The panel asserted that the Applicant presented a high risk, yet accepted this risk was not imminent;
    d) The Applicant's risk exists within the context of an intimate relationship, and the panel accepted that he was not currently in a relationship;
    e) The panel could not be assured that the Applicant would be open with new staff; and
    f) New staff may not be able to see beyond the Applicant's impression management, despite there being no current evidence of impression management.

20. The prison psychologist recommended release (her written report predating the change in rules that meant recommendations could not ordinarily be given to the Parole Board.) The POM and COM were precluded from giving recommendations but indicated that he could be progressed from closed conditions.

21. The application acknowledges that panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is a panel's responsibility to make its own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. It must make up its own mind on the totality of the evidence, including any evidence from the Applicant. 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. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

22. Taking the first and second points together, it is not sufficiently outrageous for a panel not to follow the evidence of a prison psychologist for me to find irrationality, particularly when the panel has the benefit of a psychologist specialist member. It is similarly not outrageous for a panel to conclude that a gradual

reintegration into, and testing in, the community for a man who had been in custody for some 19 years was essential to inform future decisions about release (having first decided that the statutory release test had not been met).

23. Turning to the third point, the risk level definitions used within the probation Offender Assessment System (**OASys**) are:

    a) *"High risk of serious harm – there are identifiable indicators of serious harm. The potential event could happen at any time and the impact would be serious."*

    b) *"Very high risk of serious harm – there is an imminent risk of serious harm. The potential event is more likely than not to happen imminently, and the impact would be serious."*

24. It is therefore not irrational for the panel to assert that there is a high risk, despite a lack of imminence.

25. As to the fourth point, the panel has to consider risk over an indefinite period. The lack of an intimate relationship on release does not absolve the panel from its responsibility to consider the prospect of a future intimate relationship and the risks that could arise from that.

26. The final two points relate to the Applicant's relationships with staff in the community. Given the Applicant's history of impression management, it was not unreasonable for it to conclude that (notwithstanding his current presentation) that the risk may arise in the future and that it would be prudent to test his relationships with new staff within a less restrictive regime.

27. Following **R (Wells) v Parole Board [2019] EWHC 2710 (Admin) [32]** the panel's ultimate conclusion should be tested against the evidence before it and to ask whether the conclusion can be safely justified on the basis of that evidence (with due deference and with regard to the panel's experience and expertise.

28. Having considered the cumulative impact of the points raised within the application and the reasons put forward by the panel, I find that its conclusion not to direct release can be safely justified. Its conclusion was one that it was entitled to make, its reasons are clearly and extensively articulated, and ultimately its decision is not so outrageous that every other panel would have concluded otherwise and released the Applicant. Disagreeing with the panel's interpretation and weighing up of evidence does not automatically make a decision based upon that evidence irrational, unless (as per **Wells**) the conclusion is unjustifiable. The test of irrationality sets a high bar and this case does not meet it.

Decision

29. Applying the tests as defined in case law, I do not find the panel's decision to be irrational. The application for reconsideration is therefore refused.

Stefan Fafinski
17 March 2023

3rd Floor, 10 South Colonnade, London E14 4PU
www.gov.uk/government/organisations/parole-board
info@paroleboard.gov.uk
@Parole_Board
0203 880 0885