

[2019] PBRA 30

Application for Reconsideration by Dix

Application

1. This is an application by Dix (the Applicant) for reconsideration of a decision by a Panel of the Parole Board not to direct his release dated 5 September 2019. The decision is challenged on the basis that it was both irrational and procedurally unfair.
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 that the decision is (a) irrational or (b) procedurally unfair.

Background

3. The Applicant is currently serving an 8-year extended sentence comprising a custodial term of 4 years and an extended licence period of 4 years. It was imposed on 23 October 2013 following his conviction for harassment and arson. The Court of Appeal varied the orders, by applying the extended sentence to the arson offence and concurrent determinate sentences totalling 21 months to the harassment offences. The extended sentence expiry date is 20 May 2021. The determinate sentences have all expired.
4. The harassment involved the Applicant sending to a former partner, and also to her family, a large number of threatening and abusive messages, including threats to commit arson, rape and murder. The arson was committed when the Applicant burnt down the family's stable block. All the offences were committed between 21 April and 21 May 2013. Throughout the incidents of harassment, the Applicant used two separate telephone numbers.
5. The Applicant was 25 at the time of the index offences and is now 32. He had two previous convictions for arson in 2001 and was cautioned for harassment on 1 May 2013.
6. The Applicant was automatically released on 19 January 2016, having endorsed the licence document "SIGNED UNDER PROTEST AND UNDER DURESS DUE TO MULTIPLE UNFAIR, UNNECESSARY AND UNPROPORTIONATE CONDITIONS...." He was recalled after the revocation of his licence on 25 January 2016 for breaching the condition "not to own or possess more than one mobile phone or sim card without the prior approval of your supervising officer and to provide your supervising officer



with details of that mobile phone including the IMEI number and the sim card that you possess.”

7. The Secretary of State duly referred the Applicant’s case to the Parole Board to consider whether to direct his release.
8. A panel of the Board conducting the Applicant’s first review on 25 January 2018 declined to direct his release.
9. The second and current review was conducted by a different Panel (the Panel), comprising a judicial chair, an independent member and a psychiatrist member, at an oral hearing on 4 September 2019. The Panel decided not to direct the Applicant’s release. Its reasons are set out in a Decision Letter dated 5 September 2019 (the Decision Letter).

Request for Reconsideration

10. The Application for Reconsideration is dated 17 September 2019. It is made on the basis that the Panel’s Decision not to release the Applicant was (a) irrational and (b) procedurally unfair.
11. In respect of (a) the Applicant submits that no explanation was provided as to why the Panel discarded the evidence of the three professional witnesses, all of whom recommended his release. He argues further that the Panel: (i) appears to have based its decision on the fact that he has not accepted responsibility in full for the index offences, notwithstanding completion of offending behaviour work to address those issues he does accept; and (ii) relied on his previous non-compliance and breach of licence conditions when there is no significant history of non-compliance.
12. In respect of (b) the Applicant submits that the Panel relied on an outdated psychiatric report in making its decision.

Current parole review

13. The Decision Letter records the fact that the Panel considered a dossier of 699 pages. The documents in it included the following: A Psychiatric Report dated 16 October 2015; a Stalking Risk Profile Assessment (SRP) dated 9 August 2018 by a Psychologist; a Report from the Applicant’s Offender Manager dated 12 August 2019; and a Report from his Offender Supervisor dated 22 August 2019.
14. The author of the Psychiatric Report had concluded that there was no evidence of mental illness, but that there was most likely some form of maladaptive style or personality disorder, including catastrophic reaction to rejection. He considered the Applicant had a strong sense of entitlement and significant deficits in relation to empathy.
15. The Decision Letter refers to the offending behaviour programmes successfully completed by the Applicant and to his consistently good conduct in custody.



16. It describes the discovery of the undisclosed mobile phone which had been given to him on the day of his release by family members and the text exchange with his sister in which he stated "got two phones cos not allowed the net in the hostel unless we use their computers but also only meant to have 1 phone so gotta be careful. I'll keep this one hid in my car." The Applicant's licence conditions also provided that he was not allowed to use any internet enabled device without prior approval. The phone had nevertheless been used to download pornographic videos involving bondage and urinating on women.
17. The Decision Letter states that, having weighed the evidence, the Panel did not accept that the Applicant's explanations in respect of these matters were credible.
18. The Risk Assessments in the reports before the Panel referred to the Applicant presenting a low risk of general offending and a medium risk of violent offending. The risk of serious harm to known adults in the event of any re-offending was assessed as very high. It was assessed as high to the public and medium to children and staff. Those assessments were agreed by the Panel.
19. The resettlement and risk management plan proposed by the Offender Manager and described in the Decision Letter involved release initially to Designated Accommodation where a place was available from 16 December 2019. Move on arrangements, possibly with the Applicant's sister were to be determined once there. External controls were identified, including licence conditions limiting the possession of mobile phones and subjecting the Applicant to exclusion areas and non-contact with named individuals. There would be support from a psychologist within a regime designed and supported by psychologists to help people recognise and deal with their problems.
20. The Offender Manager supported a planned progressive release through to the Applicant's Sentence Expiry Date. The Offender Supervisor also recommended release and referred in his report to the Applicant's good conduct in custody.
21. Having read the Psychiatric Report, and after interviewing the Applicant twice, the Psychologist concluded that he presented a low risk of stalking violence and of psycho-social damage to himself as a stalker. The relevance of damage to himself included its potential for impact on the victim. The Psychologist considered the Applicant to pose a moderate risk of stalking recurrence both to the victim of the index offences and to a potential future partner. At the hearing the Psychologist told the Panel that, if the Applicant was in a relationship in the community or displayed any pre-stalking or stalking by proxy behaviour, his risk would rise to high.
22. The Psychologist's availability to advise the Offender Manager with ongoing professional support and advice was confirmed. Whilst



recommending the Applicant's release, the Psychologist also identified a need for further psychological support to address his preoccupied relationship style. However, until funding was approved, the project identified to do this was unable to take on new clients.

23. The Panel identified potential protective factors. It considered the Risk Management Plan to be as robust as it could be but with heavy reliance upon monitoring and control. There was, in the Panel's view, a necessity for the Applicant to be open and honest over what it felt was a serious question mark in the light of his history. It concluded that, with or without the availability of psychological intervention in the community, the risk he posed was too high to be managed until he had demonstrated the ability to be open, honest and able to be trusted.

The Relevant Law

24. 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 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.' 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 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 uses the same word as is used in judicial review demonstrates that the same test should be applied. This test for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.

Discussion

25. The Decision Letter shows that the Panel expressly took into account, not only the written reports by the three professional witnesses, but also their oral evidence. This evidence is shown to have been subjected to critical scrutiny by the Panel which balanced the recommendations against the risks it expressly identified.
26. The identified risks were set out in the Decision Letter. The fact that the Panel disagreed with the professionals' recommendations does not, of itself, mean that the conclusion it reached about the Applicant's risk and its manageability in the community was irrational.
27. The Decision Letter expressed reasons for the Panel's conclusion that, with or without the availability of psychological intervention in the community, the risk the Applicant posed was too high to be managed until such time as he demonstrated the ability to be open and honest about all his past offending. It concluded that the risk of offending and harm was



not manageable within the current plan given the Applicant's level of risk, previous non-compliance, and breach of licence conditions. The reasons given were wide ranging and based on the evidence it recorded.

28. The Panel did not conclude that denial in itself was a bar to release. It heard oral evidence from the Applicant and had the opportunity to assess its veracity first-hand. Such assessment is a matter of independent judgment and the Panel concluded that it did not believe the Applicant in respect of matters relating to his honesty. Honesty was considered by the Panel to be relevant to risk. This view cannot reasonably be described as irrational.
29. The Panel provided a wide range of reasons for its decision of which a history of non-compliance and breach of licence conditions are but two. The Decision Letter cannot reasonably be said to demonstrate that undue reliance was placed on them, nor is it rationally arguable that they are irrelevant to the issue of risk.
30. There is no evidence in the Decision Letter that the Panel placed undue/disproportionate reliance on the historic psychiatric report in reaching its decision. This was expressly taken into account in considering the Applicant's risk factors but not exclusively so. In dealing with current risk and its manageability the Panel placed considerable reliance on the more recent report from, and the oral evidence of the Psychologist.
31. The Applicant was aware that the Psychiatric Report was in the dossier and therefore open to consideration by the Panel. Had the Applicant wanted a current report from a psychiatrist it would have been open to him to commission one.

Decision

32. Accordingly, for the reasons set out in Paragraphs 25 to 31, I do not find there to have been any procedural irregularity nor, applying the relevant case law, do I consider that the Panel's decision itself was irrational. The application for reconsideration is therefore refused.

HH Judge Graham White

7 October 2019