

[2020] PBRA 28

Application for Reconsideration in the case of Pusey

Application

1. This is an application by the Secretary of State (the Applicant) for reconsideration of a decision of an Oral Hearing Panel (OHP) dated 18 of January 2020 to direct the release of Pusey (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 are the dossier, the Oral Hearing Decision Letter, the Application for Reconsideration and the legal representations submitted on behalf of the Respondent.

Background

4. The Respondent was sentenced to Imprisonment for Public Protection in March 2007 for aggravated burglary and sexual activity with a child. The minimum term was set at 2½ years less 92 days. The tariff expired in 2009.

Request for Reconsideration

5. The application for reconsideration is dated 10 February 2020.
6. The grounds for seeking a reconsideration are as follows:
 - (a) Irrationality in the conclusion of the OHP that the Respondent does not present a risk to children;
 - (b) Irrationality in the decision to go against the recommendations of the key professionals in light of wider context;
 - (c) Irrationality in the conclusion of the OHP that there is no evidence that the Respondent's key risk factors remain active.

Current Parole Review

7. This was the Respondent's eighth review. The previous review was in September 2018. The Panel on that occasion did not direct release but advised the Applicant that the Respondent should remain in open conditions.

The Relevant Law



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8. The OHP correctly sets out in its Decision Letter dated 18 January 2020 the test for release.

Irrationality

9. 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."

10. 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.
11. 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 Respondent

12. It is submitted on behalf of the Respondent that:
- (a) As to the first ground the OHP gave full and careful consideration to the question of the risk the Respondent presented to children and reached a conclusion which was reasonably open to it;
 - (b) As to the second ground, the OHP was entitled to reject the opinions of the professionals and there was a rational evidential basis for doing so;
 - (c) As to the third ground, the OHP clearly identified the basis on which they were unable to accept that key risks were still active and gave proper reasons for taking that view.

Discussion

13. As to the first ground, the OHP set out in the Decision Letter their reasons for concluding that the Respondent does not present a specific risk to children. The reasons arise, in essence, from the nature of the index offence, the absence of any other similar offending in his history and of any subsequent concerns about risk to children together with the conclusions of a psychological assessment carried out in 2013. There was a proper evidential basis for this conclusion which cannot be characterised as irrational. In any event, the complaint of the Applicant is not so much that this finding led to an erroneous decision to direct release but



that a specific licence condition should have been included as part of the Risk Management Plan. This is not a matter for a Reconsideration Assessment Panel.

14. As to the second ground, for good and understandable reasons the submissions on behalf of the Applicant give particular emphasis to internal prison security information in relation to the Respondent. This goes directly to the second ground as well as having some relevance to the third.
15. The previous panel convened in 2018 gave anxious consideration to the quantity and nature of security reports which had been recorded in respect of the Respondent. It noted that these had led to him being transferred back to closed conditions on two previous occasions, that similar reports had been made since his move back to open conditions in August 2017 and concluded that these reports should be given substantial weight. Accordingly, the panel did not direct release but, having been invited by the Applicant to do so, advised that on a fine balance the Respondent should remain in open conditions. It also suggested that the Respondent would have to demonstrate a sustained period of intelligence free good behaviour before he could be released.
16. The OHP in this case convened on 5 December 2019. Shortly before the hearing, it was provided with a large volume of security information; it related to allegations that the Respondent was involved in the use and/or supply of illegal drugs and/or supply and, in the use of and/or supply of mobile phones. It was aware of the views expressed by the previous panel in 2018 (as to which there is express reference in the Decision Letter), the importance of this material to its own determination of risk and the extent to which it had informed the recommendations of the key professionals as to release.
17. Accordingly, it decided to adjourn so that proper opportunity should be given for careful consideration of it and for precise information about its reliability.
18. At the reconvened hearing on 13 January 2020, the OHP heard from the key professionals, the Respondent and from the Security Governor who was able to inform the OHP about how security information is gathered, how it is assessed and interpreted and the purpose for which it is collected and retained. The OHP accepted the importance of gathering and acting on such information, even if it is of low reliability, in maintaining security in the difficult prison environment but further observed, correctly, that different considerations apply to Parole Board reviews.
19. The problems which confront a panel in its consideration of material of this kind are obvious. The source of the information is, for good reason, not revealed so that objective assessment of its reliability is not easy. Whilst multiplicity of similar reports may appear to give greater weight to them, it is unknown whether they are made by the same person or may be part of an orchestrated campaign. The reports often are (and in the circumstances of the present case were entirely) hearsay accounts. In those circumstances, good practice dictates, in conformity with the guidance offered by the Parole Board, that a panel should look carefully at the source of the information, the nature and context of it, the account given by the prisoner together with any other indications which might offer support to or might undermine the reliability of the information.



20. The OHP in this case carried out that exercise with commendable care. They noted that by the time of the adjourned hearing, a good deal of the reports had been downgraded as to their security rating. All of the information which related to involvement in the use or supply of illegal drugs was rated as of low reliability. The information in respect of mobile phones was contradicted by the Respondent who blamed the detection of mobile phone use in his room on such use by another prisoner in the room next door; security reports acknowledged that this was a possible explanation. In addition, the OHP observed that despite these reports the Respondent had not been transferred back to closed conditions, had retained his enhanced status in open conditions, had been allowed to do a driving course and had remained a peer mentor. A search of his room in April 2019 had been negative and when searches had been carried out recently at the prison, he had not been included in the body of prisoners targeted for the particular attention of the search team.
21. In those circumstances, the determination of the OHP that they should give no weight to the reports about use/supply of illegal drugs and that there was no convincing (or, as it was put in the Decision Letter "*strong*") evidence that the Respondent had ever been in possession of a mobile phone was at the very least one which was properly available to them. It cannot on any view be characterised as irrational.
22. The complaint made by the Applicant that the OHP did not act in accordance with the recommendation of the previous panel is thus unsustainable. On the contrary, the OHP did precisely what the previous panel in 2018 had recommended and then, correctly, went a step further so that they did not merely acknowledge the existence of security reports but also took careful steps to evaluate them.
23. Given that the recommendations of the key professionals were substantially informed by the existence of the security reports, it is not surprising that the OHP, having found the reports to be of little or no weight, also differed from those recommendations. To have decided otherwise would itself have been irrational.
24. The third ground relates to a concern that the Respondent has aspirations on release to a lifestyle which can only be funded by acquisitive criminal behaviour which, given the nature of his previous offending and of the index offence, is likely to create risk to the public. The evidential basis for that concern was twofold. First, it arose from what was said to be his involvement in dealing with illegal drugs and mobile phones in prison. Secondly, it arose from things said by him, for example about extravagant spending when he was on temporary release from prison and about his aspirations to have an expensive car after release. The OHP, as set out above, rejected the first basis. As to the second, they heard from the Respondent at the hearing including his account as to things said by him about his financial aspirations. They concluded that he, in common with many young people, was prone to bragging or banter and that some of his utterances were no more than that. They therefore considered that this kind of talk did not amount to significant (or any) evidence of risk. Again, this was a determination to which they were fully entitled to come and was not irrational.

Decision



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

Alistair McCreath
25 February 2020