

[2020] PBRA 40

APPLICATION BY THE SECRETARY OF STATE FOR RECONSIDERATION IN THE CASE OF MAHMOOD

Introduction

1. This is an application by the Secretary of State for reconsideration of a decision of a panel of the Parole Board which, after an oral hearing, directed the prisoner's ('Respondent's') release on licence.

Documents considered

2. I have considered this application on the papers. The documents which I have considered are:
 - The 332-page dossier considered by the oral hearing panel ("the panel");
 - The panel's decision;
 - The submissions of the Public Protection Casework Section ("PPCS") on behalf of the Secretary of State in support of the application; and
 - The Respondent's solicitor's representations opposing the application.

The Relevant Law

3. Applications for reconsideration of decisions by panels of the Parole Board are governed by Rule 28 of the Parole Board Rules 2019. Under Rule 28(1) the only kind of decision which is eligible for reconsideration is a decision that the Respondent 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
 - an oral hearing panel after an oral hearing (Rule 25(1)) (as in this case) or
 - an oral hearing panel which makes the decision on the papers (Rule 21(7)).]
4. There is a time limit for submitting an application for reconsideration. The application in this case was submitted within that time limit.
5. It follows that the decision in this case is eligible for reconsideration under Rule 28.
6. There are only two grounds under Rule 28 for directing reconsideration of a decision by a panel. They are (a) that the decision was irrational and (b) that it was procedurally unfair.
7. Nothing more need be said about procedural unfairness because no suggestion is made that anything procedurally unfair occurred in this case.



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8. Irrationality, which is suggested by PPCS to have occurred, is a concept well established in decisions of the High Court on applications for judicial review. The fact that the same word is used in Rule 28 shows that the same principles as apply in the High Court on applications on the ground of irrationality must apply to applications under the Parole Board reconsideration procedure.
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 paragraph 116 of its judgment:

"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 was the test which had been set out in other contexts by Lord Diplock in the House of Lords in **CCSU v Minister for the Civil Service [1985] AC 374**. It sets

the bar quite high for anyone seeking reconsideration of a Parole Board decision.

10. 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.

Background to the present case

11. The Respondent is now aged 25. He is serving an extended sentence imposed on 30 August 2013 for an offence of rape. The custodial part of his sentence is 7 years and the licence extension period is 5 years.
12. His Parole Eligibility Date (the date on which he became eligible for early release on licence) was in January 2018. His Conditional Release Date (the date on which he will be automatically released on licence if not released earlier on the direction of the Board) is in May 2020. His Sentence Expiry Date (the date on which his sentence and any licence to which he is subject will expire) is in April 2025.
13. On 19 August 2010, at the age of 16, the Respondent committed a non-penetrative sexual assault. That offence occurred in the office of his uncle's taxi business. The victim was a female customer. For that offence the Respondent was dealt with by a 3-year youth rehabilitation order.
14. On 25 May 2012 he breached that order, for which on 11 January 2013 he was dealt with by a fine.
15. Less than 3 months later, at the age of 18, he committed the rape. Like his previous sexual offence, this offence was committed in the office of his uncle's taxi business, and the victim was a female customer.
16. He was convicted of the rape after a contested trial. He was also convicted of sexually assaulting the same victim before raping her. In his defence he falsely

claimed that the victim had propositioned him and that he was the victim. He no longer maintains that false account.

17.Those are his only criminal convictions, though in 2007 - at the age of 12 - he had been reprimanded for common assault. Perhaps more significantly there was evidence of some offending of which the Respondent had not been convicted (drug use, drug dealing and illegal driving).

18.During his sentence the Respondent has completed two sex offender programmes, though there is some doubt about the effect which those have had on him.

19.In December 2017, after he had completed the first of those programmes but before he had completed the second one, his case was reviewed by an earlier panel of the Board which decided not to direct his early release on licence.

20.His case was re-referred to the Board in December 2018, and his oral hearing took place on 27 January 2020. On 10 February 2020 the panel issued their decision directing the Respondent's release on licence.

The hearing

21.At the hearing the Respondent was legally represented. Oral evidence was given by (1) the Respondent
(2) the prison officer responsible for his supervision in prison
(3) the probation officer responsible for his supervision in the community and
(4) a prison psychologist who had completed a post-programme risk assessment after the Respondent's completion of the second programme.

22.The legal representative argued for early release on licence, which was not supported by any of the three professional witnesses. The Secretary of State was not represented and had not submitted any written observations for the panel's consideration.

Request for Reconsideration

23.The application for reconsideration was made by PPCS on behalf of the Secretary of State on 2 March 2020. As noted above, it is based on the proposition that the panel's decision was irrational.

24.PPCS's submissions in support of that proposition can be summarised as follows:

- (1) The decision was inconsistent with the panel's assessment of the Respondent's risk to the public;
- (2) It was contrary to the recommendations of the three professional witnesses;
- (3) There was no evidence of reduction in risk;

- (4) The panel failed to have sufficient regard to evidence of instances of poor custodial behaviour;
- (5) The decision was inconsistent with the panel's lack of confidence that the Respondent would comply with his licence conditions;
- (6) The panel attached significance to the length of the period when the Respondent would be on licence before his Conditional Release Date, which was irrelevant;
- (7) It was inappropriate for the panel to rely on the ability of the probation officer supervising the Respondent in the community and others participating in Multi-Agency Public Protection Arrangements ("MAPPA") to request recall if the Respondent breached his licence conditions; and
- (8) The panel did not apply the statutory test for re-release on licence correctly.

The reply on behalf of the Respondent's legal representative

25. The legal representative's submissions can be summarised as follows:

- (1) The panel correctly assessed sexual offending as the most serious risk posed by the Respondent, and there was evidence from the professionals (overlooked by PPCS) which indicated that the risk of such offending during the period before his Conditional Release Date was low;
- (2) That period was not, as PPCS submit, irrelevant: the panel was required by law to focus on that period and not on the subsequent period which was of no concern to the panel;
- (3) The Respondent had completed all core risk reduction work to an acceptable standard;
- (4) Although the static risk assessment tools used by probation (based entirely on static factors, i.e. historical factors which cannot change) indicated a high risk of re-offending, the assessments which combine static and dynamic factors (i.e. those which can change) indicate a medium level of risk;
- (5) PPCS's submissions place undue weight on evidence of custodial behaviour;
- (6) Contrary to PPCS's submission, the risk management plan is a core element in risk management;
- (7) The decision was made by an experienced panel, chaired by an experienced chair; and
- (8) The test for a finding of irrationality is not met.

Discussion

26. The panel correctly set out at the beginning of their decision, as follows, the test for release on licence:

"The Parole Board shall not direct release unless it is satisfied that it is no longer necessary for the protection of the public that you should be confined."

It is clear from the rest of the decision that the panel had that test well in mind and endeavoured to apply it faithfully.

27. It is convenient to examine in turn each of the submissions made by PPCS in support of their contention that the panel failed in that endeavour and that the high bar for a finding of irrationality is met.

Submission 1: inconsistency with the panel's assessment of risk.

28. The statutory test does not require that there should be no risk at all to the public: if it did, very few offenders could be released on licence. The key issue is always whether the offender's risk is such as to require his continued confinement in prison for the protection of the public. In practice that will usually depend on whether, with the proposed risk management plan in place, his risk will be manageable on licence in the community. If so, the Board should direct release on licence: if not, it should decline to do so.

29. The legal representative is correct in submitting that for risk assessment purposes the most important risk to be considered in this case was that of sexual offending. Whilst there is some evidence that the Respondent had in the past committed other types of offences of which he was never convicted, the risk of a repetition of such offending would clearly not be sufficient to justify his continued detention for the protection of the public.

30. As regards the risk of general re-offending the panel essentially adopted the assessments based on statistical risk assessment tools, which place the Respondent's risk of violent re-offending at the low level and his risk of non-violent re-offending at the medium level.

31. As regards the risk of sexual re-offending the relevant statistical risk assessment tool (which is based on static factors) indicates a high risk of such offending by the Respondent. However, the panel accepted the evidence of the psychologist that, when dynamic factors are taken into account, his actual risk should be regarded as medium.

32. Although none of the professionals supported release on licence it appears that their recommendations were largely based on reports of poor custodial behaviour and unsubstantiated security intelligence (which will be discussed below) rather than concerns about sexual re-offending.

33. As regards sexual offending:

- (a) the prison officer gave evidence that the Respondent had completed all core risk reduction work to a reasonable standard, and that he was unlikely to commit a further sexual offence before his Conditional Release Date (the significance of that date will also be discussed below);
- (b) the probation officer also gave evidence that the Respondent had completed core offending behaviour programmes, and added that he was able to express his learning: her evidence too was that he was unlikely to commit a sexual offence upon release;
- (c) the psychologist gave evidence that there was no evidence of the Respondent over-sexualising or behaving in a sexually inappropriate way in detention; and that any risks which he presented would be manageable up to his Conditional Release Date.

34. In accordance with this evidence the panel found that the Respondent's risk of sexual offending appeared to be less imminent and likely than his risk of general offending.

35. They were clearly entitled to that view, and their assessment was in no way inconsistent with their decision to direct release on licence. The panel were clearly satisfied that, with the proposed risk management plan in place, such risk of sexual re-offending as the Respondent presents will be manageable on licence until his Conditional Release Date and that it does not therefore require his continued confinement in prison during that period. On that basis the test for release on licence was clearly met.

Submission 2: the decision was contrary to the recommendations of all three professional witnesses

36. A panel of the Parole Board are not obliged to follow the recommendations of professional witnesses. Their responsibility is to make their own assessment of a Respondent's risk to the public, and (as the Divisional Court recognised in **DSD**) they have the expertise to do so. If they conclude, having considered all the evidence including the views of the professionals, that the Respondent's risk is manageable on licence in the community, they must direct release on licence.

37. If a panel fail to give reasons for departing from the unanimous recommendations of professionals, or if their stated reasons for doing so can be shown to be flawed, that might afford a ground for a conclusion that the panel's decision was irrational. However, in this case the panel gave detailed reasons for their decision, acknowledging the points on both sides of the argument, and those reasons cannot be said to be in any way flawed.

38. Indeed, as pointed out above, the views of the professionals appear to have been largely based on custodial behaviour and unsubstantiated security intelligence. It seems that, whilst the panel faithfully applied the statutory test for release on licence, the professionals may not have done so and may have been unduly influenced by considerations whose relevance to the statutory test was limited.

Submission 3: there was no evidence of reduction in risk

39. This is not the case. There was clear evidence of reduction in risk in the form of:
- (a) the Respondent's completion of the two programmes;
 - (b) the psychologist's opinion that, having completed those programmes his risk of sexual offending should now be regarded as medium rather than being at its original high level as shown by the statistical risk assessment tool for sexual re-offending; and
 - (c) the opinions of all three professionals that the Respondent is unlikely to commit a further sexual offence in the period before his Conditional Release Date.

Submission 4: the panel failed to have sufficient regard to the evidence of instances of poor custodial behaviour.

40. Custodial behaviour is always a relevant factor but there are limits to its value in assessing a Respondent's risk to the public in the community. Good custodial behaviour is not a guarantee that such behaviour will be repeated in the community; conversely instances of poor custodial behaviour are not necessarily indicators of the likelihood of misbehaviour in the community (let alone offending of a kind requiring the offender's continued confinement in prison).
41. As the legal representative points out, conditions in prison and those in the community are very different, and factors which may result in inappropriate behaviour in one will not necessarily result in the commission of criminal offences in the other.
42. The panel clearly recognised and took fully into account that the Respondent's custodial behaviour had been "mixed" (i.e. there was some poor behaviour as well as some good behaviour), and gave examples of instances of poor behaviour on his part. They did not regard that as demonstrating a risk to the public in the community at a level requiring the Respondent's continued confinement in prison until his Conditional Release Date. They were fully entitled to take that view.

Submission 5: The decision was inconsistent with the panel's lack of confidence that the Respondent would comply with his licence conditions

43. There was no inconsistency. The panel very properly recognised that the Respondent might not comply with his licence conditions, and clearly took that risk into account in reaching their decision. They concluded, as they were entitled to do, that that risk was not such as to make it necessary for the Respondent to remain in prison until his Conditional Release Date.
44. The panel's task was to assess the Respondent's risk to the public, which is related to - but by no means the same thing as - the risk of his breaching his licence conditions. Many breaches of licence conditions will have no effect on the

Respondent's risk to the public. The risk of breaches must certainly be taken into account (as the panel did) but it does not necessary lead to the conclusion that the Respondent needs to remain in prison for the protection of the public.

Submission 6: the panel attached significance to the length of the period when the Respondent would be on licence before his Conditional Release Date, which was irrelevant

45. The legal representative is correct in submitting that, so far from this period being irrelevant, it was in fact the precise period on which the panel was required by law to focus.
46. In a case of this kind the Board is concerned only with the period up to the Conditional Release Date. After that, if the Respondent has not already been released early on the direction of the Board, he will be automatically released on licence irrespective of the risk which he presents to the public.
47. This legal position was carefully and correctly explained by the panel in their decision. The panel pointed out that, given the time required to issue a Parole Board decision, and to secure a hostel placement, the period under consideration was likely to be less than two months. The time required to allow for (and decide) an application for reconsideration also needs to be taken into account in determining the likely length of that period.
48. The need to focus on the period up to the Conditional Release Date no doubt explains why the professional witnesses were asked in evidence (either by the panel or by the legal representative) for their assessment of the risk of the Respondent committing a further sexual offence during the period in question. I have already referred to their evidence on that point.

Submission 7: it was inappropriate for the panel to rely on the ability of MAPPA and the probation officer supervising the Respondent in the community to request recall if the Respondent breached his licence conditions

49. Again, the legal representative is correct in her response to this submission. A Respondent's risk to the public is not to be assessed in a vacuum. The likely effectiveness of the risk management plan proposed is a key element of the assessment. The question for the Board is whether, with that plan in place, the Respondent's risk to the public would be manageable on licence in the community.
50. The fact that the Respondent will be liable to recall if he breaches any of his licence conditions is part of the protection afforded to the public by the risk management plan, which incorporates those conditions. The panel was not, therefore, "relying on" MAPPA and the probation officer supervising the Respondent in the community: it was pointing out - whilst acknowledging the concerns that the Respondent might not comply with his licence conditions - that

those conditions were enforceable (by recall if necessary). In addition, the knowledge that he was liable to recall was a protective factor making it less likely that he would breach the conditions.

Decision

51. It will be apparent from the discussion above that I am unable to accept that PPCS's submissions (whether viewed separately or together) demonstrate that the panel's decision in this case was irrational within the established meaning of that term. Some panels might have decided this difficult case differently, but that is not the test for irrationality. The bar for establishing irrationality is a high one, and this case does not reach it. I cannot therefore accede to this application for reconsideration.
52. It will also be apparent from the discussion that I accept most of the legal representative's submissions. There is one point made by the legal representative which I have not allowed to influence my decision. It is correct as a matter of fact that this was an experienced panel chaired by an experienced Chair. However, even experienced panels can make mistakes and it would be wrong for me to rely on the experience of this particular panel in deciding whether its decision was irrational. As it happens, for the reasons set out above I am satisfied that the panel's approach to the case was entirely rational and its decision fully justified on the evidence. The panel's application of the statutory test for release on licence cannot be faulted.

Jeremy Roberts

18 March 2020