

[2020] PBRA 54

Application for Reconsideration by O'Dwyer

Application

1. This is an application by O'Dwyer (the Applicant) for reconsideration of a decision of the Parole Board dated 9 March 2020 made following an Oral Hearing held on 26 February 2020 which decided not to direct his release on licence. The Secretary of State had referred the Applicant's case to the Parole Board to determine whether or not it would be appropriate to direct his release.
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. This is an eligible case.
3. I have considered the application on the papers. These are the dossier (which contains the outcome of an earlier parole review held in June 2018), the Decision Letter dated 9 March 2020 and the application for reconsideration itself dated 27 March 2020 from solicitors acting on behalf of the Applicant. The Secretary of State has made no representations.

Background

4. The Applicant is now aged 75. He is serving a sentence of life imprisonment imposed on 31 July 1984 for kidnapping and indecent assault. The minimum term, which expired on 27 December 1990, was set at seven years and one day. The victim was a female child of around ten years of age.
5. The Applicant has a very long history of offending, having first been convicted in 1955 when he was just 11 years old. Thereafter, he accumulated a large number of convictions for offences of dishonesty and for driving offences. Of particular importance is his record of serious sexual offending.
6. The Applicant was released on licence on 6 April 2018 (throughout the Decision Letter the date is mistakenly stated as being 6 April 2019). The recall five days later on 11 April 2018 was precipitated by two events. First, the Applicant was found in possession of a Stanley knife and extra blades purchased on the same day as he was released. Secondly, the Applicant was reported to have been seen associating with another person who had been convicted of a sexual offence.
7. The Decision Letter emphasised the importance of these events to the issues the panel had to determine. Importantly, the panel noted that the Applicant had



given at least three different and inconsistent explanations for his purchase of the knife. Furthermore, the panel found that his initial denial of any meeting or association with the other offender hindered their understanding of his future intentions and risk.

8. On 11 April 2018 a police officer contacted the Applicant's former Offender Manager to report that the Applicant had been captured on CCTV in the company of a convicted sex offender for perhaps as long as one hour forty minutes. It is right to note immediately that the only CCTV footage shown to the panel lasted just a few minutes and revealed only a passing image of the Applicant. Despite panel directions seeking further footage or other evidence from the police regarding this meeting, none was forthcoming. The panel addressed this in the Decision Letter where they said that the CCTV footage covers only five minutes and does not support the suggestion recorded in the Applicant's former offender manager's report (i.e. that the Applicant and the other man were together for well over one hour).
9. An independent psychologist provided two reports. The first dated 13 March 2019 and the second 20 December 2019. The Decision Letter summarised the psychologist's evidence regarding the matters leading to the Applicant's recall, by outlining that the psychologist expressed that it was difficult to understand the Applicant's intentions regarding the purchase of the knife, and whether he intended to use it in future offending. The psychologist also expressed a hypothesis that the purchase/possession of the knife could relate to a change in the Applicant's modus operandi arising from his age and culpability and that this was further questionable due to his association with the other person convicted of a sexual offence.

The Relevant Law

Irrationality

10. 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."

11. 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.

The Solicitor's Representations



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



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12. The Applicant's solicitors submit that the decision not to direct release on licence was irrational. The grounds advanced can be summarised under two headings. First, the panel's approach to the evidence regarding the Applicant's recall to prison on 11 April 2018. Secondly, the panel's treatment of the opinions and recommendations of the professional witness.
13. The solicitors submit that the panel's decision was irrational in the following key respects:
 - i) **The professional witnesses all recommended release.**
 - ii) **The panel misunderstood the evidence relating to the Applicant's meeting with another sex offender and attached undue weight to it and further it was not entitled to rely upon a hypothesis put forward by the psychologist.**
 - iii) **The panel in adopting analyses from decisions of previous oral hearings failed to carry out their own fresh assessment.**
 - iv) **The panel failed to fully appreciate and make any allowance for the fact that the Applicant's IQ is low.**

There were other matters relied upon which I have of course very carefully considered. It seems to me that the four matters I have identified lie at the centre of this application.

Discussion

14. I turn now to deal with the four key submissions:

i) **The professional witnesses all recommended release.**

- a) One of the purposes of an Oral Hearing is to examine and challenge the assertions made. The fact that professionals agree or do not agree that the risk is or is not manageable does not mean that the panel is bound to agree with them. It is the panel's responsibility to make their own assessments and make up their own minds based on the totality of the evidence, including that of the Applicant. The panel 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. It is the panel who are independent and who are the experts and who have the expertise through training and experience to carry out the task of assessing risk.
- b) In this case the panel did not agree with the professional witnesses. It is my task to decide whether the panel have provided clear and logically justifiable reasons based on a fair-minded analysis of all the evidence before them. It is important that I should remind myself that it is appropriate to direct that a decision be reconsidered only if it is obvious that there are compelling reasons for interfering with the panel's decision.



- c) This on any view was a very serious and troubling case. The Applicant had been in prison for a considerable period of time and was then 75 years old. The process of assessing the evidence is not made easier when a professional witness changes their recommendation as happened in this case.
- d) The panel in a lengthy, detailed and carefully argued decision set out how and why they had reached a different conclusion to the professional witnesses. They are criticised for suggesting that the recommendations before them may have been partly based upon a practical response to the unavailability of a particular intervention rather than an expression of confidence that the Applicant's risk was manageable. This was a view that in my judgment they were perfectly entitled to reach, provided that the statutory test for release remained paramount, which it clearly did.

ii) The meeting with the sex offender.

- a) Considerable emphasis is placed by the Applicant's solicitors on the submission that there was no evidence before the panel to undermine the explanation the Applicant had given with regard to the nature and length of his meeting with the other offender. It is submitted, bluntly, that "*the panel repeatedly refer to the extended meeting as if it were an accepted fact. It was not*".
- b) The panel in the Decision Letter say that "*There is no information available that substantiates the original timescale you were alleged to have spent with the other person*"
- c) On a careful reading of the first report by the psychologist dated 13 March 2019, it would appear that both the panel and the Applicant's solicitors did not entirely accurately reflect the state of the evidence. In his report the psychologist records the Applicant as in fact accepting that he did spend some time with the other person "*looking at shops*" and furthermore that he volunteered to the psychologist that his reason for initially denying meeting the person at all was because "*it looked bad*". It seems therefore there was some evidence in existence before the panel that did potentially undermine the Applicant's account.
- d) Even if the conclusion of the panel that there was no information to substantiate the original time scale of this meeting can be characterised as a mistake of fact, it is not of such a nature which can be shown to have directly contributed to the conclusion arrived at by the panel. In any event, the finding made by the panel is, if anything, in the Applicant's favour.
- e) There was in my view no misunderstanding on the part of the panel who in the decision set out their findings and addressed the issue of how those matters impacted upon their view of the Applicant's future intentions and risk. The view of the psychologist expressed as a "*hypothesis*" was not in my view "*guess work*" as it is described in the



solicitor's submissions. The psychologist's first report reveals that the very same concerns he was raising had been drawn to his attention by the Probation service, namely that the Applicant's actions on licence may have been preparatory to another offence.

iii) Adopting the analyses of previous panels.

- a) It is common practice for panel decisions to adopt analyses made by previous panels particularly where there has been an absence of any significant developments in the intervening period.
- b) This was a case in which the Applicant had served approximately 35 years on his life sentence prior to his release on licence and one where his offending history and other relevant matters had been extensively documented and where there had been no change in understanding the nature of his offending, the severity of the offences themselves and what motivated him to commit the offences for which he was given a life sentence.
- c) In terms that were regrettable this process was characterised in the solicitors written submissions as the panel "*borrowing views*" from previous dossiers leading to a failure of the panel to undertake their own assessment.
- d) I disagree. This was a legitimate and useful approach particularly in a case such as this. It placed the panel in a position to fully explain the decisions it had reached. In my judgment this is precisely what they did.

iv) The Applicant's IQ.

- a) It is accepted in the solicitor's submissions that the Applicant's IQ scores are acknowledged by the panel but that no comment is made as to its relevance in the panel's assessment of the evidence given by Applicant. Further it is submitted that the panel made no allowance for the issue of his IQ, his age or the passage of time.
- b) It is in my view inconceivable that the panel would not have been well aware of the presence of these factors and more in the carrying out of its duties. There was a considerable amount of material before the panel in this regard from the professional witnesses; there were reports from and the oral evidence of an experienced psychologist and finally, the particular advantage in this case of the chair being a psychologist member of the Parole Board.
- c) From a reading of the Decision Letter as a whole it is abundantly clear that the panel had all these aspects of the Applicant's case very much in mind throughout.

15. The panel explained in its detailed reasons how it had weighed and balanced the competing views and facts. It correctly focused on risk throughout. It applied and stated the correct test for release.



16. Either taken individually or together, the matters put forward on behalf of the Applicant in support of his application for a reconsideration of this decision have failed to satisfy me that this case meets the legal test of irrationality.

Decision

17. The complaints of irrationality are not made out on the papers before me.

18. Accordingly, this application is dismissed.

HH Michael Topolski QC
15 April 2020