

[2020] PBRA 76

Application for Reconsideration in the case of Johnston

Application

1. This is an application by the Secretary of State (the Applicant) for reconsideration of the decision of a Panel of the Parole Board (the Panel) issued on the 7 May 2020 directing the release of Johnston (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 (including the provisional Decision Letter) amounting to 485 pages and the written representations on behalf of the Secretary of State and the response to the application by the Respondent's legal representative.

Background

4. On the 16 November 2009, the Respondent was sentenced to an extended sentence of 12 years in custody and five years extended licence for offences of wounding with intent to cause grievous bodily harm and attempted robbery. The offences of wounding with intent to cause grievous bodily harm and attempted robbery involved the Respondent, with others, attempting to rob a security van during which two security guards were beaten and one of them sustained knife wounds which required surgery.
5. At the time of the offences, the Respondent was subject to supervision on licence; on the 9 December 2008, he had been released on licence from a sentence of five years imprisonment imposed for robbery.
6. The Respondent was first released on licence for the present offences on the 29 February 2016. On the 31 July 2016, he was arrested by police officers, one of whom had to use a Taser. On the 4 November 2016, he was sentenced to 22 months imprisonment for aggravated vehicle taking, assault by beating and criminal damage.

7. The oral hearing in respect of this application took place on the 18 March 2020; the matter was then adjourned for further information from the Respondent's Offender Supervisor. At the oral hearing, the Panel heard evidence from Offender Manager, the Offender Supervisor, a Psychologist, the Respondent and submissions from his legal representative. None of the professional witnesses supported release on licence and only the Psychologist supported a move to open conditions.

Request for Reconsideration

8. The application for reconsideration is dated the 28 May 2020.

9. The Applicant applies for reconsideration on the basis that the decision was irrational because the totality of the evidence suggested that the Respondent did not meet the test for release.

10. The Applicant's carefully drafted representations make a number of individual submissions, some of which inevitably overlap with others. The salient submissions appear to be:

(a) The Panel failed to consider the most recent probation service assessment report which assesses the risk and needs of an offender;

(b) The Panel failed to mention that the Respondent is a Category B prisoner and failed to investigate why the Respondent had been moved to his present prison;

(c) The Panel failed to explore inconsistencies in the risk assessments contained in the dossier;

(d) The Panel found that the Respondent was currently drug free and observed "*Substance misuse is a core risk factor, and in the community should be capable of being monitored.*" However, the Respondent has declined to do work to address his substance misuse which suggests he will not remain drug free in the community;

(e) The Respondent's continuing poor behaviour in prison (including threats to prison officers) and security concerns indicate he will not comply with licence conditions. The Respondent has declined to complete work to address his offending behaviour; and

(f) None of the witnesses at the hearing supported the Respondent's release.

11. The submissions filed by the Respondent's legal representative dispute the suggestion that the Panel did not see the most recent probation service report. In a welcome effort to be helpful, the representative has summarised lengthy passages of what she recalls being said before the Panel and which undermines the Applicant's submissions. She has an advantage over the Secretary of State, who was not represented, in that she was present at the oral hearing.



12. However, the reconsideration procedure mirrors that of the Divisional Court and does not investigate disputes about the evidence. The procedure is to read the dossier and the Decision Letter in the light of the written representations and decide on that material, whether the decision was irrational in the sense that it was unreasoned or lacked ostensible logic or comprehensible justification.

Current parole review

13. The Respondent was returned to prison on the 22 September 2016; his case was reviewed by a single member panel on the 26 February 2018 which refused to re-release him. On the 8 April 2019, this application was directed to an oral hearing. On the 14 November 2020, the case was adjourned at the Respondent's legal representative's request to allow the completion of an assessment of further risk reducing work and, to allow the Respondent to show significantly improved behaviour and stability. The oral hearing took place on the 18 March 2020 and after evidence had been given, it was adjourned to investigate an outstanding adjudication where the Respondent had been found with an undisclosed foreign substance in his toothpaste tube. The application was concluded on paper on the 5 May 2020.

The Relevant Law

14. The Panel correctly sets out in its Decision Letter the test for release.

Irrationality

15. In order to be "irrational" within the meaning of Rule 28 (1) (a) the decision in question must be so outrageous as to defy logic, accepted moral standards or one at which no sensible person could have arrived. Moreover, in considering the assessment of the decision, due deference is to be given to the expertise of the Parole Board in making decisions relating to parole. It will also be borne in mind that in the case of oral hearings it is the panel members who saw heard and assessed the evidence of witnesses before them: see **R (on the application of DSD and others) v the Parole Board [2018] EWHC 694 (Admin), CCSU v Minister for the Civil Service [1985] AC 374.**
16. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"
17. It is an insufficient basis for a challenge to a panel's decision simply to put forward a reasonable, alternative conclusion consistent with the evidence, because as Lord Hailsham remarked in **Re W (An Infant) [1971] AC 682**: "*Two reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their right to be regarded as reasonable.*"



The reply on behalf of the Respondent

18. A lengthy reply dated 8 June 2020 has been filed on behalf of the Respondent. The legal representative questions whether the Applicant is correct when he suggests the Panel did not have the latest probation service assessment report. In a much-appreciated attempt to be helpful, the reply continued by summarising what was actually said at the oral hearing and which contradicted the submissions made on behalf of the Applicant. Of course, the Respondent's legal representative who was present at the oral hearing has a distinct advantage over the Applicant who chose not to be represented.
19. However, the approach of the Reconsideration Assessment Panel mirrors that of the Divisional Court and does not, save in the most exceptional cases, consider what the parties claim was said at the oral hearing. Reconsideration involves looking at the papers before the Panel and the Panel's decision to see whether that decision is irrational, in the strict sense that it was unreasoned or lacked ostensible logic or comprehensible justification.

Discussion

20. The basis for the assertion the Panel did not have the most recent (and third) probation service assessment report is that the provisional Decision Letter indicated that the Panel had before it a dossier of 441 pages whereas the third report is paginated 442 – 469.
21. It is possible there is an error in the Decision Letter; however, I proceed on the basis the Panel did not have the third probation service assessment report.
22. The absence of a report ought more correctly to be considered under the ground of procedural irregularity rather than irrationality.
23. Omitting to put information before Panel is not a ground for procedural unfairness: see **Williams [2019] PBRA 7**, a decision made exclusively on the interpretation of the wording and meaning of Rule 28 of the Parole Board Rules 2019. However, in the course of the decision it was observed that "*As a matter of policy, it is undesirable for the Secretary of State's inefficiencies to be encouraged by giving him a ready means of rectifying mistakes...*"
24. I have read all the three probation service assessment reports and the third adds nothing of substance to the previous two reports, in particular the assessment of risk and the list of recent adjudications in the third report were the same as those set out in the second report. Indeed, the Applicant's representative does not specify any matter in the third report which the Panel ought to have considered and which was not contained in the papers actually before the Panel.
25. Nothing turns on this particular submission.
26. The second submission concerns the Respondent's prison security status and the reason for his transfer to his present location. The Panel did not consider the



Respondent's Category B status in the context of his risk; the Panel did not need to do so as it had numerous professional risk assessments before it.

27. The information about why the Respondent had been moved to his present prison is confusing. In a report dated the 30 April 2019, a former Offender Supervisor (who subsequently had no contact with the Respondent) said she had been told the move was connected with an unidentified security problem. The probation service assessment report makes no mention of any such problem. More recently, the suggestion has been made that the move was so the Respondent could do a particular piece of offending behaviour work.
28. If there was any significance in the move, it should have been set out clearly in the most recent Offender Supervisor report. In the absence of clear information, the Panel could not carry out an effective investigation.
29. Turning to the Applicant's criticisms of the Panel's assessment of the Respondent's risk of reoffending, the results of various risk assessments were set out in the probation service assessment reports dated the 15 January 2019 and the 10 November 2019 and in the Offender Manager's reports dated the 22 October 2019 and the 16 March 2020.
30. The actuarial assessments based on static factors such as age and previous offending patterns, unsurprisingly, show a consistent risk which is medium.
31. The risk to prison staff was assessed as low on the 15 January 2019 but medium on the 22 October 2019 and thereafter. As a matter of common sense, the Panel is unlikely to have been particularly interested in this risk as it was considering directing release.
32. The risk to known adults (seemingly the two security guards attacked in the attempted robbery) was assessed as low in January 2019 but the Offender Manager's report of the 22 October 2019 put the risk as high. However, that particular risk is printed in red, used throughout the report for rubrics, rather than black, used throughout for information, and may have been a typing error.
33. The risk was assessed as medium in the probation service assessment report of November 2019, but the Offender Manager assessed it as low on the 16 March 2020, two days before the oral hearing.
34. The fact that the Decision Letter does not mention what the Offender Manager said about the assessment at the oral hearing is not evidence that she was not questioned on the topic. It is the invariable practice of all panels to ask the Offender Manager about the current assessment of risk.
35. The Panel appears to have adopted and endorsed the most recent risk assessments.
36. The Applicant next questioned the strength of the evidence to suggest the Respondent would remain drug-free in the community



37. The Decision Letter records that the Respondent told the Panel he intended to remain free of drugs and the Panel was entitled to accept that assertion.
38. However, I suspect the Applicant may have missed the point when he refers to the passage of page 8 of the Decision Letter. The Panel was not saying it accepted the Respondent, on his own, would remain drugs free but that the care plan could be effective because substance misuse by someone on licence in the community is capable of being monitored.
39. I am a little concerned about paragraph 11.2 of the Applicant's written representations where it says: "*having discussed [the Respondent's] adjudications with the OM (Offender Manager) she confirms that those [adjudications] noted above suggest behaviour linked to obtaining drug paraphernalia and provide evidence to argue that it is unlikely [the Respondent] has been drug-free since July 2019*".
40. I can see no reference to this opinion in the Offender Manager's relevant report dated the 16 March 2020 and no reference to it in the Decision Letter.
41. If the Applicant has learnt of this opinion since the oral hearing it follows:
- (a) It was not material before the Panel for it to consider,
 - (b) It was never tested by cross-examination and, therefore,
 - (c) It should not have been alluded to in this application.
42. The last two submissions can be taken together. It is clear that the Panel accepted the facts of the Respondent's poor behaviour. The Panel did not mention two adjudications/behavioural warnings relating to a television in November 2019 and January 2020. These are very similar to the earlier adjudications. The Panel did consider the toothpaste tube allegation and adjourned the hearing for that purpose.
43. The Applicant is also correct when he submits none of the professional witnesses supported release.
44. There was an essential difference between the opinions of the professional witnesses and the findings of the Panel. The professional witnesses regarded the Respondent's poor behaviour and reluctance to do offending behaviour work as a clear indication that the Respondent's risk of causing serious harm in the community could not be managed.
45. The Panel took the view that the Respondent's poor behaviour perhaps reflected a childish and immature attitude and a lack of problem-solving and, although it was unacceptable, it fell short of indicating that the risk of causing serious harm could not be managed in the community.
46. The Panel carefully and correctly distinguished between evidence which indicated a risk of non-compliance in the community and evidence which indicated a risk of



future serious harm. In my view, the representations made on behalf of the Applicant at times blur the distinction and it may be that the professional witnesses at the oral hearing did not draw the distinction as clearly as they might have done.

47. The Panel also took the view that the Respondent could and would do further offending behaviour work in the community and this would make his risk more manageable.
48. The Panel was entitled to this view provided it explained with reasonable clarity why and how it had come to it.
49. I take the view that the Panel gave adequate reasons for the decision, particularly on page 8 of the Decision Letter.
50. I have some sympathy for the Applicant's anxiety: this was a decision which carried a level of risk which was somewhat out of the ordinary. However, the fact that another panel may have taken a more cautious approach, is not a reason for disturbing the decision of this Panel.
51. The Applicant's submissions, when reduced to their essentials, represent an argument for supporting a refusal to release. Had this been a decision made on the papers, the Applicant's submissions would have been a great deal stronger; however, the reconsideration process, like the procedure in the Divisional Court, does not have the advantage of seeing the witnesses, or hearing their answers and being able to pick up the nuances of their evidence. This in part is the basis for the Divisional Court's reluctance to interfere with decisions of fact or judgement. Taken as a whole, the criticisms made on behalf of the Applicant of the Panel do not meet the high test set out in **R (on the application of DSD and others) v the Parole Board**.

Decision

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

James Orrell
16 June 2020