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[2021] PBRA 163

Application for Reconsideration by Curran

Application

1. This is an application by Curran (the Applicant) for reconsideration of a decision of a Panel of the Board contained in a letter dated 12 October 2021 (the Decision Letter) not to release him. This followed an oral hearing held on 6 October 2021 conducted remotely via a video link.

2. The Panel consisted of two independent members and a specialist member.

3. 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.

4. I have considered the application on the papers which comprise the Decision Letter, the Application for Reconsideration and the dossier now paginated to 383 pages.

Background

5. The Applicant is serving an indeterminate sentence for public protection imposed on 23 June 2009 for two counts of rape. The minimum term was set at 9 years less time spent on remand in custody.

6. The Applicant was 28 years of age at the time of sentencing and his Tariff Expiry Date is given as 12 August 2017.

7. On the evening of 9 December 2007, having been drinking and following an argument with his partner, the Applicant entered a property with the intent to steal. However, believing that a female was present in the house he entered a bedroom and attacked and raped the female occupant. He was not apprehended at this time.

8. On 2 August 2008, having again been drinking heavily, the Applicant met up with a young woman in a taxi queue and, whilst ostensibly walking her home, the Applicant took the opportunity of pushing her to the ground and violently raping her.

9. The Applicant contested both matters at trial but was found guilty and is reported to have since fully accepted his guilt.

10. The Applicant was released on licence in December 2017. However, in July 2019, when on his "stag night", he was once more very drunk and went into an alleyway with a sex worker. An argument ensued and he was subsequently charged with, and pleaded guilty to, counts of sexual assault and assault for which he was sentenced to 22 months imprisonment in December 2019. The Conditional Release Date for these offences was in November 2020.

11. Prior to the index offences the Applicant had previous convictions dating from 1999 for being on enclosed premises for an unlawful purpose, theft from motor vehicles and non-dwelling burglary. In addition, he was sentenced to 6 years imprisonment in July 2002 for rape when, after inviting a prostitute to his home, he threatened her with a screwdriver when she refused to participate and raped her repeatedly.

12. The Applicant has completed a number of accredited programmes in custody and has a supportive partner in the community. No core risk reduction work remains outstanding. He has undertaken educational courses and has earned more privileges through good custodial conduct.

Request for Reconsideration

13. The application for reconsideration is dated 24 October 2021.

14. It is handwritten and is not made on the published form CPD2, which contains guidance notes to help prospective Applicants ensure their reasons for challenging the decision of the Panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints, and reminds Applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made.

15. The Applicant helpfully sets out his grounds for seeking a reconsideration in 5 numbered and clearly argued points, which I shall address in the Discussion section, and submits that the decision of the Panel was irrational.

16. It is not submitted that there was procedural unfairness.

Current parole review

17. The Secretary of State referred the Applicant's case to the Parole Board in September 2020 to consider whether to direct his re-release or, if not, to advise on his suitability for open prison conditions.

18. At the hearing on 6 October 2021 the Panel considered a dossier of 370 pages and there was no evidence which could not be disclosed to the Applicant. The Secretary of State did not express a view and was not represented. The Applicant was represented by his solicitor, who sought a direction for release.

19. The Panel heard evidence from:

    a) The Prison Offender Manager (POM);

b) The Applicant;

c) A Prison Psychologist who had prepared a brief addendum report in September 2021 and also gave evidence as a stand-in for the Prison Psychologist who had prepared the formal Psychological Risk Assessment (PRA) in June 2021 and had since left the Service;

d) The Community Offender Manager (COM); and

e) The Independent Forensic Psychologist.

20. The Independent Psychologist was supportive of release. The other professional witnesses opposed the Applicant's release on licence and there was no support for a move to open conditions.

21. The Panel concluded that it continued to be necessary for the protection of the public that the Applicant should remain confined. Therefore, the Panel did not direct the release of the Applicant nor did it make a recommendation for progression to open conditions.

The Relevant Law

22. The Panel correctly sets out in its decision letter the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019

23. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner 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 by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).

Irrationality

24. 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."

25. 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.

26. 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 Secretary of State

27. By email dated 12 November 2021 it was confirmed by PPCS on behalf of the Secretary of State that no representations are offered in response to the reconsideration application.

Discussion

28. In dealing with the grounds for reconsideration, it is necessary to stress certain matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgement of the Panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those found by the Panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the Panel.

29. The second matter of material importance is that when deciding whether a decision of the Parole Board was irrational, due deference has to be given to the expertise of the Parole Board in making decisions relating to parole.

30. Third, where a Panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the Panel.

31. The Applicant refers to the Panel's finding that the plans to manage his risk in the community were insufficient. He argues that this issue was not raised in the hearing and that the Panel had the option of adjourning for the Risk Management Plan (RMP) to be strengthened.

32. It is clear that the Panel (as it was obliged to) explored the RMP with the COM and questioned the Applicant about his plans if released.

33. An adjournment for a fresh RMP was, I find, not appropriate given the Panel's finding that external controls as provided for in the RMP would be insufficient to deal with its concerns about the Applicant's inability to utilise his learning from sexual offending behaviour work and to apply strategies to avoid the risk of re-offending.

34. In addition, the Panel found that external controls on their own would not properly protect the public, particularly lone females and sex workers with whom the Applicant might come into contact.

35. Secondly, the Applicant notes that the Panel found that he did not yet understand the reasons why he commits sexual offences and he places reliance on apposite quotations from the reports of each of the three expert psychology witnesses.

36. The Panel acknowledged the positive progress that the Applicant had made, the insight he had gained into the index offending and the significant offending behaviour work he had completed prior to his release on licence.

37. However, the Panel's concerns (relying on the evidence of those professionals who opposed re-release) centred upon the fresh offence-paralleling (para. 8.3) matters committed whilst on licence without identifiable warning signs of increased risk.

38. In this regard, the Panel found that the Applicant lacked insight into the motivation and triggers for his sexual offending and was not persuaded by his reliance on alcohol use as being the predominant risk factor involved in the new offences.

39. Accordingly, the Panel found that the Applicant needed to develop internal controls and strategies to avoid such behaviour in future and, for these reasons, should be required to examine properly his thinking and decision-making at the time of the new offences.

40. The Applicant also suggests that insufficient weight was given to the evidence of the independent psychologist who supported his release. I find that the Panel engaged with that evidence, both oral and written, and made a clear finding that it was not persuaded by this psychologist's rationale and was uncomfortable with his comments regarding what he considered to be the usual behaviour of sex workers and the inability of men to control themselves sexually when they have had too much to drink.

41. The next issue which the Applicant raises is that of warning signs. I find that the issue of these "triggers" for sexual offending were of considerable concern to the professional witnesses and to the Panel.

42. Again, whilst it was felt that due to the significant amount of risk reduction work which the Applicant had undertaken prior to his release, the rationale behind the index offending was well understood, the same did not apply to the new matters.

43. Given that it assessed the Applicant as a high risk of sexual re-offending and a high risk of serious harm to the public, the Panel was obviously concerned at the unpredictable nature of the new offending, that the Applicant sought to account for this by reference to his intoxication at the time and demonstrated little or no insight into the link between the underlying patterns of thought and behaviour behind the index offending and the new offences.

44. Accordingly, the Panel accepted that further work (which it identified) needed to be completed in custody so as to enable the Applicant to develop internal controls and strategies to avoid such behaviour in future rather than relying solely on the external controls provided by the RMP.

45. Next, the Applicant relies on the apparent consensus that he would comply with licence conditions. Unfortunately, I do not find that this assists the Applicant to any great extent since his compliance did not prevent him from committing further offences in the community and the clear view of the Panel was that external controls alone would at this point be insufficient to protect the public from serious harm.

46. Finally, the Applicant argues that the one to one work recommended is irrational. I do not accept that submission since the Panel read and heard the evidence and found that, given the Applicant's inability to adequately identify the factors which led to his offending on licence, further work to explore relevant issues should be completed in closed conditions.

Decision

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

PETER H.F. JONES
23 November 2021