[2021] PBRA 166

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Application for Reconsideration by Marsh

Application

1. This is an application by Marsh (the Applicant) for reconsideration of a decision of an oral hearing panel which, on 1 November 2021, after a hearing on 18 October 2021, decided not to direct his release on licence and not to recommend his transfer to open conditions.

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 160 page dossier provided by the Secretary of State which included the decision reasons, the application for reconsideration and an email on behalf of the Secretary of State.

Background and current parole review

4. The Applicant is now aged 37. On 27 January 2009, when he was aged 24, he received a sentence of Imprisonment for Public Protection for two counts of s18 wounding with intent. He received no separate penalty for assault occasioning actual bodily harm, possession of a bladed article, possession of drugs, breaching a community order and failing to surrender to custody. The sentencing judge described the Applicant as a "*violent young man when in drink*".

5. His minimum term was set at 2.5 years less time on remand and expired on 5 April 2011.

6. During this sentence the Applicant has completed accredited programmes to address offending behaviour. Following an oral hearing in 2012, the Parole Board panel directed release.

7. After over seven years in the community his licence was revoked on 22 January 2020 but he was not returned to custody until 26 January 2021, after a year spent unlawfully at large. He was recalled after committing further offences including driving whilst over the prescribed limit and dangerous driving.

8. This was his first review by the Parole Board following his recall. His case was referred by the Secretary of State on 24 February 2021.

9. The case was directed to an oral hearing after consideration by a Parole Board member as part of the member case assessment process. The oral hearing took place by video link on 18 October 2021. The oral hearing panel heard evidence from the Applicant, his Prison Offender Manager (POM) and his Community Offender Manager (COM). The Applicant was legally represented throughout the hearing. The Secretary of State was not formally represented.

Request for Reconsideration

10. The application for reconsideration is completed on the relevant application form by the Applicant's legal representative and was received on 19 November 2021.

11. The Applicant seeks reconsideration on the grounds that the decision was irrational. In essence, the Applicant submits that the decision has been made on the basis of the failings of the Probation Service to monitor the Applicant effectively when he was in the community and their failure to recommend work required to address alcohol misuse in the community. Furthermore, the conclusion by the panel that the risk management plan submitted by the COM was not capable of managing risks in the community was irrational as it was not based on the risk the Applicant actually poses.

The Relevant Law

12. The panel correctly sets out in its decision dated 1 November 2021 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

13. 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)).

14. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

15. 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."

16. 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.

17. 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

18. The Secretary of State confirmed by way of email dated 24 November 2021 from PPCS on his behalf that he did not wish to make any representations in response to the application.

Discussion

19. I am reminded that the question for me is not whether a differently constituted panel might have come to a different conclusion but whether the conclusion this panel reached, and the basis for it, met the high test for irrationality or not.

20. Whilst the Applicant spent over seven years out in the community, it was not without incident as highlighted by the panel in its decision. In 2017 he had been convicted of two assaults with intent to resist arrest and possession of cocaine. In October 2019 he went on holiday without permission and received a verbal warning for that. The Applicant admitted that this had been an 'all inclusive' holiday and he had been drinking from the morning onwards, which led to him being ill on his return to the UK. He was then recalled for other further offending as detailed above and remained unlawfully at large for just over a year. Following recall, it also became known that the Applicant had been regularly drinking at licensed premises which was a repeated breach of his licence condition not to enter such premises without permission and he had moved in with his partner without permission which was also a breach of his licence. He also admitted regular use of illegal drugs. These had not been detected for some time (or even at all) by the Probation Officer who was tasked with monitoring him at the time.

21. The Applicant argues that he is being punished for the failings of the Probation Service for not picking up his licence breaches through sufficient monitoring. Inevitably, as time moves on following release, provided those on licence are doing well, supervision appointments become less regular and other aspects of monitoring or restriction may be lifted or reduced. This does not alter the fact that the person remains on licence and subject to the conditions stated within it. The Applicant is serving an indeterminate sentence of imprisonment for public protection and so his licence remains unless and until he applies for it be removed

(as he is entitled to do after meeting certain criteria). It is incumbent on the Applicant to continue to abide by the conditions and to engage with supervision, including not doing anything which undermines the purposes of supervision on licence which are to protect the public. It would be a nonsense to say that every offender recalled for breach of licence or poor behaviour can blame the Probation Service for their failure to manage them or monitor them sufficiently.

22. The Applicant further submits that the Probation Service failed to recommend work in the community to address alcohol misuse and this led to an irrational decision not to release. Essentially the Applicant is saying that this missing aspect of the risk management plan led to the panel concluding it was insufficient, and that was the failure of the Probation Service and not the Applicant. The Applicant goes on to say that the conclusion by the panel was that the risk management plan submitted by the COM was not capable of managing risks in the community rather than the risk the Applicant actually poses.

23. The panel is responsible for making its own risk assessment and evaluating the likely effectiveness of any risk management plan proposed. The panel must make up its own mind on the totality of the evidence, including evidence from the Applicant. The panel would be failing in its duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if it failed to do just that. As was observed by the Divisional Court in **DSD**, panels of the Parole Board have the expertise to do it.

24. Both the POM and COM gave evidence to the panel that, in their opinion, the Applicant needed to address his alcohol use. Despite this, they both supported re-release. In the decision letter the panel relayed some of the evidence given and this included the COM admitting that it was '*difficult to find offending behaviour work that addresses binge drinking*' but this appears to have been relevant to availability in both custody and the community. The panel highlighted that no specific work was included within the risk management plan for release, but it did include a condition to comply with any requirements from his supervising officer for the purposes of addressing his alcohol problems.

25. The panel analysed the risk management plan provided by the COM in section 7 and 8 of its decision. It is not the task of a Parole Board panel to create its own risk management plan, albeit the panel did discuss additional conditions of alcohol testing and alcohol tagging. Of course, it is also open to the Applicant to look at the plan provided and consider steps he can take to increase the robustness of the plan and play his part in managing his own risk. The panel's task is to consider whether the plan is capable of managing the risk that a person poses and included within that is whether the person is likely to comply with the plan. The panel concluded that it was not capable of managing the risks that the Applicant poses to members of the public whilst his alcohol use remains unaddressed. After hearing the evidence, the panel identified alcohol as a 'key risk factor' for the Applicant and concluded it had not been fully addressed. The panel disagreed with the witness that it could be addressed in the community.

26. The panel was evidently very concerned by the issues which had arisen in the community. I have considered the decision letter carefully, which details the reasons for its decision. The panel's assessment of the Applicant was that he did

not seem to appreciate how his alcohol misuse had increased the risk to others and was unable to see the risky situations he had been in. The panel was not convinced that he would abstain from drinking in the future. Furthermore, the panel's assessment was that the Applicant was not open and honest with the Probation Service whilst he was in the community. The panel did not accept that external measures alone could manage the risks given the Applicant had been drinking heavily and repeatedly breaching his licence conditions without the knowledge of the Probation Service. Those were matters within the control of the Applicant.

27. Ultimately, the panel considered the risk that the Applicant posed to be too high to meet the test for release. In fact, the panel went on to say that he had not reduced his risk sufficiently to warrant a recommendation for transfer to open conditions. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it, 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. This assessment cannot be said to be irrational given the evidence the panel had, including the evidence from the Applicant himself, which the panel is entitled to form opinions about and has made clear in its decision letter.

Decision

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

Cassie Williams
26 November 2021