[2021] PBRA 98

the Parole Board
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Application for Reconsideration by O'Neill

Application

1. This is an application by O'Neill (the Applicant) for reconsideration of a provisional decision by the Parole Board under Rule 25(1) of the Parole Board Rules 2019 (the 2019 Rules) that the Applicant was unsuitable for release (the Decision). The letter by which the Decision was communicated is dated 21 May 2021 (the Decision Letter).

2. I have considered the application on the papers comprising:
   a) A dossier of 508 numbered pages, including the Decision Letter and undated handwritten representations by the Applicant; and
   b) Written submissions by the Applicant's solicitors dated 9 June 2021 in which reconsideration is requested.

Background

3. In March 2006 the Applicant was sentenced to an indeterminate (life) sentence for murder. The minimum tariff expired in July 2020.

4. The Applicant was aged 21 when he received the sentence and he is now aged 36.

Current parole review

5. The Decision was made on the Secretary of State's referral of the Applicant's case to the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release.

6. The Decision was made by a panel of the Board that considered the Applicant's case at an oral hearing in May 2021 (the Panel). The Panel was comprised of two Independent Members of the Board and a Psychologist member of the Board. The oral hearing was conducted remotely due to constraints imposed by the coronavirus pandemic.

Application and response

7. The Applicant's submissions assert that the Decision is marred by irrationality and procedural unfairness.

8. By an email dated 23 June 2021, the Public Protection Casework Section notified the Board that the Secretary of State offered no representations in response to the Applicant's reconsideration application.

The Relevant Law

9. 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.

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.

12. 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 application of this test has been confirmed in previous decisions on applications for reconsideration under Rule 28: **Preston [2019] PBRA 1** and others.

Procedural unfairness

13. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result.

Consideration

14. It is asserted in the 9 June 2021 submissions that the Board has failed to apply the correct test to the Applicant's application for release and failed to consider adjourning the case for the risk management plan to be further developed. It is asserted that the result is that the decision is rendered irrational and procedurally unfair.

15. It is asserted in the 9 June 2021 submissions that detention of an indeterminate prisoner post tariff can only be justified on the grounds that their risk of serious harm is at a level which cannot be managed in the community. It is asserted that the decision reflects that the Applicant's risk can be managed in the community while residing at National Probation Service designated accommodation. It is asserted that the decision accepts that the Applicant does not pose an imminent risk of serious harm. It is asserted that the test for release has therefore been met and that the Applicant's application should have been granted, therefore the decision not to release is therefore irrational.

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16. The Board is empowered to direct the release of a prisoner serving an indeterminate sentence who is eligible to be considered by the Board for release if the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. The assessment of whether the protection of the public requires the confinement of such prisoner is properly conducted on the basis that the public needs to be protected from the prisoner for the duration of the prisoner's sentence, which is indefinite. The availability of any measures that could monitor, reduce and/or control the prisoner's risk will often be relevant factors. The imminence of any risk to the public that is posed by the prisoner will also often be relevant. In some cases a combination of such factors may be considered to be sufficient to protect the public against the risk that is considered to be posed by a particular prisoner notwithstanding that long term arrangements are as yet unknown, regarding accommodation for example.

17. In the Applicant's case, there is no finding by the Panel that risk to the public is likely to not be imminent in the community. There is also no finding that it is likely that the Applicant's risk could be managed in the community while residing at National Probation Service designated accommodation; that is described as '*possible…in the very short term*' with the caveat that professionals had assessed the risk as manageable as such on the basis that there would be clear signs of increasing risk, whereas the Panel noted that the Applicant had concealed a reliance on illicit substances in custody from professionals for several years. The reference in the Decision Letter to 'a risk management plan which does not provide assurance beyond the first few months of [the Applicant's] release' is not, in my consideration, a finding that it is likely that the Applicant's risk could be managed in the community while residing at National Probation Service designated accommodation.

18. It is further asserted in the 9 June 2021 submissions that, because the Applicant's risk was considered manageable in National Probation Service designated accommodation, consideration should have been given to adjourning the case to enable the risk management plan to be improved by the exploration of the possibility of a longer term accommodation in designated accommodation or a placement in a residential rehabilitation facility. It is stated that that course of action was mooted as a possibility in submissions during the hearing, and that the Community Offender Manager described the possibility as realistic. It is asserted that the Applicant was disadvantaged by deficiencies in the plan that was proposed to manage his risk to the public in the community that were occasioned by the approach taken by HM Prisons and Probation Service to his case. It is asserted that the Panel could have improved the Applicant's prospects of securing a placement in a residential rehabilitation facility by indicating that the Applicant's risk was considered manageable in National Probation Service approved premises. It is asserted that the failure to adjourn the case for those reasons renders the decision procedurally unfair.

19. The Board can only assess whether the protection of the public requires the confinement of such prisoner of the measures that could monitor, reduce and/or control the prisoner's risk that are proposed in any risk management plan that is presented to the Board by HM Prisons and Probation Service. It may be appropriate in certain cases for the Board to adjourn proceedings to explore the availability of additional measures, on the application of a party to the proceedings or, perhaps, of its own volition if the availability of an additional measure is obviously potentially material to the assessment. I do not consider that it would ever be appropriate for the Board to provide an indication

of an element of its assessment in advance of making the decision as to whether a prisoner is suitable for release.

20. There is no suggestion from the materials that there was an application by the Applicant to adjourn the proceedings to explore the possibility of longer term accommodation in designated accommodation or a placement in a residential rehabilitation facility. I do not consider that the availability of an additional measure could be said to be obviously potentially material to the assessment In the Applicant's case. I also do not consider that there is any finding in the Decision Letter that it is likely that the Applicant's risk could be managed in the community while residing at National Probation Service designated accommodation.

21. In his handwritten submissions, the Applicant makes the additional assertions that the Board was irrational in having regard to his anxiety as a risk factor at all and in having regard to an incorrect understanding that the Applicant had deselected himself from a therapeutic regime to help people recognise and deal with a wide range of complex problems. The Applicant also asserts that the Board was irrational in failing to have regard to the evidence of his ability to manage his anxiety and to manage substance misuse and mental health, and in failing to have regard to his motivation and work towards reducing his risk generally.

22. I do not consider that there is irrationality in the Decision as asserted by the Applicant. The understanding that the Applicant had deselected himself from the therapeutic regime rather than, as he asserts, being deselected after witnessing a murder is not a material aspect of the reasons that are stated in the Decision Letter. The Decision Letter reveals that the Panel had regard to the Applicant's considerable positive progress, but there was ongoing use of medication to manage opiate dependence and a relatively recent lapse into illicit drug use and consideration of the Applicant's anxiety as a risk factor was not irrational in the light of the evidence that that factor could lead him to aggression.

23. The Decision Letter highlights the Applicant's substantial custodial period served which started when he was 21, meaning that he had never established an adult life in the community, his continuing anxiety which appeared sometimes to manifest in threats to staff and other emotional volatility, an absence of any employment history that could support reintegration into the community, continued reliance on medication to manage opiate dependence, the limitations of the risk management plan and the absence of tested pro-social personal support outside of professional networks. The Decision Letter reveals that the combination of those factors led the Panel to the assessment that satisfied that it remained necessary for the protection of the public that the Applicant should be confined.

24. The Applicant also asserts that the Board acted unfairly in not permitting his key worker to give evidence but there is no indication that the Applicant applied for permission to call that person as a witness in accordance with the relevant provisions of the 2019 Rules and it is not obvious from the materials that that person's oral evidence could potentially have been material to the outcome of the case.

Decision

25. The Decision is not marred by irrationality or procedural unfairness. The application for reconsideration is, accordingly, refused.

Timothy Lawrence
9 July 2021