

[2019] PBRA 67

Application for Reconsideration by Stephenson

Application

1. This is an application by Stephenson (the Applicant) for reconsideration of a decision not to direct her release made on 28 October 2019, following an oral hearing on 21 October 2019. The Panel did not direct release but recommended a move to open conditions.

Background

2. The Applicant is serving an Indeterminate sentence for Public Protection (IPP). Her tariff expired in August 2009 and her index offence was arson of the rented flat in which she was then living. She had three previous convictions for similar offences for which she had received custodial sentences, including a determinate sentence of 7 years.

Request for Reconsideration

3. The application for reconsideration is dated 29 October 2019.

Current parole review

4. In October 2018 the Secretary of State referred the Applicant's case to the Parole Board for her 8th review. The Panel were asked to consider whether to direct the Applicant's release. By reason of the revision of the 2014 policy, the Panel were also required to consider, in the event that they did not direct release, whether to recommend that the Applicant be moved to open conditions. The Panel determined that the release test had not been met but recommended a move to open conditions.

The Relevant Law

5. Rule 25 (decision by a panel at an oral hearing) and Rule 28 (reconsideration of decisions) of the Parole Board Rules 2019 apply to this case.
6. Rule 28(1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case.



7. In **R (on the application of 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."

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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

Discussion

8. The task of the Panel was, first, decide whether the release test had been met and, secondly, if it was not satisfied that the test had been met whether it was appropriate in all of the circumstances of the case to recommend to the Secretary of State that the Applicant be moved to open conditions.
9. Reconsideration Assessment Panels are empowered to reconsider decisions as to whether a prisoner is suitable or unsuitable for release. A recommendation that a prisoner is or is not suitable for a move to open conditions is final and not within the scope of the reconsideration process (see Parole Board Rules 2019 rules 19 (1) (a) and (b), 21 (7), 25 (1) and (5) and 28).
10. The Panel identified carefully the risk factors and the protective factors which applied to the Applicant. It noted that when she was moved to open conditions in 2015 her behaviour demonstrated that some of her risk factors were still live, evidenced by her taking alcohol, engaging in sexual behaviour with a stranger and not returning from temporary release during which this behaviour had occurred. The Panel recognised that she had done further work since 2015 and that progress had been made, although work remained to be done in some areas. At a review in 2018, a panel (which had declined to direct release) had observed that there was evidence of offence paralleling, with which the Panel agreed. The Panel went on to identify further and more recent behaviour which demonstrated a lack of emotional control and was considered by the Panel to amount to further instances of offence paralleling. Her evidence as to this is cited in the Decision Letter: *"When asked why you didn't put your learning into practice at these times, you said at times you feel overwhelmed with situations and feel an intense rage."* The Panel, having considered the materials contained in the dossier and having heard oral evidence, was unable to agree with the assessment of the Offender Manager that the recent incidents could be regarded as a *"blip"* and that they were born out of frustration rather than being instrumental, like the index offence.



11. The Offender Manager, the Offender Supervisor and the Psychologist supported release in their reports. The Offender Manager and the Offender Supervisor repeated their recommendation in their evidence but the psychologist, having read and heard about some of the Applicant's recent behaviour, felt unable to provide a recommendation without further assessment; she recognised a risk that the Applicant could cause harm, although not necessarily by fire-setting. The Applicant's legal representative asked the Panel to continue with the hearing and not to adjourn for such an assessment to take place; the Panel agreed.
12. The Panel considered the Risk Management Plan and the additional licence conditions proposed within it. They included a condition of residence at designated accommodation under a regime designed and supported by psychologists to help people recognise and deal with their problems, which would have as its objective (or part of its objective) consolidation of the Applicant's learning. The Panel considered that the Risk Management Plan formed the basis of an effective plan to manage the Applicant's risk in the community but did not consider that she met the test for release. In addition, there was no evidence about what the Applicant would be expected to engage in at designated accommodation, including whether there would be one-to-one work with a psychologist. The relevance of this can only be that even if the Panel had considered that the release test was met, it would have been unwilling to direct release, at least without further information about this aspect of the Risk Management Plan.
13. In reaching its decision as to release, the Panel acknowledged that the Applicant had made progress in the time since the last review but considered that there was a need to consolidate learning and to test it. No complaint is made as to this, not least because it was common ground between all witnesses that this was necessary. The question was whether this could take place in the community, only possible if the release test was met. The Panel also took account of other factors, including offence-paralleling behaviour, lack of emotional support and unwillingness to seek support. It is not suggested that these were not relevant factors. Nor is it suggested on the Applicant's behalf that any irrelevant considerations were taken into account. The Panel took into account the opinions of the Offender Manager and the Offender Supervisor, together with the qualified view of the Psychologist, but considered they were not persuasive. This was a decision which the Panel, having considered all of the documentary material and oral evidence, was fully entitled to come to and which cannot be regarded as irrational.
14. The Applicant submits that the Panel's decision was erroneous, citing parts of the evidence which supported the application for release and the arguments in favour of release. These were all considered by the Panel and are dealt with at least sufficient clarity in the Decision Letter. It is submitted to this Reconsideration Assessment Panel that undue weight was given to some factors and insufficient weight to others but it is not contended (and is not arguable) that in making these assessments the Panel strayed beyond the bounds of rationality.
15. In short, by identifying relevant factors, avoiding taking into account irrelevant factors and giving such weight as it rationally considered appropriate to relevant



matters, the Panel discharged its function correctly and thus reached a decision which cannot be characterised as irrational.

16. The principal contention on behalf of the Applicant is that the recommendation to move the Applicant to open conditions was wrong. As earlier indicated, this is not a matter for this Reconsideration Assessment Panel. In any event, here again the Applicant's submissions consist of repetition of parts (but not all) of the material in the dossier and of the arguments put before the Panel as to why a move to open conditions was undesirable. If it is submitted that because the Panel considered the Applicant's risk manageable in open conditions, it should equally have found her risk manageable in the community, such a submission would be ill-founded and illogical. Decisions as to release are governed by the strict statutory test. Recommendations as to progressive moves to open conditions trigger other and different considerations and do not depend on the release test being met.

Decision

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

Alistair McCreath
29 November 2019

