

[2022] PBRA 92

Application for Reconsideration by O'Keefe

Application

1. This is an application by O'Keefe ('the Applicant') for reconsideration of the decision of a panel of the Board ('the panel') which on 10 June 2022, after an oral hearing on 6 June 2022, issued a decision not to direct his release on licence and not to recommend that he should be transferred to an open prison.

Background, and history of the case

2. The Applicant is aged 47 and has a significant criminal record including a number of convictions for violent offences. He is now serving life imprisonment for his part in a murder committed with another man when he was aged 26. He was convicted after a contested trial in the course of which his co-defendant pleaded guilty.
3. The Applicant was sentenced on 20 June 2002. His minimum term ('tariff') was set at 12 years less time served on remand. It expired in December 2013.
4. After a successful period in open conditions the Applicant was released on licence on 26 March 2018 but his licence was revoked on 29 December 2020 and he was returned to prison on 2 January 2021.
5. The revocation of his licence was the result of an incident reported to probation by his partner's daughter in which he was said to have smashed his partner's mobile phone, run at her with a knife, threatened to kill her and threatened to burn her house down. Neither his partner nor her daughter wished to make statements to the police, and no charges were brought against the Applicant. He has admitted that there was a verbal argument but denies the above allegations.
6. Following the Applicant's recall his case was referred by the Secretary of State to the Parole Board to decide whether to direct his re-release on licence. If

the panel did not direct his release on licence it was invited to advise the Secretary of State about his suitability for a move to open conditions.

7. On 24 March 2021 the case was sent for an oral hearing and in due course it was allocated to the panel. On 8 September 2021 the hearing commenced but was adjourned for further evidence to be obtained. The adjourned hearing eventually took place on 6 June 2022.
8. At the hearing oral evidence was given by the Applicant and by
 - a prison psychologist
 - an independent psychologist
 - the official prospectively responsible for managing the Applicant's case in the community (A) and
 - the official responsible for managing his case in prison (B).
9. The independent psychologist recommended that the Applicant should be released on licence to a probation hostel, but A and the prison psychologist both recommended that he should remain in a closed prison to complete further risk reduction work. B did not make any recommendation.
10. As indicated above, the panel decided not to direct the Applicant's release on licence and not to recommend that he should be moved to an open prison.
11. This application for reconsideration of the panel's decision was made on 1 July 2022 by the Applicant's legal representative on his behalf.
12. I am one of the members of the Board who are authorised to make decisions on reconsideration applications, and this case has been allocated to me.

The Relevant Law

The test for release on licence

13. The test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public. This test was, as one would expect, correctly set out by the panel at the start of its decision.

The rules relating to reconsideration of decisions

14. Under Rule 28(1) of the Parole Board Rules 2019 (as amended) a decision is eligible for reconsideration if (but only if)
 - (1) it is a decision that the prisoner is or is not suitable for release on licence and
 - (2) one of more of the following three grounds is established:

- it contains an error of law
- it is irrational
- it is procedurally unfair.

15. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by

- a paper panel (Rule 19(1)(a) or (b)) or
- an oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or
- an oral hearing panel which makes the decision on the papers (Rule 21(7)).

16. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. It is made on the ground of irrationality. There is no suggestion of error of law or procedural unfairness. The decision not to recommend a move to an open prison is not eligible for reconsideration.

The test for irrationality

17. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin) (the "Worboys case")**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It stated 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."

18. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.

19. 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.

20. The Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see **Preston [2019] PBRA 1** and other cases.

21. It has been established that a decision may be regarded as irrational where the panel has failed to give sufficient reasons for its decision. The importance of giving reasons was reiterated in **R (on the application of Stokes) v Parole Board [2020] EWHC 1885 (Admin)**. In that case the court cited the following explanation given by Lord Carnwath in **Dover District Council v CPRE Kent [2017] UKSC 79** for the need to give reasons in public law decision-making.

"I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the [decision maker] should be disclosed... It is to be noted that a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so to make effective the right to challenge the decision by judicial review."

22. It follows that a panel of the Parole Board must provide sufficient reasons to explain its logic and how its conclusion follows from the evidence put before it. There should not be an *"unexplained evidential gap or leap"*: see the decision of Mr Justice Saini in **R (on the application of Wells) v Parole Board [2019] EWHC 2710 (Admin)**.

Request for Reconsideration

23. The Applicant's legal representative makes the following representations in support of the application for reconsideration of the panel's decision:

- There were two expert witnesses who had provided reports and oral evidence for the Applicant's hearing: the prison psychologist and the independent psychologist.
- The prison psychologist did not recommend release but the independent psychologist did.
- The panel concluded that the Applicant should remain in custody but did not provide sufficient reasons for rejecting the expert evidence of the independent psychologist and his recommendation for release.
- It is noted in **Wells** that the duty to give reasons is heightened when a panel of the Parole Board is rejecting expert evidence.
- The panel summarised the evidence of the independent psychologist in its decision but provided no reasons for rejecting his evidence or for preferring the evidence of other witnesses.
- The reasons given as to why the panel found that the Applicant did not meet the test for release make no reference to why the independent psychologist's expert evidence or recommendation was rejected despite referring to it again and acknowledging that release was being recommended by that expert.

The Secretary of State's position

24. By e-mail dated 21 July 2022 PPCS on behalf of the Secretary of State stated that he offers no representations in response to the application.

Documents considered

25. I have considered the following documents for the purpose of this application:
- The dossier provided by the Secretary of State for the Applicant's case, which now runs to page 354 and includes a copy of the panel's decision letter;
 - The representations submitted by the Applicant's legal representative in support of this application; and

- The e-mail from PPCS stating that the Secretary of State offers no representations in response to this application.

Discussion

26. It was apparent to me on reading the dossier and the panel's decision that this was a difficult case where the views of professional witnesses could and did reasonably differ and the panel's decision was likely to be finely balanced. The arguments advanced by all the professional witnesses (including A, who is an expert witness just as the two psychologists are) carried a good deal of weight. The panel was therefore required to make a careful assessment of the strength of those arguments in order to decide whether the test for release on licence was met.
27. In most if not all the cases in which the ground of insufficient reasons has been upheld the panel's decision has been contrary to the unanimous recommendations of all professional witnesses. However, it is certainly true that the duty to give reasons is not limited to those cases.
28. I am afraid that I cannot agree that the panel failed to give sufficient reasons for its decision in this case. Equally I cannot find that any of its reasons can be faulted in any way.
29. In the 'Conclusion' section of its decision the panel set out the matters which led it to conclude that the test for release was not met. These were as follows:
- (a) The Applicant's index offence was of the utmost seriousness and resulted in the death of the victim.
 - (b) The Applicant has a history of violent offending and is assessed as presenting a high risk of committing serious harm.
 - (c) Whilst there were some clear positives regarding his time in the community, there were also repeated concerns regarding drug and alcohol use and reports of violence towards his partner and associates as well as a conviction for assaulting Police.
 - (d) He has not since his recall engaged in any further interventions to address the issues that occurred in the community.
 - (e) He takes limited responsibility for his behaviours that led to recall.
 - (f) He lacks the internal controls to recognise and manage future risks.
 - (g) He has not been consistent regarding his intentions for future drug and alcohol use.
 - (h) There are conflicting accounts regarding the future of his relationship.
 - (i) All professionals agree that all of these are key risk areas which, if active, could lead to serious harm being caused.
 - (j) The Applicant has not always evidenced a capacity to be open and honest and he has a history of non-compliance.
30. There was ample evidence to support each of these findings, which clearly justified the panel's decision. It is unnecessary to refer to the evidence in detail, but it is perhaps worth referring to one point. The Applicant's relationship with his partner has clearly been volatile and problematic and an area of risk. They have continued to be in daily telephone contact. The Applicant told the panel that their relationship

had ended, that they were just friends and that he had no intention of resuming an intimate relationship with her. However, A told the panel that he had spoken to her on the day of the hearing when she clearly expressed that they planned to re-establish their relationship on the Applicant's release.

31. The panel did not expressly state in its decision that for these reasons it was rejecting the independent psychologist's evidence, but it was absolutely clear that for those reasons it preferred the evidence and recommendations of the other professional witnesses.
32. In the light of the above I am afraid I cannot accept the legal representative's contention that the panel failed in its duty to explain the reasons for its decision. On the contrary its decision was conspicuously clear and well-reasoned. Other panels might have reached a different conclusion in this difficult case but there is no basis on which this panel's decision can be regarded as irrational.

Decision

33. For the reasons explained above I must dismiss this application. The panel's decision will therefore become final.

Jeremy Roberts
26 July 2022