[2019] PBRA 86

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Application for Reconsideration by Anokwuru

Decision of the Assessment Panel

Application

1. This is an application by Anokwuru (the Applicant) for reconsideration of the decision of a two-member panel not to direct his release, following an oral hearing which convened on 6 November 2019.

2. I have considered this application on the papers. These were the dossier, the provisional decision letter of the panel dated 11 November 2019 and the application for reconsideration dated 29 November 2019. The Secretary of State did not wish to offer any representations.

Background

3. The Applicant is now 29 years old.

4. In 2008 15 year old girl **A** alleged she had been raped by the Applicant, who was then aged 18. He was arrested but not charged.

5. In May 2008 the Applicant raped 28 year old woman **B**. He was convicted by a jury of this index offence in August 2011.

6. In August 2010 the Applicant perpetrated a sexual assault by penetration against 17 year old girl **C**. He was convicted by a jury of this offence in March 2011.

7. Pre-sentence reports were prepared for both these matters in 2011. These early reports contain the only assessments of the Applicant's risk in the dossier that pre-date his release on licence in 2016.

8. In September 2011 the Applicant was given an extended sentence for the index offence. The sentence comprised a custodial term of 10 years and an extended licence period of 5 years. The judge's sentencing remarks are not in the dossier, but the passing of this type of protective sentence required the judge first to find that the Applicant was a dangerous offender as defined by statute, i.e. he posed a significant risk of serious harm occasioned by him committing further sexual offences. The proven facts of the index offence and the Applicant's antecedents and the results of the structured risk assessment in the pre-sentence report amply justified such an adverse judicial finding.

9. As the law on extended sentences then stood, the Applicant had to be conditionally released on licence at the halfway point of the custodial term in February 2016. Throughout this initial period in custody he continued to deny that he had committed any sexual offence and hence he had done no core risk reduction work as he was not a candidate for the programmes then available. His risk of serious harm to the public at the point of release was assessed as high. It was later reduced by his Offender Manager to 'medium' after he had spent some time in the community, at first residing in Probation designated accommodation and then with his mother.

10. On 5 September 2018 19 year old woman **D** alleged she had been raped by the Applicant. He was acquitted of this charge by a jury in March 2019.

11. On 12 September 2018 the Applicant was recalled to prison. He accepts that he breached his licence by not informing his supervising Offender Manager of the relationship he had developed with woman **D**.

Request for Reconsideration

12. The request for reconsideration contends that the provisional decision of the panel which convened on 6 November 2019 not to direct release was both irrational and procedurally unfair.

Current parole review

13. After recall, the Secretary of State referred the Applicant's case to the Parole Board for his first review. If release was not directed by the panel at that or subsequent parole reviews, the Applicant would remain in prison until his extended sentence expired in February 2026. The 'at risk' period for the attention of the panel when it convened on 6 November 2019 was therefore 6¼ years.

14. The panel heard oral evidence from the Applicant, his Offender Supervisor, his Offender Manager and a Prison Psychologist. The Applicant was legally represented at the hearing.

15. The panel explored closely with the Applicant the allegations of girl **A** and woman **D** but made no findings of fact. The lack of core risk reduction work prior to his initial release on licence was noted and compared with the newer programmes that were now said to be available, if the Applicant was motivated to participate in them and assessed as suitable. The panel considered the several structured risk assessments within the dossier and made its own assessment that the Applicant still posed a high risk of serious harm to the public. The risk of sexual re-offending was not found to be imminent.

16. The Offender Supervisor and Offender Manager recommended release, whilst the Prison Psychologist did not.

The Relevant Law

17. 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.

18. 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.

19. 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 paragraph 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.

20. The Courts have in the past refused permission to apply for judicial review where the decision would be the same even if the public body had not made the error.

21. Section 31(3C) to (3F) of the **Senior Courts Act 1981** now provides that the Courts must refuse permission to apply for judicial review if it appears to the Court highly likely that the outcome for the claimant would not have been substantially different even if the conduct complained about had not occurred. The Court has discretion to allow the claim to proceed if there is an exceptional public interest in doing so. See paragraph 5.3.5 of the **Administrative Court Guide to Judicial Review 2019**.

Discussion

22. The information within the dossier of two other allegations of harmful behaviour on the part of the Applicant was plainly relevant to his first parole review. They were accusations of rape, the same charge as his index offence. The panel had to evaluate the cumulative weight to be given to these unproven complaints in the context of the evidence as a whole and then either (a) choose to disregard either or both complaints or, (b) make findings of fact on the balance of probabilities or, (c) make an assessment of the allegations to decide whether how far to take them into account as part of the parole review. The allegations and the circumstances around them can form a basis for testing the reliability of a prisoner's evidence. The wider circumstances of the allegation might also give rise to areas of concern. This exercise of judgment requires a panel to draw on its skills and experience to

form a view about the level of concern that should attach to the allegation(s) and how that then impacts on the parole review.

23. In section 4 of the provisional decision letter, the panel listed several potential risk factors but added the caveat that, because the Applicant maintained he was innocent of any sexual wrongdoing, it could only speculate about his actual areas of risk as they had not been formally identified whilst he was in custody. This was an appropriate warning to those responsible for the Applicant's management and future panels that his risk profile was incomplete and warranted further study.

24. In section 5 of the provisional decision letter, the panel found that the Applicant's own account of the events which led to woman **D**'s complaint against him was utterly lacking in credibility. Paragraph 13 of the application submits that this was an unfair conclusion to reach without full details from the court. I consider that the dossier contained enough disclosure from the court case to equip the panel with the evidence it needed fairly to form that view of the Applicant's positive case. There was a detailed police case summary and full transcripts of woman **D**'s video-recorded interview and the Applicant's interview under caution on the same day. He described to the police consensual sexual activity and its context. There is nothing in the papers to suggest that the prosecution and defence cases changed between those contemporaneous rival statements and the trial six months later.

25. Paragraphs 8 and 9 of the application submit that it was unfair for the panel not to explore more fully with the Offender Manager and, if necessary, to adjourn to clarify the availability of accredited risk reduction work in the community and to assess the Applicant's suitability for the most appropriate course in that setting. I do not agree with this criticism of the panel's conduct of the hearing and its summation of the evidence on this point in section 7 of the provisional decision letter. The primary duty of the panel is to make the judgment asked of it in its terms of reference from the Secretary of State. It is for the parties to gather and present the evidence which will help the panel perform that task. It is in the interests of the prisoner whose case is in front of the panel, those waiting behind him for their hearings and the general public that there should be a timely determination of each review. It was open to the Applicant's legal representative to fill by supplementary questions any perceived gap in the panel's exploration of the matter with the Offender Manager. If the answers of the witness did not settle the issue, the Applicant's legal representative could have asked the panel that the hearing be paused whilst the Offender Manager made a telephone enquiry from the prison office, or even adjourned part-heard. These options were not pursued on the day.

26. Paragraphs 7 and 10 of the application argue that it was irrational not to direct release when reporting witnesses and the panel had found that the Applicant did not pose an <u>imminent</u> risk of sexual re-offending. It is said that this means that his risk was at a level that could be managed in the community. I find this to be too narrow a basis for the application of the test for release. The 'at risk' period for the attention of the panel when it convened was 6¼ years. The panel was entitled to find that the draft risk management plan was not sufficiently robust to manage the Applicant's assessed high risk of sexual re-offending (and consequential serious harm) between now and the expiry of his sentence in 2026.

27. The panel explained in the provisional decision letter how it had analysed, weighed and balanced the competing views and facts. It clearly set out how the serious sexual allegations of girl **A** and woman **D** gave rise to risk-related concerns that deserved some weight and how these had therefore impacted upon the making of its decision. The conclusion is a succinct and well-rounded summation of the relevant matters. It was correctly focused on risk throughout. The panel was entitled to prefer and adopt the recommendation of the Prison Psychologist for the full reasons it gave in the provisional decision letter. The legal test of irrationality is a very strict one. This case does not meet it.

Decision

28. The complaints of irrationality and procedural unfairness on the part of the panel are not sustained on the papers before me.

29. Accordingly, this application must be dismissed.

Anthony Bate
24 December 2019