

[2020] PBRA 104

Application for Reconsideration by Jackson

Application

1. This is an application by Jackson (the Applicant) for reconsideration of a decision by a panel of the Parole Board (the OHP) which, following hearings on 5 June and 11 June 2020, did not direct his release.
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. This is an eligible case.
3. I have considered the application on the papers. These are the application for reconsideration prepared by the Applicant's legal representatives, the Decision Letter (the Decision) which is incorrectly dated 8 June 2020 and the contents of the dossier.

Background

4. The Applicant, who is now 39 years of age, was on 10 July 2009 sentenced to Imprisonment for Public Protection for an offence of inflicting grievous bodily harm. The minimum term set by the Judge was one of three years and 229 days, which sentence expired on 25 February 2013. He was 28 years old when he committed the index offence.
5. The Applicant has a large number of previous convictions. Unprovoked violence directed at strangers has been a theme in his offending.
6. The Applicant was released following an oral hearing on 5 November 2018 and he was recalled five months later, on 4 April 2019.

The Relevant Law

Parole Board Rules 2019

7. 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)).

8. 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

9. 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."

10. 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.
11. 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 Solicitor's Representations

12. The grounds for seeking a reconsideration on the basis of irrationality are as follows:
 - (i) The OHP's Decision is mis-dated 8 June;
 - (ii) The OHP failed to take sufficiently into account that there was no evidence of alcohol misuse nor offending by the Applicant while on licence prior to his recall;
 - (iii) The OHP failed to give sufficient weight to the fact that the Applicant's risk of violence was not imminent;
 - (iv) Insufficient weight was given by the OHP to the fact that the Applicant had been compliant with the terms of his licence for five months prior to his recall;
 - (v) It is not accepted that the Risk Management Plan is properly or fairly described by the OHP as being "*reduced and skeletal*"; and
 - (vi) The OHP failed to apply the correct legal test for a move to open conditions.

The reply on behalf of the Secretary of State

13. The Secretary of State has indicated that he makes no representations in respect of this application.

Discussion

14. While not specifically pleaded as a ground for reconsideration it is implicit in the representations made on behalf of the Applicant that the OHP fell into error in not following the recommendations of the majority of the professional witnesses who were in favour of release into the community.
15. The decision in **R (ex parte Wells) v The Parole Board [2019] EWHC 2710 (Admin)** contains helpful guidance on the correct approach to deciding whether a decision made by a panel in the face of evidence from professional witnesses can be regarded as irrational. It is a decision I am bound to follow.
16. It is suggested in **Wells** that rather than ask the simple question, "*was the decision being considered irrational*", the better approach is to test a panel's ultimate conclusions against the evidence before it and to ask whether the conclusions can be safely justified on the basis of that evidence, while giving due deference to the panel's experience and expertise.
17. Panels of the Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessment and to evaluate the likely effectiveness of any risk management plan proposed. If a panel is going to depart from the recommendation of an experienced professional it is important it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions.
18. In applying the guidance set out in the case of **Wells** to this case I must examine carefully the reasons expressed by the OHP in rejecting the views of three of the four professionals that the Applicant's risk could be safely managed in the community and that his incarceration was no longer necessary.
19. I turn to consider the specific grounds and in doing so I shall follow the numbering in paragraph 13 (i) to (vi):
 - (i) The date of the Decision recorded as being 8 June 2020 is clearly an error upon which nothing turns. It does not found a ground for a reconsideration.
 - (ii) It is clear from the Decision that the Applicant's recall to prison was based on more than just the issues of alcohol misuse and offending behaviour. The OHP noted several other risk factors, among them his problems with coping and lack of emotional resilience. The OHP observed, to the credit of the Applicant, that prior to recall he had engaged well in supervision; it also took into account evidence that his behaviour was reported to have begun to deteriorate and he had missed appointments with his key worker. The panel referred to the views of one of the professional witnesses, who did not suggest his

conduct on licence was indicative of the risk of further violence but what gave cause for real concern was his emotional resilience and management. In his own evidence to the OHP, the Applicant accepted his recall was appropriate and that things had begun to unravel for him, while denying that he used drugs or alcohol. I am entirely satisfied that the OHP took into account all relevant matters regarding the Applicant's conduct over a period of five months when reaching their conclusion that the recall was appropriate.

- (iii) The OHP accepted in terms that the risk of violence presented by the Applicant was not imminent. However, it went on to explain in some detail that it was concerned that within a relatively short time of being in the community he had begun to have difficulty in managing himself and his relationships. What is more, the OHP found that he was not being open with professionals and there were signs that he was not coping well with stress. Clearly the OHP reached the conclusion that albeit there was no evidence of offending, nor of imminent risk, there was nonetheless a clear link between his deteriorating behaviour leading to potential alcohol consumption which in turn would increase the risk of violent conduct. In my judgment the OHP paid very careful attention to the evidence that the risk of serious violence was not regarded as imminent and reached an appropriate and fair conclusion having taken all relevant matters into account.
- (iv) Throughout the Decision, the OHP returned time and again to matters that weighed in favour of the Applicant and pointed towards at least some compliance. For example, the apparent absence of the misuse of alcohol and drugs; the absence of any offending, his general good engagement with supervision at least until the middle of March when things began to deteriorate; his behaviour in prison and so on. In addition, the OHP accepted that it had been confirmed that he had not resumed a relationship with his former partner. The complaint in this ground is that insufficient weight was given by the OHP to his compliance with the terms of his licence. I disagree, in my judgment proper and full attention was given and fair conclusions were reached by the OHP in respect of a variety of matters associated with his compliance. Nonetheless, as they were entitled to do, the OHP ultimately reached the conclusion that the Applicant did not meet the test for re-release into the community for reasons that were examined and explained in considerable detail.
- (v) It is submitted in support of this ground that the OHP were not entitled to describe the risk management plan as being "*reduced and skeletal*" and to say so was unfair on the Applicant. A careful reading of the Decision as a whole reveals, in its evaluation of the effectiveness of the risk management plan and in its conclusions, that the OHP placed particular reliance upon the following:
 - (a) If re-released, the Applicant would have been subject to the same licence conditions as previously;
 - (b) Due to the changes in practice brought about by the advent of Covid-19, designated accommodation for released prisoners were not conducting drug and alcohol testing;
 - (c) One of the professional witnesses supporting release was of the view that the proposed risk management plan was not robust enough;

- (d) That the concerns of the professionals were that more support and intervention was necessary; and
- (e) The OHP was particularly concerned that the risk management plan remained largely as it had been when the Applicant was last released but was, in the light of the current circumstances, (i.e. the Covid outbreak) "*reduced and skeletal*" by which it clearly meant that the usual resources and services which the professionals agreed were essential to help and support the Applicant could not be provided due to the pandemic. With all due respect, this submission is misconceived.

(vi) I can take this final ground very shortly. The OHP, in my judgment, set out clearly and accurately the appropriate test for release and for a move to open conditions. Having carefully considered and refused release the OHP went on as it was required to do by the terms of the referral to carefully consider the question of a move to open conditions, which it recommended and which it justified and explained.

20. Whether considered individually or together, the matters put forward on behalf of the Applicant in support of his application for reconsideration of this decision have failed to satisfy me that this case meets the legal test for either irrationality and/or unfairness.

Decision

21. This application for reconsideration is dismissed.

Michael Topolski QC
4 August 2020