

[2020] PBRA 105

Application for Reconsideration by Boothby

Application

1. This is an application by Boothby (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 8 July 2020 not to direct release nor to recommend a transfer to open prison.
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.
3. I have considered the application on the papers. These are the dossier including the decision letter amounting to 573 pages and the written submissions in support of the application.

Background

4. The Applicant, then aged 56, pleaded guilty to a series of 26 sexual offences committed against children spanning a period of 27 years. On the 16 November 2011, he was sentenced to an indeterminate sentence of imprisonment for public protection with a minimum period to serve of eight years (less time on remand) before he was eligible for parole.
5. The minimum period expired on the 13 July 2019.

Request for Reconsideration

6. The application for reconsideration was received on the 15 July 2020.
7. The grounds for seeking a reconsideration, which are based on irrationality, are as follows:
 - (a) The decision not to direct release was irrational considering the weight of evidence supporting release; the professional witnesses all recommended release. The principal reasons for the witnesses recommending release were (i) their assessment that the Applicant's risk was not imminent and (ii) there was no further core risk reduction work for the Applicant to undertake;
 - (b) The risk management plan was sufficiently robust to manage the Applicant's risk in the community;



- (c) The panel failed to apply the correct legal test for release; and
- (d) The panel failed to apply the correct legal test for recommending a transfer to open conditions.

Current parole review

- 8. The Secretary of State referred the case to the Parole Board in October 2018.
- 9. An oral hearing listed for September 2019 was adjourned to enable a psychological risk assessment of the Applicant to be completed.
- 10. On the 26 June 2020, a three-member panel heard evidence from a prison psychologist, the Applicant's Offender Supervisor, his Offender Manager and from the Applicant.

The Relevant Law

Parole Board Rules 2019

- 11. 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)).
- 12. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28 - see **Barclay [2019] PBRA 6**.

Irrationality

- 13. 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."

- 14. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: *"It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship."*
- 15. It is an insufficient basis for a challenge to a panel's decision simply to put forward a reasonable, alternative conclusion consistent with the evidence, because as Lord



Hailsham remarked in **Re W (An Infant) [1971] AC 682** "Two reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their right to be regarded as reasonable."

The reply on behalf of the Secretary of State

16. The Secretary of State did not make any representations in response to the application for reconsideration.

Discussion

17. The three professional witnesses supported release and so the panel disagreed with each witness.

18. The decision letter set out in some detail the panel's assessment of their evidence.

19. In her report dated the 15 November 2019 the Psychologist did not support release and recommended the Applicant completed a particular piece of offending behaviour work whilst in custody.

20. The Psychologist expressed concern that, given that the Applicant had offended over a long period time, his strategies for managing his sexual problem were not detailed and had not been practised.

21. The Applicant was assessed for the recommended offending work but was found unsuitable. The reason for this was that he did not express an active sexual interest in children.

22. The Psychologist prepared an addendum report dated the 19 June 2020. It followed that her professional anxieties expressed in November 2019 remained and additionally, the work she had recommended had not been done.

23. Nevertheless, the Psychologist now supported release although she still expressed anxiety about the Applicant's limited strategies, particularly bearing in mind he would be exposed to more triggers to offending in the community than in custody.

24. In her evidence, the Psychologist accepted that, as the professionals had no information about whether the Applicant was having unhealthy sexual thoughts, it was unclear what strategies he would use to manage those thoughts.

25. The Offender Supervisor supported release but in her evidence said she was concerned the Applicant might be suppressing any sexual thought; the risk was that if the Applicant did not acknowledge he was having these thoughts, he would not be able to manage them.

26. Perhaps the crucial sentence in the decision letter identifying this central problem appears at page 4: "*The [Offender Supervisor] said that [the Applicant] had a theoretical understanding of [his] risks, but she was concerned [the Applicant] was 'not really acknowledging them in real terms' adding that [he] needed to acknowledge any thoughts because currently [he] was reluctant to talk about [his] index offences, why they happened or any ongoing sexual attraction to children*".



27. The Offender Manager had taken responsibility for the case only in March 2020, had been able to speak with Applicant only by telephone and had not been able to discuss the index offending in any depth with him. Understandably, she was influenced by the recommendations of the Psychologist and the Offender Supervisor.
28. The Applicant chose to give evidence. It would appear the panel found him uncommunicative in respect of crucial areas of his offending, saying he could not remember, or he did not know why he had acted in the way he had. He was extremely vague about whether he had been sexually attracted to his victims.
29. He also claimed the last time he had had a sexual thought was in 2011. He said he suppressed all sexual thoughts, healthy as well as unhealthy, but could not say why.
30. The decision letter revealed that the panel entertained deep anxieties about a number of matters including the following:
- (a) The Applicant was still using the same strategies to manage his sexual problem he had used when he was offending, and the strategies were plainly ineffectual;
 - (b) The Applicant had no insight into his offending or what triggered his behaviour;
 - (c) In his evidence the Applicant continued to minimise and deflect responsibility for what had happened;
 - (d) The Applicant had not yet done work with professionals to help him develop insight; and
 - (e) The Applicant's extended family was a factor, potentially important, but not yet fully understood by the professionals: the Applicant's victims had been ostracised which raised anxiety about the sort of influence the extended family might exercise.
31. In **Benson [2019] PBRA 46**, Sir John Saunders observed at paragraph 7 "*There are two matters which apply generally to all these applications. First, it is for the panel to assess the weight to be given to any piece of evidence, including the opinion as to risk given by the professional witnesses. It is for the panel to test the assessment and look at the reasons for it. So, even in a case where every witness is supporting release, it is for the panel to make their assessment taking into account all the evidence. The reverse is also true. If the panel disagrees with the evidence given by the professionals, it must give adequate reasons for doing so. Secondly a decision letter is directed at the prisoner. While it has to descend to sufficient detail so that everyone, but particularly the prisoner, can understand the reasons for the decision, it is not necessary for every point which has been raised in the hearing to be discussed. What is necessary is that everyone is able to understand the reasons for the decision*".



32. The decision letter sets out in a balanced way both the points for the application for release and those against. They provide an adequate justification for the decision taken by the panel.
33. The panel correctly set out both at the commencement and in the conclusion of the decision letter the test for release and in my view, correctly applied it to the findings they made.
34. The extremely conscientiously and clear written representations drafted by the Applicant's solicitor essentially contend that the panel should have preferred an alternative, arguable case and come to a different decision. The reconsideration mechanism follows the practice and procedure of Judicial Review. The correct approach of the reconsideration process is not to ask whether the panel might have come to a different decision; the correct approach is confined to asking whether the Applicant has established that the panel's finding was irrational within Lord Diplock's definition. In this instance, the Applicant has failed to do that.
35. As referred to at paragraph 12, the decision not to recommend a move to open conditions is not eligible for reconsideration under Rule 25 (decision by a panel at an oral hearing) and Rule 28 (reconsideration of decisions) of the Parole Board Rules 2019.

Decision

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

James Orrell
11 August 2020