the Parole Board
working with others to protect the public

[2020] PBRA 163

Application for Reconsideration by Ameen

Application

1. This is an application by Ameen (the Applicant) for reconsideration of a decision of the Parole Board refusing to direct his release. The panel making the decision was an MCA single-member panel which considered the matter on paper on 21 September 2020.

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 420 pages, the grounds supporting the application, a chain of emails from the Applicant's solicitor dealing with the interpretation of time limits for filing a reply to the application, the representations made on behalf of the Secretary of State and a document seeking to clarify the dates relating to the length of the Applicant's sentence.

Background

4. On 28 April 2016, the Applicant, then aged just under 24 years, was sentenced to a determinate sentence of imprisonment for a period of 5 years and a notification requirement for a period of 15 years under the Counter-Terrorism Act 2008. This followed his conviction under section 12(1) of the Terrorism Act 2000, for inviting support for a proscribed organization, and under section 1 of the Terrorism Act 2006, for publishing statements intending to encourage terrorism.

5. The expiry date for the sentence was the 26 October 2020.

6. On 9 May 2018, the Applicant was released on automatic licence.

7. On 4 February 2020 the Applicant was recalled to custody, having been found to have breached the licence conditions that required him to be of good behaviour, not to commit any further offence and not to use any internet enabled device without the prior approval of his supervising officer. The device was a mobile telephone.

8. On 5 February 2020, the Applicant was convicted of offences under section 54(1) Counter-Terrorism Act 2008 for breaching his notification requirements. He was

sentenced to two determinate sentences of imprisonment of 5 months each, to run consecutively, giving a total sentence of 10 months.

9. The sentence expiry date for these sentences is the 4 December 2020.

Request for Reconsideration

10. The application for reconsideration was received on the 16 October 2020.

11. The application is based on both irrationality and procedural unfairness. I have reformulated the grounds very slightly and altered the order of importance.

12. The grounds in support of irrationality are as follows:

i. The panel applied a higher test for release than the statutory test.

ii. The panel failed to take account of the panel decision of 14 April 2020 that the Applicant met the statutory test for release.

iii. The panel failed to give adequate reasons for not accepting the recommendations of the professional witnesses.

iv. The panel gave insufficient weight to the fact the Applicant has spent 20 months on licence without demonstrating the risk of serious harm, and 13 months evincing good compliance, prior to the breach of July 2019.

v. The panel relied on an evaluation made by the Community Offender Manager which she no longer held.

vi. The panel wrongly decided the Applicant would be released automatically in October 2020 when the correct date was 4 December 2020.

13. The grounds in support of procedural unfairness are as follows:

i. The panel failed to give adequate reasons for its decision.

ii. The panel failed to apply the test in **Osborn** when deciding to proceed on the papers.

iii. The panel followed a Parole Board policy which was unlawful or the Parole Board failed to put in place a procedure to ensure prisoners subject to short sentences under the Terrorist Offenders (Restriction of Early Release) Act 2020 could have oral hearings.

Current parole review

14. The Secretary of State's referral is undated. However, the Applicant's case was considered by a single-member panel on 14 April 2020. On that occasion, the panel found the Applicant met the test for release but did not in fact direct release because he was serving the sentence of 10 months imprisonment imposed on 5 February 2020.

15. The Applicant's case was considered further on 21 September 2020. At that stage, the Applicant's release was supported by the Prison Offender Manager, the Community Offender Manager and the author of the psychological assessment report for risk of extremist offending, whose opinion was that the Applicant's risk was manageable in the community.

16. Following the panel's refusal to direct release, the Applicant applied successfully for the time in which to apply for an oral hearing to be reduced to 14 days. At the same time, the Applicant waived his right to apply for an oral hearing, thereby enabling this application for reconsideration to take place sooner than otherwise would have been the case.

The Relevant Law

Parole Board Rules 2019

17. 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.

Irrationality

18. 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."

19. 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.

Procedural unfairness

20. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.

21. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:

    (a) express procedures laid down by law were not followed in the making of the relevant decision;
    (b) they were not given a fair hearing;
    (c) they were not properly informed of the case against them;
    (d) they were prevented from putting their case properly; and/or
    (e) the panel was not impartial.

22. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Other

23. In the cases of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

24. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that it stated reasons should be sufficient to justify its conclusions, **R (Wells) v Parole Board 2019 EWHC 2710**.

25. 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.*"

The reply on behalf of the Secretary of State

26. The Secretary of State's reply is dated 27 October 2020.

27. It has been suggested that the reply is out of time. The broad purpose of the reconsideration process is to achieve a just result, taking into account all relevant, admissible material. I have considered the Secretary of State's reply; if necessary, I extend time for filing that reply until 27 October 2020.

28. The response helpfully explains how an error crept into the computation of the Applicant's sentence end date and gives the correct information concerning the sentence.

29. Apart from that, the Secretary of State expressly refrains from making representations in respect of the substantive aspect of the application.

Discussion

30. Dealing with the first ground, the statutory test is the Parole Board may not direct release *"unless satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined".*

31. Lord Mance in **R (Sturnham) v The Parole Board (No 2) [2013] UKSC 47** at page 61 approved the view expressed by Leggatt LJ in the Divisional Court that *"it was unhelpful to invent alternative versions of the statutory test".*

32. The panel correctly set out the statutory test in the final section of the decision letter. That might have been the end of the matter, but for a somewhat different statement in the opening section,

"The Parole Board has to consider your risk of serious harm to the public and your manageability under supervision in the community."

33. That passage appears in the position where the statutory test is usually found and it is likely to be read as setting out the test the panel had to apply.

34. The test, expressed in that way, has two separate limbs: (i) risk of serious harm and (ii) manageability under supervision. The statement does not explain that the manageability is relevant to release only insofar as it affects the risk of serious harm and the reader can be left with the impression that both limbs must be satisfied before release can take place.

35. In the concluding paragraph, immediately following the correct statement of the test, there is this passage,

"The Panel has considered all of the evidence and your Legal Representations very carefully. As documented, there were too many uncertainties for the Panel to be reassured that you would be able to comply unequivocally and completely with your Licence and Part 4 Reporting obligations whilst being vulnerable to family and relationship disruptions as well as being a potential target for re-radicalisation. Your own behaviours and attitudes to compliance with professional advice and guidance is equally a concern".

36. That passage speaks almost exclusively of compliance with licence and reporting conditions and compliance with professional advice and guidance.

37. The importance of clarity when dealing with the statutory test has been illustrated in **Wells**. Although, in that case, the decision letter had stated "the panel considers

that you need to remain confined for the protection of the public", it contained this passage,

"The panel appreciated that you had not been violent for a considerable time. However, you have continued to display active risk factors associated with your use of violence. You also have not yet built the protective factors which would be key to helping you live an offence free life in the future. As a result, the panel concluded that your risks could not be safely managed in the community. Having taken into account the written and oral evidence the panel considers that you need to remain confined for the protection of the public and did not direct your release."

38. The offending sentence was *"You also have not yet built the protective factors which would be key to helping you live an offence free life in the future".*

39. Having considered the statute and the authorities, Saini J said of the passage

"In my judgment, it is hard to avoid the conclusion that the Panel misdirected itself in law as to the hurdle which they considered the Claimant had to overcome. Reading this paragraph in the context of those preceding it, in my reading of the Decision the Panel appears to have considered that it had to be satisfied that that there was essentially no risk of reoffending. That cannot be correct in law".

40. At the very best, the present decision letter comes extremely close to saying that the Applicant must remain confined because of his risk of non-compliance with the various conditions to which he remains subject.

41. Grounds ii and iii are closely connected and I shall deal with them together. It is accepted that a tribunal should explain clearly its reasons for making a decision contrary to the opinions and recommendations of all the professional witnesses. As Saini J put it in **Wells**:

"The duty to give reasons is heightened when the decision-maker is faced with expert evidence which the Panel appears, implicitly at least, to be rejecting. I also consider that departure from an earlier reasoned recent decision from another Panel required some explanation".

42. I have tried to identify the various factors, some of which preceded the recall, upon which the panel relied before coming to its decision. The following list may not be exhaustive:

- The breach of the licence condition and the continuing failure to report the mobile telephone to the Community Offending Manager.
- The Applicant applied to a shop for a job without disclosing his convictions.
- The view of the Community Offending Manager that the Applicant did "*not wish to honestly engage with [his] Licence and the measures put in place to protect the public*".
- There were "*clear and unequivocal recommendations for [him] to undertake core risk reduction work",* most of which has not been done.

- The Applicant's emotional stability and mental health when he stops taking medication.

- The Applicant met his latest partner through the same site as a previous partner who shared the Applicant's radical views.

- The professionals have not fully investigated the Applicant's family's hostility towards him.

- The fact the Applicant has mixed with TACT prisoners.

43. It is difficult to see how some of these factors were relied on without being investigated further at an oral hearing.

44. By way of illustration, the recommendations to do behaviour offending work were never made as a precondition for release (as opposed to being beneficial) and the same professionals who made the recommendations are currently recommending release. The psychological assessment report for risk of extremist offending recommended that *"it does not appear [the Applicant] would benefit from any specific accredited intervention".*

45. The professional evidence is that the Applicant's relationship with his partner is a protective factor and although based on self-reporting, the professional evidence is the Applicant is getting on well with his family.

46. The most recent view of the Community Offending Manager, which did not find its way into the decision letter, was *"…whilst I acknowledge that [the Applicant] has not been totally honest in relation to the current matters I have not assessed his level of engagement prior to recall action as superficial."*

47. I have also tried to identify matters not contained in the decision letter and which ought to have been in, if the document was not to fall below an acceptable standard in public law.

48. The letter does not deal with the following highly significant finding of the panel in April 2020

    "Since recall, it would appear that nothing of concern had been discovered on the phone. You have said that you were willing to continue complying with supervision if re-released. Under the circumstances, the panel is satisfied that it is no longer necessary to protect the public that you remain in custody. However, you have been further convicted and as a result of the new sentence, cannot be re-released during this sentence. Your re-release is therefore not directed".

49. The present decision letter adopts the analysis of offending in section 3 and the risk factors in section 4 of the April 2020 panel. Apart from that, the only reference I can see to that panel's decision making is the opening line of the decision letter which states:

"An MCA Panel of the Parole Board first considered your case on 14 April 2020 and did not direct your release; that Panel had been provided with incorrect information in the dossier about your sentencing".

50. The decision letter makes no reference to the fact that the Applicant's risk of serious harm has not increased since he was last released on licence. At page 44 of the dossier, the Community Offender Manager said *"Having considered the circumstances of the current offence(s) and interviewing [the Applicant], it is my view the current matters do not represent an increase in his risk of serious harm level".*

51. Lastly the decision letter does not deal specifically with the reasons given by the professional witnesses for recommending release; it simply gives a number of factors which the panel relied on to refuse release.

52. Ground iv tends to lend weight to grounds i to iii, and grounds v and vi, taken individually or cumulatively, would be insufficient to justify granting the application.

53. However, grounds i to iii cause anxiety. This was not an easy case and the panel did not have the assistance of co-panelists nor the assistance of a lawyer to make representations of the actual hearing.

54. I have carefully considered the whole of the evidence in the case, the decision letter and the legal representations. At the end of the day, I am persuaded that the reasons given by the panel for its decision were not sufficient to justify its rejection of the recommendations of all the professional witnesses. As I have tried to point out, the duty to give reasons is heightened when a panel is making a decision in the face of unanimous expert evidence supporting a different decision, a recently constituted panel has also come to the same, different decision and there was no evidence of an increase in the risk of serious harm.

55. In that context the unusual and arguably ambiguous description of the test to be applied by the panel becomes fatal. Taken together, those three grounds require me to direct that the decision should be reconsidered by a different panel.

56. In those circumstances, I turn, very briefly, to the grounds in support of procedural unfairness.

57. Failure to give adequate reasons is evidence of irrationality and not evidence of procedural unfairness.

58. The panel correctly applied the test in **Osborn**, given the short time available to arrange a hearing. There was no application on behalf of the Applicant for a telephone hearing and subsequently the Applicant waived his right under rule 20 to apply for an oral hearing.

59. The jurisdiction of the Reconsideration Panel is governed by the Parole Board Rules 2019 rule 28; that rule does not give the Reconsideration Panel jurisdiction to make decisions in respect of policy or procedure nor to give to give declaratory judgements. These matters remain the preserve of the High Court.

Decision

60. Accordingly, whilst I do not find there to have been a procedural irregularity, I do consider, applying the test as defined in case law, that the decision to refuse release to be irrational. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel.

James Orrell
9 November 2020