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[2020] PBRA 169

Application for Reconsideration by PYLE

Application

1. This is an application by Pyle (the Applicant) for reconsideration of a decision of a three-member panel of the Parole Board, dated 14 September 2020, not to direct her 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.

3. I have considered the application on the papers. These are the dossier comprising 860 pages, including the Decision Letter dated 14 September 2020, and the Reconsideration Application. The Secretary of State did not make any formal representations in response to the application.

Background

4. The Applicant received a Discretionary Life Sentence, with a minimum term of 3 years, on 15 July 2002. This was following her guilty plea to manslaughter (on the grounds of diminished responsibility) and arson. The minimum term expired on 16 July 2005, which means that the Applicant has now been in custody almost 19 years and is more than 15 years post tariff.

5. The current review is the Applicant's seventh review by the Parole Board. A previous panel, in 2016, concluded that she did not meet the test for release but recommended that she was suitable for open conditions, a recommendation that the Secretary of State accepted. However, the Applicant was returned to closed conditions after one month following concerns about her interaction with other inmates and staff, particularly male members of staff, the latter concern having been identified as a problem since 2014.

6. A subsequent panel of the Parole Board in 2018 accepted the recommendation of professional witnesses, including a Psychologist, that the Applicant had completed all core risk reduction work but required testing in open conditions before it would be safe to release her, stating that the conclusion of the previous Parole Board panel in February 2016 remains pertinent, and agreed with that panel that - after so long in custody and having regard to the seriousness of the index offences and the continuing risk of harm she presented – before her release can be directed with any confidence there has to be a time of consolidation, assessment of her risk

and so testing of her in the community. It was important, in particular, that the Applicant was tested by periods of temporary release into the community.

7. The Applicant was again transferred to open conditions in June 2018, where she remains. However, at the time of the Decision Letter dated 14 September 2020 she had still not completed any periods of temporary release nor started the community-based trauma therapy, largely due to her continuing antagonism to male prison staff and, more recently, the impact of the Covid-19 lockdown.

Request for Reconsideration

8. The application for reconsideration is dated 2 October 2020.

9. The grounds for seeking a reconsideration are as follows:

(a) The panel's decision was irrational, in that:

(i) One of the panel's main reasons not to direct release was the lack of testing by way of community release on temporary licence but the Applicant had not had that opportunity, since she was approved by the prison for release on temporary licence in April 2020, due to the current Covid restrictions. Furthermore, "there is no certainty" she will have that opportunity, so she may not be able to meet this requirement and "no alternative pathway is mentioned for testing". This requirement is therefore unfair and irrational due to the present circumstances;

(ii) One of the reasons the Applicant had not been approved for release in temporary licence prior to April 2020 was due to her non engagement with male staff. In turn, that has prevented her accessing the community-based trauma work. This is irrational and unfair in the circumstances;

(iii) The panel gave insufficient weight to factors in support of release, in particular, the absence of any substance misuse (a key risk factor) or violence since the index offences;

(iv) The panel disregarded what the Applicant refers to as her "Complex Post Traumatic Stress Disorder" (there is no reference in the dossier to any formal diagnosis); additionally, it is irrational that "coercion with male staff is used as a bartering tool" in the temporary release licence process;

(v) The panel failed to acknowledge the availability of a placement in designated accommodation, counselling and support as part of a robust release plan.

(b) The panel's decision was procedurally unfair as the panel "is not sufficiently independent from the Prison establishment", where the proceedings took place.

The Relevant Law

10. Section 28(6)(b) of the Crime (Sentences) Act 1997 provides that the Parole Board shall not give a direction for the release of a life sentence prisoner unless "the Board is satisfied that **it is no longer necessary for the protection of the public** that the prisoner should be confined" (emphasis supplied). The panel correctly set out in its decision letter dated 14 September 2020 the test for release.

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)).

Irrationality

12. 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."

13. 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.

14. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

Procedural unfairness

15. 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.

16. 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.

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

Discussion

17. The panel in this case had an extensive dossier of papers and the advantage of seeing and hearing the witnesses over the course of two days of evidence, as well as oral and written closing submissions. Those witnesses included the Applicant's Prison Offender Manager (POM), prison Psychologist, independently instructed Psychologist and the Applicant at the first hearing on 26 February 2020. That hearing was adjourned so that the panel could consider further evidence regarding the risk management plan and "move-on" plans after a period in designated accommodation, as well as information regarding the reason why temporary releases had not been approved and, specifically, whether there were risk-related concerns arising from that. At the resumed hearing on 1 July 2020 the panel heard further evidence from all these witnesses, as well as evidence from the Applicant's Community Offender Manager (COM) and the Deputy Governor of the prison in relation to the concerns arising in the process for temporary release.

18. The POM, COM and both psychologists all agreed that no further core risk reduction work was necessary but none of them recommended release. The COM, POM and prison psychologist all described the temporary release licence process as "essential", for the following reasons: to ensure that the Applicant had developed sufficient insight from interventions; to practice skills in a community setting; to test her responses to males; and to see how her rigid and entrenched views might best be managed by those supervising her. The independent psychologist also recommended testing before release, although considered that release may be practicable under an enhanced risk management plan, which she accepted was not currently available and therefore she did not support release.

19. Subsequent to that hearing, the panel, at its direction, received further written evidence regarding the release plan and written submissions on behalf of the Applicant. In a very detailed decision letter running to 14 pages of careful and forensic analysis, the panel set out the reasons why it agreed with all the professional witnesses that a further period of consolidation and testing in the community (i.e. by way of periods of temporary release) was necessary and without this the Applicant was not ready to be released.

20. Of course, the panel were not obliged to adopt the opinions and recommendations of the professional witnesses. It is the panel's responsibility to make their own risk assessments and to evaluate the likely effectiveness of the proposed risk management plan. They must make up their own minds as to the totality of the

evidence they hear, including the evidence of the Applicant and they must consider the submissions made on her behalf. They would be failing in their duty to protect the public from serious harm (whilst also protecting the Applicant from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do just that.

21. In **R(Wells) v the Parole Board [2019] EWCH 2710 (Admin**) the court recognised that *"as is obvious, a rationality challenge…is always a substantial challenge for a Claimant, and particularly so, when dealing with a specialist quasi-judicial body which will have developed experience in assessments of risk in an area where caution is required".* The court also noted the Parole Board's own 2013 "Guidance for referral of cases to an Oral Hearing", which states:

> *"When dealing with cases concerning post-tariff indeterminate sentence prisoners, it should* ***scrutinize ever more anxiously*** *whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff."* (emphasis added)

In other words, the question is whether the conclusion arrived at by the panel can be safely justified on the evidence heard, in the context of anxious scrutiny being applied: "does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion?".

22. The facts as found by this panel, in considering the release of a prisoner many years over her tariff, are set out in a clear and comprehensive and coherent decision letter. The decision logically follows from the stated reasons. The statutory test was correctly cited and applied. The panel accepted the opinions expressed by professional witnesses and, indeed, by two previous panels of the Parole Board, that the Applicant did not meet the test for release in the absence of a period of testing. The decision letter explains with care how the panel had conducted its own analysis and weighed and balanced the written and oral evidence presented to it.

23. I cannot find any evidence to support the Applicant's contention that the panel disregarded or gave inadequate weight to the positive factors in her favour, including the completion of offending behaviour work, improved engagement with the prison regime and a significant period of time free from adjudication and, significantly, no evidence of violence since the index offences. Additionally, the panel directed, and received, detailed information about the risk management plan which could be implemented in the community. It also considered with care the reasons why the Applicant had not been able to evidence a period of testing via the temporary release licence process and heard evidence at the second hearing from the Deputy Governor regarding this. The panel's focus, throughout, was on the issue of risk. The statutory test to be applied was <u>whether</u> it was necessary for the

protection of the public for the Applicant to be detained. The question as to why the Applicant could not show that she satisfied the test – i.e. the reasons for the absence of testing via the temporary release licence process - was properly explored by the panel to the extent necessary to assess its relevance to the panel's assessment of the Applicant's current and future risk of serious harm and whether that could be managed in the community.

24. Panels will, not infrequently, come across cases where, through no direct fault of the prisoner, the evidence is not available to show a reduction of risk or manageability of risk. For example, this has occurred, historically, in some short-tariff indeterminate sentence cases where the prisoner has not been able to access offending behaviour work due to systemic lack of resources. It can occur where a suitable risk management plan cannot be implemented due to lack of financial support or where placements at suitable community placements are subject to lengthy waiting lists. The reasons why a prisoner cannot show necessary risk reduction or manageability of risk will be relevant to a greater or lesser degree in individual cases, and the reasons will be relevant, but rarely determinative. In the Applicant's case, the panel properly examined the reasons why she had not been able to demonstrate a period of community testing through the temporary release licence process. The panel concluded, however, that without that period of testing it could not be satisfied that it was no longer necessary for the Applicant to be detained. On the papers before me, I can see no objective basis for arguing that the decision of the panel was irrational.

25. Finally, I can deal in brief terms with the Applicant's complaint that the panel's decision was procedurally unfair as the panel was not independent from the prison. There is no information in any of the papers before me that the panel's independence was in any way compromised. The Applicant's solicitor did not raise this as a concern at any time during the course of these proceedings. The allegation appears only in the Applicant's handwritten submissions attached to the formal application filed by the solicitor. The Applicant gives no indication at all as to why, in her view, the panel was not independent. The allegation is, therefore, wholly without detail or substance and in those circumstances, I cannot find that there is any merit in this ground.

Decision

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

Elaine Moloney
13 November 2020

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