

[2020] PBRA 23

Application for Reconsideration by Harris

Application

1. This is an application by Harris (the Applicant) for reconsideration of a decision of an Oral Hearing Panel (OHP) dated 3 January 2020 not to direct his release.

Background

2. The Applicant is serving an Extended Determinate Sentence of 10 years, the custodial part of which (7 years) expired in September 2019. The extended licence expires on 11 September 2022.

Request for Reconsideration

3. The application for reconsideration is dated 29 January 2020.

Current parole review

4. In November 2018 the Secretary of State referred the Applicant's case to the Parole Board to consider whether to direct the Applicant's release.

The Relevant Law

5. 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.
6. 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.
7. 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 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."

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.

Discussion

8. The Applicant has a considerable record of previous offending, including many offences of violence, amongst them a number of convictions for robbery. The index offences concerned an attempt by the Applicant and three associates to rob. The other perpetrators escaped but the Applicant was detained. He was in possession of a loaded shotgun. The Applicant was at the time of the offence subject to post-release licence in respect of an earlier sentence.
9. The Applicant was released on licence in March 2016 but was recalled in August 2016 for breaches of licence conditions. He was re-released on 2nd November 2018. He was recalled on 16 November 2018. He had breached his licence in a number of respects, including failure to return to premises where he was required to reside and entering into a relationship without informing his Offender Manager (OM).
10. The application for reconsideration is based on three grounds:
 - 11.(a) The OHP failed to apply the correct test by not making a presumption in favour of release;
 - 12.(b) The OHP was wrong to conclude that the Applicant presents a risk of serious harm to the public and/or failed to give adequate reasons for that conclusion;
 - 13.(c) The OHP failed to give adequate reasons for departing from the unanimous recommendations of professionals supporting release.
14. The first ground is based on the decision of the Court of Appeal in ***Sim [2003] EWCA Civ 1845*** in which the Court decided that in determining whether to release a prisoner who had been recalled during the extension period of an extended sentence passed in accordance with s.85 of the Powers of Criminal Courts (Sentencing) Act 2000, the OHP should direct release unless it is satisfied that it is necessary for the protection of the public that the prisoner remains confined.
15. There is a tenable argument that the amendments made by ss114, 124 and 125 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to ss 255, 226 and 246 of the Criminal Justice Act 2003 had the effect of creating an extended sentence of a different nature from that under s85 of the 2000 Act and of overturning the decision in ***Sim*** by creating a statutory prohibition against directing or ordering release unless the statutory test is met (...it is not necessary



for the protection of the public that the prisoner should be confined). It would therefore follow that what has been described, arising from that case, as a presumption in favour of re-release in the case of extended sentence prisoners during their extended licence no longer exists.

16. In the absence of any definitive judicial decision which supports the argument set out above, this Reconsideration Assessment Panel (RAP) will address this aspect of the application on the basis that **Sim** remains good law.
17. There is authority for the proposition that an OHP is not required to set out in terms the formula proposed in **Sim** so long as the Decision Letter (DL) makes it clear that the OHP has "...noted all the information before them and reached a conclusion, which although not identical in language to the formulation of the Court of Appeal in *Sims*, is to the same effect". See **R (Gary Coney) v Parole Board and Secretary of State for Justice [2009] EWHC 2698**. The critical question is whether there is a proper basis for concluding that the OHP reached its decision not to direct release for the reason that the Applicant had failed to discharge a burden of proof to justify his release.
18. The DL in this case did not in terms mention the presumption in favour of release. It is to be noted, however, that in the Introduction to the DL the correct test is set out without any reference to a requirement on the Applicant to justify release. The DL, taken as a whole, is careful and full, identifying the key evidence contained in the dossier and given to the OHP in oral evidence, including the account given by the Applicant.
19. This RAP has given particularly careful consideration to the section in which the conclusions and decision of the OHP are set out, asking itself whether there is to be found within that part of the DL, of crucial importance in relation to this aspect of the Applicant's complaints, anything which could give rise to an inference that the decision not to direct release was flawed, in the sense that the decision rested on a perceived failure by the Applicant to justify release.
20. The principal reasons given for the decision, in summary, were that the proposed risk management plan was not sufficiently robust to manage the Applicant's risk, that core offending work remained to be undertaken by the Applicant and that the work (or some of it) should be done before release in order to reduce his risk of future violence. The opinion of the OHP was that the Applicant's risk had not reduced to a level where he could be managed on licence. In the case of **Coney**, above, Burnett J said: "*There is no suggestion in the reasons of the Parole Board that they failed to recommend his release because he had failed to discharge any burden of proof*". The same applies in the present case.



21. Accordingly, in the absence of any indication that the OHP's decision not to direct release was the result of erroneously casting a burden of proof on to the Applicant, this ground of complaint is not made out and therefore fails.
22. As to the second ground, the OHP set out in the DL the assessment tools used by the professionals to assess risk, together with the findings of the professionals based on those assessments, and made reference to the opinion of the Offender Manager (OM) that the assessments of high risk of reconviction for a violent offence and high risk of causing serious harm to the public or a known adult were accurate. There is also reference to a similar view expressed by the psychologist as to a high risk of further violent offending. In those circumstances, the submission that the OHP was wrong to conclude that the Applicant presented a high risk of serious harm is unsustainable. As to the complaint that adequate reasons were not given for that conclusion, it is difficult to understand what better reasons could have been given other than that the assessment of the panel accorded with that of the professionals. There is no substance to this complaint.
23. The third ground, as it appears in the Application, is limited in its scope, asserting only that the OHP failed to give adequate reasons for departing from the unanimous recommendations of the professionals in support of release. It does not go so far as to say that there were no such reasons (or that any reasons which might have been given were irrational). This ground, expressly stated to relate only to procedural unfairness, is expanded upon within the Application thus: *"In principle the Parole Board can depart from professional recommendations and does so regularly but it must give its reasons for doing so and the quality of those reasons must be sufficient for [the Applicant] to know the reasons why his application was refused"*.
24. Notwithstanding the limited nature of the challenge, there are further passages within the Application which appear to suggest that the complaint goes not only to procedural unfairness but also to the rationality of the rejection of the recommendations of the professionals. This RAP will, accordingly, deal with both possible challenges.
25. As to rationality, it is clear, as stated in the Application, that the professionals were generally supportive of release. They were favourably impressed by the Applicant's custodial behaviour, they considered that the time he had spent in a part of the prison given over to the treatment and rehabilitation of prisoners was having beneficial results, they noted that there was no evidence of substance abuse (a risk factor in relation to his offending) and, for these and other identified reasons, were generally of the opinion that he could be safely released under a robust risk management plan.



26. The professionals were not, however, unanimous as to whether core risk reduction work was necessary to reduce the Applicant's risk. As is recorded in the DL, the view of the psychologist was that such work was not necessary whilst the view of the psychiatrist was to the contrary. The psychiatrist had no firm view as to whether this work should take place in custody or in the community but recognised that the intervention would take more than three months to complete and would therefore last beyond the time when the Applicant would be required to reside in Designated Accommodation. The OM also accepted that it was important that the Applicant undertook work to address his emotional instability, although she was in favour of doing this in the community rather than in custody.
27. The OHP were provided with a Risk Management Plan which was accepted in the DL to appear robust. It did not, however, include a clear plan to deal with circumstances as they would be after the Applicant's three month stay at Designated Accommodation. The OHP regarded this as important, given that it was likely that he would not have completed core risk reduction work by then. They were also concerned that no adequate provision was planned to assist the Applicant with his emotional control at the point of release, whether by medication or by psychological intervention.
28. It is clear that the OHP took a cautious approach in making their decision. They were fully justified in doing so. The Applicant had a troubling offending history. The index offences were of obvious gravity, involving a loaded shotgun. The Applicant had already been recalled twice. Amongst the reasons for the first recall was a relationship which the Applicant did not disclose to his OM and which, in the context of a history of abusive relationships, was concerning. The second recall took place within two weeks of release in circumstances in which, as the Applicant frankly acknowledged, he had determined within one day of release not to comply with licence conditions by absconding and thus wilfully frustrating the risk management plan. These recalls were not in any sense technical in their nature, such as might happen, for example, if a chaotic offender repeatedly forgot appointments, but went directly to risk and/or to risk management. His second release was directed in large part because it was accepted by the Panel that the recommendations of the professionals for release, made on rational grounds and in good faith, had been frustrated by the apparent inability of the Applicant to cope with life in the community. There was evidence, accepted by the OHP, that he had not completed core risk reduction work. The OHP also had some concerns about the Applicant's ability to form and manage relationships appropriately. The Applicant accepted that he had been aggressive and threatening in his intimate relationships.
29. It is plain (and no contrary submission is made to this RAP) that the OHP acted rationally in deciding that core risk reduction work was necessary and that this work needed to be undertaken before release. There was a clear evidential basis



for these decisions. The OHP correctly performed their function of making their assessment of the evidence and of making findings and decisions based on that assessment.

30. As to the complaint of procedural unfairness, it is to be noted that in the Application itself the assertion quoted in paragraph 23, above, is immediately followed by a recitation of what the reasons for the decision of the OHP appear to be, namely that core risk reduction work remains necessary, there is no clear move-on plan and the Applicant's apparent reliance on medication to manage his anxiety. Whilst this is a rather crude representation of the reasons set out with care and in some detail in the DL, it does at least have the virtue of capturing the essence of those reasons.
31. On a fair reading, the DL as a whole and in particular the parts of it dealing with the evaluation of the Risk Management Plan and with the conclusion and decision of the panel set out fully and clearly the decision of the OHP, the considerations which it has taken into account in reaching it and the reasons for it. In essence, they are that the Applicant's history of offending and of conduct on release requires a cautious approach, there is core risk reduction work which needs to be undertaken, there are identified reasons why that should be done before release and accordingly that it is necessary for the protection of the public that the prisoner remains confined until that work has been completed.
32. In those circumstances and for those reasons, this RAP finds no procedural unfairness and no irrationality in the manner in which the reasons for the decision are set out nor in relation to the reasons themselves.

Decision

33. 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.

Alistair McCreath
12 February 2020

