

Application for Reconsideration by Russell

Introduction

1. This is an application by an indeterminate sentence prisoner, Russell ("the Applicant"), for reconsideration of the decision of a panel of the Board which considered his case at an oral hearing on 25 November 2019.
2. The panel's decision is dated 27 November 2019 but was not issued until 2 December 2019. The panel did not direct the Applicant's release on licence, nor did it recommend a move to open conditions. On 20 December 2019 the Applicant submitted an application for reconsideration of the decision.
3. The case has been reviewed by a judicial member of the Board under the reconsideration procedure. As it happens, this judicial member was also the MCA member who considered the Applicant's case on his previous review in December 2016. At that time the Applicant had withdrawn from the parole process and was not seeking a direction for release on licence or a recommendation for a move to open conditions. There is no conflict of interest as the judicial member, though unable to direct release or recommend a progressive move in 2016, was sympathetic to the Applicant's case and expressed the hope that he would re-engage and be able to move forward.
4. The judicial member, as the Reconsideration Assessment Panel ("RAP") of the Board for the purposes of this application, has considered the following material:
 - Dossier containing 601 numbered pages which includes the decision of the Oral Hearing Panel ("OHP") dated 27 November 2019;
 - Representations by the Applicant himself dated 20 December 2019; and
 - An e-mail from PPCS dated 30 December 2019 stating that the Secretary of State offers no representations in response to the application.

Background

5. The Applicant is aged 44 and had no criminal convictions until 30 October 2009 when he pleaded guilty to two very serious offences of domestic violence (threatening to kill his estranged partner and threatening to damage her property with intent to endanger her life).
6. The facts of the offences were described as follows in the 2016 paper decision and adopted in the OHP's 2019 decision:



'You were aged 33 at the time of the offences. You had had a difficult childhood, but in due course established a good work record, and were happily married for several years. However, you used drugs and drank to excess and suffered from anxiety and depression at various times. Your marriage broke down (partly, it is said, as a result of your excessive drinking) and some months later you met [the victim] and embarked on a volatile on-off relationship with her. There came a stage when she told you she was involved in a sexual relationship with someone else. As a result your thoughts began to fester, and on 25 August 2009 you left a voicemail message for her saying that you were going to burn her. Shortly afterwards you were seen outside her house shouting threats to do just that. You then broke into her house with 2 cans of petrol. She fled to the bathroom and locked herself in. You told her dog to go outside while you "dealt with it". She escaped through the bathroom window and ran to a neighbour's house. The police were called, and when they arrived they found you outside [the victim's] house clutching a large box of matches.'

7. For those offences the Applicant received a sentence of imprisonment for public protection (IPP). His tariff was set at 3 years less the time which he had served in custody on remand. It expired in February 2012, so he is well "over tariff".
8. He has remained in closed conditions throughout his sentence. This is the fourth review of his case by the Board. The Board can only direct his release on licence if it is satisfied that he has reduced his risk of serious harm to other people to a level at which it is no longer necessary for him to be confined in prison for the protection of the public. The three panels of the Board which have previously considered his case were unable to conclude that that was the case.
9. The Applicant's risk factors have been identified as including misuse of drugs and alcohol; mental health issues; emotional instability; poor control of emotions; poor relationship skills; feelings of rejection; a need for power and control in relationships; rigid and vengeful thinking; a preparedness to use violence within relationships; and the use or threat of fire as a weapon.
10. This review of the Applicant's case commenced in March 2018. An oral hearing was directed on 18 December 2018. The case was allocated to the OHP which comprised a psychiatrist member of the Board and two independent members. The oral hearing had to be adjourned twice when it was listed to take place, but it eventually took place on 25 November 2019. The Applicant was not legally represented but presented his own case.
11. Oral evidence was given by the Offender Supervisor and Offender Manager, and the OHP also considered the dossier which then contained 594 pages. The dossier included psychological risk assessments by a prison psychologist and an independent psychologist. In its decision the OHP explained why neither of the psychologists gave oral evidence and why the OHP did not consider their presence to be necessary. None of the professional witnesses was able to support release on licence or a progressive move.



12. In explaining why it was unable to direct release or recommend a move to open conditions, the OHP added the following comments for the Applicant's assistance:

"To move on you will need to break out of your current cycle of injustice and rumination. You will need the help of professionals to do so. A good first step would be for you to take the initiative in achieving a sustained period of good behaviour in closed conditions. The panel shares [the Offender Supervisor's] view that you need to move to an establishment that is better equipped to offer the support you need. It urges you to explore with him and [the Offender Manager] the potential of [a specialised unit with psychological support] which all the professionals - including [the independent psychologist] - believe would be beneficial for you; a psychologically informed approach could be helpful in helping you regain the control over your life you wish to have"

The Relevant Law

13. The principles relating to reconsideration of decisions by the Board are to be found in Rule 28 of the Parole Board Rules 2019. The only two grounds for reconsideration under that rule are (a) that the decision was irrational or (b) that it was procedurally unfair.
14. Under Rule 28(1) the only decisions which are eligible for reconsideration are those which relate to a prisoner's suitability for release on licence. It follows that the OHP's decision not to direct the Applicant's release on licence is eligible for reconsideration but the decision not to recommend his transfer to open conditions is not.
15. Irrationality is a concept well known in judicial review proceedings in the High Court. 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 paragraph 116 of its judgment:

'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 was the test set out in a different context by Lord Diplock in the House of Lords in **CCSU -v- Minister for the Civil Service [1985] AC 374**.

16. Procedural unfairness may result from a variety of procedural irregularities in the parole process. Not all such irregularities will affect the fairness of the proceedings and afford grounds for reconsideration.



The Applicant's Representations

17. The Applicant is to be complimented on the clear and concise way in which he has presented his application. He argues that the OHP's decision was both irrational and procedurally unfair.
18. The complaint of irrationality is based on the proposition that (a) "evidence was falsely reported by report writers" and (b) "report writers were allegedly following instructions directed for them irrationally by the Parole Board".
19. The complaint of procedural unfairness is based on the proposition that HM Prison and Probation Service (HMPPS) and the National Offender Management Service (NOMS) failed to work with the Applicant supportively in achieving his sentence plan objectives, and especially in failing to meet their obligations to provide for his treatment needs.

Discussion

20. A claim that parts of the evidence presented to a panel of the Board were inaccurate or misleading is not normally a ground for saying that the panel's decision was irrational. It could only be such a ground if it can be said that the panel's acceptance of such evidence was irrational. The RAP has carefully examined the OHP's analysis of the evidence in this case and cannot detect any instance in which the panel's acceptance of evidence presented to it was irrational.
21. A claim that HMPPS or NOMS failed to comply with their obligations is not a ground for saying that the parole process was procedurally unfair. The OHP's task was to assess the Applicant's risk of serious harm and to determine whether it would be manageable on licence in the community. If it concluded that that was the case, the Applicant's continued confinement in prison would be unnecessary and unlawful and the OHP would be obliged to direct his release on licence: if it concluded that that was not the case, it could not direct his release.
22. The OHP clearly applied the above test, assessed the Applicant's risk and concluded that it would not be manageable on licence. That conclusion was fully justified by the evidence, and indeed was almost certainly inevitable. If (which the RAP is not in a position to say) HMPPS or NOMS could or should have provided further assistance to the Applicant to help him to reduce his risk to a level manageable on licence, that does not affect the OHP's conclusions on the issues which it had to decide.
23. As regards the Board's directions, which are suggested to have been irrational, the RAP has carefully considered the directions issued by the MCA member and all the various directions issued by the panel chair. The RAP cannot detect any irrationality in any of the directions: they were all reasonable and clearly appropriate to the case.



Decision

24. For the reasons set out above there are no grounds which would enable the RAP to conclude that the decision not to direct the Applicant's release on licence was either irrational or procedurally unfair, and this application cannot therefore be granted.

Jeremy Roberts

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