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[2021] PBRA 110

Application for Reconsideration by Jones

Application

1. This is an application by Jones ('the Applicant') for reconsideration of the decision of a panel of the Board ('the panel') which on 22 June 2021, after an oral hearing on 10 June 2021, issued a decision not to direct his release on licence but to recommend his move to an open prison.

2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.

Background

3. The Applicant is now aged 31. He has a substantial criminal record, having accumulated 14 convictions by the age of 22. His last two convictions were both for wounding with intent.

4. At the age of 17 he received a sentence of 5 years in a young offenders' institution for slashing someone in the face with a knife. He was automatically released on licence at the half-way point of that sentence but recalled to prison only 4 days later. He was not released again until his sentence expiry date.

5. Only 4 weeks after that release he committed a serious attack on his then partner. He had been drinking heavily and had taken cocaine and Valium. He had an argument with his partner in the course of which he stabbed her four times.

6. For that offence he received on 7 September 2012, at the age of 22, a sentence of imprisonment for public protection ('IPP'). His minimum term was set at 4 years (less time served on remand) and expired on 11 April 2016.

7. During this sentence he has spent four periods in open conditions but on each occasion, he was returned to closed conditions where he remains. He believes that on some at least of those occasions he was unreasonably and unfairly returned to closed conditions. I will assume for the purpose of this decision that that may well have been the case.

8. His case has been referred four times to the Parole Board during this sentence. The most recent referral was on 20 May 2020 when the Secretary of State invited the Board to decide whether to direct his release on licence and, if not, to advise the Secretary of State about his suitability for another move to an open prison.

9. In due course it was directed that the case should proceed to an oral hearing, and the case was allocated to the panel to conduct that hearing.

10. At the hearing evidence was given by five professional witnesses, four of whom (two psychologists and the two officials responsible for managing the Applicant's case in prison and prospectively in the community) recommended the Applicant's release on licence. The fifth (the official previously responsible for managing his case in prison) did not support release on licence but recommended a further period in open conditions.

11. As noted above the panel did not direct re-release on licence but recommended a move to open conditions.

12. On 12 July 2021 the Applicant's solicitors submitted an application on his behalf for reconsideration of the panel's decision.

The Relevant Law

The test for release on licence

13. The test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the panel in the introductory section of their decision.

The rules relating to reconsideration of decisions

14. Under Rule 28(1) of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.

15. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by:
(a) a paper panel (Rule 19(1)(a) or (b)) or
(b) an oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or
(c) an oral hearing panel which makes the decision on the papers (Rule 21(7)).

16. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both of two grounds: (a) that the decision is irrational or (b) that it is procedurally unfair.

17. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. It is made on the ground of irrationality. The decision to recommend a move to an open prison is not eligible for reconsideration.

The test for irrationality

18. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin) (the "Worboys case")**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It stated 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 was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.

20. 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.

21. The Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under rule 28: see **Preston [2019] PBRA 1** and other cases.

The Request for Reconsideration

22. The Applicant's solicitors submit that it was irrational, within the meaning explained above, for the panel to reject the opinions and recommendations of the four professional witnesses who supported release on licence.

23. In support of that submission the solicitors make seven points which will be explained and discussed below.

Documents considered

24. I have considered the following documents which have been provided for the purpose of this application:

- The 497-page dossier provided by the Secretary of State (which includes the panel's decision);
- Representations submitted on 13 July 2021 by the Applicant's solicitors support of the application; and
- An e-mail from PPCS dated 23 July 2021 stating that on behalf of the Secretary of State they offer no representations in response to the application.

Discussion

25. The starting point in considering this application is that a panel of the Board is a judicial tribunal whose duty is to make its own independent assessment of an offender's risk of serious harm to the public and its manageability on licence in the community. It is not obliged to follow the recommendations of professional witnesses, even if they are unanimous. If it disagrees with them, it must say so.

26. However, if a panel is going to depart from the recommendations of professional witnesses, it must give reasons for doing so and those reasons must stand up to close examination. If a panel fails to give adequate reasons, or if on close examination its reasons can be shown to be flawed, that is likely to be a ground for directing reconsideration of its decision.

27. In this case the panel certainly gave reasons for departing from the recommendations of four of the five professional witnesses. Having stated that it did not lightly set aside the evidence and recommendations of those witnesses, the panel proceeded to give its reasons for doing so, as follows:

> *"The panel consider that [the Applicant] pose a High Risk of causing serious harm to known adults, future partners and members of the public for the following reasons: The panel note that [the Applicant has] spent the majority of [his] adult life in custody and that [he] committed the index offence within 4 weeks of being released from a previous sentence. There is a clearly identifiable pattern in [the Applicant's] previous offending which relates to the use of violence with weapons after misusing drugs and alcohol and on occasions, within a relationship, [he had] committed intimate-partner violence when sexual jealousy has been a catalyst.*
>
> *The panel consider that the proposed risk management is robust but note that the close supervision afforded at the [designated accommodation] would be available for about 8 weeks and thereafter they consider that in the community [the Applicant's] risk could escalate quickly before effective intervention could take place. The plan is also reliant upon [his] compliance and the panel note your poor history of compliance."*

28. It is clear from this that the panel was not satisfied that the Applicant's risk of serious harm to the public would be safely manageable in the community. Once that finding was made, it followed that the panel could not direct release on licence. The panel's focus on the future beyond the Applicant's time in designated accommodation was entirely correct. In assessing an offender's risk, the Board must not confine itself to the short term but should consider the longer term as well.

29. To see whether the panel's approach stands up to close examination I can now turn to the specific points raised by the Applicant's solicitors in their representations.

Point 1: The four professional witnesses who supported release on licence had all had recent contact with the Applicant whereas the one who did not support release had not had any contact with him for a year and it was not clear whether he had even had sight of the updated reports including two psychological reports.

30. It is a valid point, no doubt made by the Applicant's solicitor at the hearing, that the professional who did not support release on licence had no recent knowledge of the applicant. However, the panel's decision was clearly based on its own assessment of the Applicant's risks, and I cannot believe that it would have been any different if all five professional witnesses (instead of only four) had supported release on licence.

Point 2: No sensible panel could have rejected the opinions of the professionals who supported release on licence, given that they all (a) confirmed that all core work had been completed (b) believed that his risk of serious harm was moderate and not imminent and (c) believed that his risk could be managed in the community.

31. I am afraid that I cannot agree with this point. The factors relied upon by the Applicant's solicitors were all significant but there were limitations to the weight which could be attached to any of them and it was open to the panel to conclude that they were outweighed by other factors.

32. The fact that all core work had been completed did not necessarily mean that the test for re-release was met. The Applicant needed to demonstrate not only his learning from courses but also his willingness and ability to apply that learning in practice.

33. The panel was entitled, making its own assessment, to conclude that the Applicant's risk was high rather than moderate.

34. I have already explained that the Board needs to consider the longer-term risk as well as the short-term one, so lack of imminence was not sufficient to show that the test for release on licence was met.

35. As to the manageability of the Applicant's risk in the community, the panel was entitled to its view that that risk was not manageable on licence unless and until his progress had been tested in less secure conditions. It is generally accepted that, where an offender has been convicted of serious violent offences and has been in prison for a long time, he will not be suitable for release on licence unless and until he has undergone a successful period of testing and monitoring in open conditions and a process of gradual reintegration into the community.

36. I cannot see any reason why that principle should not have been applied in this case, as it was by the panel. It may not have been entirely the Applicant's fault but the fact is that he had been unable, in his various periods in open conditions, to complete the kind of testing and monitoring and reintegration into the community which is normally required. That is the case whether or not he was unreasonably or unfairly returned to closed conditions on any of the occasions when that happened. It is the Board's responsibility to protect the public, so far as possible, from the offender's risk of serious harm. If protection of the public requires a further period of testing and monitoring and gradual reintegration in open conditions, that is what the Board must decide.

37. If the present position has been brought about by unfair actions on the part of officials in the prison service, that might result in a successful claim in the courts against the Secretary of State, but it cannot affect the Board's assessment of the offender's risk and its manageability on licence in the community.

Point 4: The primary four witnesses did not consider that it was necessary for the Applicant to return to open conditions for consolidation or testing. The two psychologists considered open conditions but did not consider that it was necessary for the Applicant to progress through that environment.

38. The panel was fully entitled to disagree with the professionals about that (see paragraphs 35-7 above).

Point 5: Matters which supported the Applicant's suitability for release on licence were (a) the robust risk management plan proposed (b) his

current stability and engagement with professionals (c) his methadone programme (d) the absence of evidence of any other current drug taking.

39. These were matters in the Applicant's favour, as was recognised by the panel in its decision, but the panel was entitled to its conclusion that they were outweighed by the need for a period of testing and monitoring and gradual reintegration into the community.

40. As has been recognised by the Board in many cases, the existence of a robust risk management plan is no guarantee that a prisoner's risk can be safely managed on licence in the community. The panel was fully justified in its conclusion that after a period in designated accommodation the Applicant's risk could escalate quickly before effective intervention could take place, and that he had a poor history of compliance.

41. It was encouraging that the Applicant was currently stable and engaging with professionals. However, he was in a closely controlled environment and this was not guaranteed to continue in conditions of lesser security, still less when released into the community. This was, in the panel's justifiable view, the reason for testing and monitoring in open conditions rather than release directly into the community.

42. The Applicant clearly has a significant drug problem and, whilst that was currently managed in closed conditions by a methadone script, there was no guarantee that that would continue in conditions of lesser security (where illegal drugs are more readily obtainable), still less when released into the community. A relapse into illegal drug use could happen very quickly.

Point 6: It was accepted by the primary 4 witnesses that open conditions are not for everyone and that there would be more support available in the community from which the Applicant would benefit given his motivation.

43. It is of course correct that not all offenders need or would benefit from a period in open conditions, and no doubt the Applicant would benefit from the support available to him in the community. However, that was not the question which the panel had to decide. What it had to decide was whether his risk would be manageable on licence in the community or whether his continued confinement in prison was necessary for the protection of the public. If it decided (as it did and was entitled to do for the reasons explained above) that his risk remained too great to be manageable on licence in the community, it was its duty not to direct his release (no matter how much support would be available to him in the community). No doubt the panel took that support into account, but it was entitled to conclude that it would not be sufficient to reduce the Applicant's risk to a level justifying release on licence.

Point 7: The Applicant had significantly matured since his offending and there had been a distinct lack of violence perpetrated by him for many years. Even when he was assaulted in the last open prison in which he had been detained, there was no evidence that he fought back. The

circumstances of his previous offending were clearly in the past and were not currently live or active.

44. Unfortunately, it is not uncommon for an offender with violent tendencies to be able to avoid the use of violence in a closely controlled environment but for those tendencies to resurface in the community when he is exposed to all sorts of pressures and stresses (including those arising in intimate relationships). Whilst the absence of violent behaviour on the Applicant's part in prison (even when subjected to an assault) was encouraging and very much to his credit, the panel was entitled to its view that there remained an untested risk of future violent offending.

Decision

45. This was a difficult case and some panels might have felt able to come to a different conclusion, but for the reasons explained above I cannot accept that this panel's decision reached the high threshold which is required for a finding of irrationality. I cannot therefore allow this application for reconsideration.

Jeremy Roberts
2 August 2021