the Parole Board

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[2021] PBRA 117

Application for Reconsideration by Chaaraoui

Application

1. This is an application by Chaaraoui ('the Applicant') for reconsideration of the decision of a panel of the Board ('the panel') which on 30 June 2021, after an oral hearing on 21 June 2021, issued a decision not to direct his release on licence.

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 29. On 26 May 2015, when he was aged 23, he received an extended sentence for causing grievous bodily harm with intent. The victim was his 19-year old partner. His custodial term was set at 8½ years and the licence extension period at 4 years.

4. He became eligible for early release on licence (by direction of the Parole Board) on 15 September 2020 (his 'parole eligibility date'). The test which the Board is required to apply when deciding whether to direct early release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public. If not, early release should be directed.

5. In August 2020 the Secretary of State referred the Applicant's case to the Board to decide whether or not to direct his early release on licence.

6. On 11 January 2021 a single-member panel of the Board decided on the papers that the above test was not met, and therefore did not direct early release. However, the Applicant's solicitors applied to the Board for an oral hearing, and on 29 January 2021 another single-member panel directed an oral hearing. It was directed that the hearing should be conducted by a single-member panel.

7. In due course the case was allocated to the panel. At the hearing evidence was given by three witnesses: the Applicant himself, the official responsible for managing his case in prison (A) and the official prospectively responsible for managing his case in the community (B). A supported early release on licence but B did not. The panel decided that the test for release was not met, and therefore did not direct early release on licence.

8. Unless the Board directs early release on licence the Applicant will be automatically released on licence on 17 July 2023 (his 'conditional release date'). His sentence will not expire until 17 July 2027.

9. If early release on licence is not directed at this stage, his case will be considered again by the Board in about a year's time.

The Relevant Law

The test for early release on licence

10. As stated above, the test for early 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 its decision.

The rules relating to reconsideration of decisions

11. 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.

12. 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)).

13. 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.

14. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. The application for reconsideration is made on the ground of irrationality.

The test for irrationality

15. 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."

16. 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.

17. 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.

18. 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 Application for Reconsideration

19. The application for reconsideration was made by on 16 July 2021 by the Applicant's solicitors on his behalf. The solicitors' representations in support of the application may be summarised as making three submissions:

(1) that the panel failed correctly to apply the test for release on licence;

(2) that the panel attached too much weight to B's evidence opposing release on licence, and insufficient weight to A's evidence supporting it; and

(3) that, whilst the Applicant had not completed any offending behaviour work to reduce his risk to the public, that was due to reasons beyond his control.

Documents considered

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

- The 297-page dossier provided by the Secretary of State (which includes the panel's decision);

- The representations submitted by the Applicant's solicitors in support of the application for reconsideration; and

- An e-mail from PPCS dated 30 July 2021 stating that on behalf of the Secretary of State they offer no representations in response to the application.

Discussion

21. It is convenient to discuss separately the issues raised by each of each of the solicitors' submissions.

Was the test for release correctly applied?

22. In order to decide whether the Applicant's continued confinement in prison was necessary for the protection of the public, the panel had (a) to assess his risk of serious harm to the public and then (b) to decide whether that risk would be manageable safely in the community during the two-year period between the date

of the hearing (21 July 2021) and the Applicant's conditional release date (17 July 2023).

23. The solicitors do not challenge these assessments, though there might be a case for saying that the risk to future partners was high and the risk to the Applicant's former partner medium. That would make no difference to the overall assessment that the Applicant was a high-risk offender.

24. That he was a high-risk offender was a conclusion fully justified by the evidence. He had committed a violent offence of extreme seriousness and he had not completed any of the offending behaviour programmes designed to reduce risk and equip an offender with the skills necessary to enable him to avoid re-offending.

The risk management plan and the panel's conclusion about its likely effectiveness

25. The risk management plan proposed by B was summarised as follows in the panel's decision:

'The proposed risk management plan is that you would reside initially at [designated accommodation] for up to 12 weeks depending on bed availability. [B] confirmed following the hearing that a notice period of between 6 and 12 weeks would be required to secure a bed. Move-on accommodation is likely to be to independent accommodation, which could be via an application to [the appropriate local authority] or a private rental. At that stage a probation office transfer would take place. Additional licence conditions proposed were a curfew, GPS tagging for six months, a requirement to attend for drug testing, notification of developing intimate relationships, and a requirement to undertake work as directed to address the various aspects of risk.'

26. The panel's assessment of the likely effectiveness of this plan was as follows:

'The panel considered that the plan would be reasonably robust for up to six months, taking account of the additional restrictions at [designated accommodation], and the impact of GPS tagging to monitor your movements. However, the period until your conditional release date is some two years, and the panel was concerned about the efficacy of longer-term risk management, when you would be living independently with less monitoring and supervision, and the probation service would be reliant on your self-report and engagement.'

'…. As things stand, the panel is not satisfied that you currently possess the necessary skills and strategies to manage difficulties in intimate relationships, or the ending of relationships, appropriately, or to manage heightened emotions such as anger and jealousy without recourse to violence …. Whilst the panel accepted that your risk is not assessed as imminent, risk would increase if you formed a new intimate relationship, and this could occur soon after release.'

27. In the light of those findings (which the panel was fully entitled to make on the evidence) it inevitably concluded that the Applicant's risk of serious harm to the public would not be manageable safely on licence in the community during the relevant period and that his continued confinement in prison was therefore necessary for the protection of the public.

The solicitors' submissions

28. The solicitors start with a criticism of the panel's statement that *"While the panel accepts your risk is not imminent, risk would increase if you formed a new intimate relationship, and this could occur soon after release."* The solicitors say that *'could'* is not the test. It was, however, clearly not intended to be a test of anything. In assessing an offender's risk, a panel has to consider various scenarios in which his risk may increase, and that is what the panel, quite properly, was doing.

29. The solicitors go on to say that *'if a new intimate relationship could occur soon after release then the panel acknowledged the RMP was sufficient to manage risk for up to six months…'* This is, I am afraid, a fallacious argument. It was obvious that the Applicant might start a new relationship at any time. If it started after the six-month period, the panel's concerns about the Applicant's risk at that stage (see above) would apply. If it started during the six-month period but continued after that period ended, the same concerns would apply.

30. The solicitors conclude their submissions on this aspect of the case by saying that the panel's statement at the end of its decision that *'in all these circumstances, the panel has concluded that your risk cannot be safely managed in the community under the proposed risk management plan at this stage'* is inconsistent with its acceptance that the risk management plan was robust enough to manage his risk for up to 6 months.

31. On its face this does look like an inconsistency. But when the decision is viewed in its entirety it is clear that what the panel was saying was that at that stage it was not possible to conclude that the applicant's risk would be manageable safely in the community during the relevant 2-year period (which was the period which it was required to consider). If that was not already clear, it is put beyond doubt by the panel's statement, immediately before the above passage, that:

'The risk management plan, whilst likely to suffice in the short term, would not, in the panel's view, be effective in managing your risk during the period of two years which remain until your conditional release date.'

32. In the result I cannot see that there was any irrationality in the panel's application of the test for release. On the panel's unassailable findings of fact, the test for release was clearly not met.

The conflict of opinion between the two officials

33. It was clearly an important point made by the Applicant's legal representative at the hearing that A had a great deal more knowledge of the Applicant than B. As recorded by the panel in its decision, the legal representative in his oral submissions at the close of the evidence submitted that the panel should rely on the evidence of A, who knew the Applicant well, and should discount B's evidence because he had spoken to the Applicant only twice.

34. The panel, quite correctly, declined to adopt that approach. It acknowledged A's much better knowledge of the Applicant but stated that as B would be responsible

for the management of his case in the community his evidence *'must be accorded the appropriate weight'.*

35. The solicitors criticise that expression as being *'meaningless'* and suggest that A's view was *'dismissed as irrelevant'.*

36. I do not think that to refer to *'appropriate weight'* was meaningless. I do not think a panel is expected to attempt to quantify the weight which it is giving to a particular piece of evidence (an exercise which would normally be impossible). What the panel was doing here was to indicate that it did not accept the legal representative's submission that the panel should discount A's evidence altogether.

37. Equally I do not think that the panel was dismissing A's evidence as irrelevant. Its decision shows that it carefully considered all the evidence (including A's) and that its decision was based on its own assessment of the Applicant's risk and its manageability in the community.

38. It is unfortunately not uncommon for the official who is going to be managing an offender's case in the community to have had limited contact (or in some cases no contact at all) with the offender while he is in prison. That does not prevent that official from assessing the offender's risk on the basis of information on file and formulating a risk management plan for the Board's consideration. That is what B was able to do in this case. Naturally the fact that the official has had little or no contact with the offender has an effect on the weight to be attached to his or her assessment of risk, but it does not mean (as the Applicant's legal representative was suggesting at the hearing) that no weight at all should be attached to it.

39. B in fact provided sound reasons, which the panel was fully entitled to accept and adopt, for his view that the applicant was not yet ready for release on licence.

40. A's opinion, on the other hand, was not without its weaknesses. In her original report, she did not recommend early release and expressed the view that core work to address aspects of risk remained outstanding and that there was insufficient evidence of a reduction in risk. In her later report, she recommended release on the proviso that the Applicant continued to demonstrate positive custodial behaviour and that there was a robust risk management plan which included a placement on a particular offending behaviour programme in the community. The evidence at the hearing showed that if the Applicant was released on licence a place on that programme was unlikely to be available for a year, leaving the Applicant as an untreated high-risk offender during that time.

41. A does not appear to have been able to provide a convincing explanation for departing from her original view and then from her revised view that a placement on the identified programme in the community would be an essential element of a risk management plan sufficient to manage the Applicant's risk if released on licence.

42. In these circumstances the panel was fully justified in reaching a conclusion which coincided with B's but not with A's. There was no irrationality in the panel's approach.

The Applicant's failure to complete risk reduction work

43. In the course of their submissions the solicitors state that the Applicant *'was willing to engage in courses but for reasons beyond his control had not been able to.'*

44. I am afraid that this, if correct, could not have affected the assessment of the Applicant's risk of serious harm to the public. If an offender presents a high risk of serious harm which needs to be treated by successful completion of an appropriate offending behaviour programme - and which will remain too high to be safely manageable in the community unless and until such treatment has been completed - the fact (if it is the fact) that it was not his fault that he did not complete the programme cannot alter the fact that his risk remains untreated and too high to justify release on licence. The Board's duty to protect the public means that, however much sympathy it may have for the offender if he has been deprived of the opportunity to undertake the necessary offending behaviour work, it cannot direct his release on licence if the necessary reduction in risk has not been achieved.

45. In fact, it is by no means clear that in this particular case the fact that the Applicant had not completed the necessary work to reduce his risk was due to factors outside his control. It is certainly true that for some little while now the COVID-19 restrictions have meant that most offending behaviour programmes have been suspended. However, it is unclear whether the Applicant had the opportunity to complete an appropriate programme before those restrictions were in place.

46. As recorded by the panel in its decision, in November 2017 a referral had been made for the Applicant to complete a programme which would specifically have addressed his outstanding risk factors. That would have required a transfer to another prison where the programme was available. It was reported that in July 2018 the Applicant refused the opportunity to be transferred. The Applicant has said that that was a misunderstanding and that he only refused a transfer to one prison which offered the programme in question but would have been willing to transfer to another. It was unnecessary for the panel to resolve that issue as, for the reasons just explained, it could not have affected its decision.

Decision

47. For the reasons explained above I cannot find any evidence of irrationality in the panel's approach to this case. On the contrary the panel's reasoning and conclusions were impeccable. I must therefore refuse this application.

Jeremy Roberts
7 August 2021