[2021] PBRA 135

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Application for Reconsideration by Entwistle

Application

1. This is an application by Entwistle (the Applicant) for reconsideration of a decision of an oral hearing panel, which on 29 July 2021, after a hearing on 20 July 2021, decided not to direct his release on licence or recommend his transfer to open conditions.

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 442-page dossier provided by the Secretary of State which included the decision letter, the application for reconsideration submitted by the Solicitor representing the Applicant and an email from PPCS on behalf of the Secretary of State dated 13 September 2021.

Background and current parole review

4. The Applicant is now aged 71. On 9 March 1988, when he was aged 38, he received a mandatory life sentence for murder. He abducted, raped and strangled a 16-year-old girl. He was convicted after trial.

5. The Applicant had previous convictions including two offences of rape (with other offences including two other rapes taken into consideration) for which he was sentenced to a total of 7 years' imprisonment in 1974 and a further conviction for rape for which he was sentenced to 10 years' imprisonment in 1980. The index offence was committed within a few weeks of his release from the 1980 sentence. The Applicant maintains his innocence with regards to these offences and the index offence.

6. The Trial Judge recommended a tariff of 25 years. The then Lord Chief Justice had no comment to make on the recommendation but in due course, the Home Secretary set a whole life tariff. In 2009 this was restored to 25 years. It expired on 18 April 2012.

7. During the early part of this sentence, the Applicant has completed accredited programmes to address offending behaviour, but he has not ever progressed to

open conditions. Previous reviews by the Parole Board-including the review before this-have concluded that there is necessary further work to address his risk.

8. This was his 5th review by the Parole Board. His case was referred by the Secretary of State in April 2019. In December 2019 a member of the Parole Board directed his case to an oral hearing.

9. The Applicant's case was due to be heard on 23 March 2020. This was the day the whole country went into lockdown in response to the Covid-19 pandemic. Face to face hearings were halted that day and so the hearing did not proceed and was deferred.

10. The case was then listed for a video link hearing on 13 July 2020. This was adjourned before the hearing date as the Applicant objected to a video hearing and requested a face-to-face hearing. Eventually the hearing went ahead on 20 July 2021 by way of a hybrid with one panel member at the prison, one witness, the Applicant and his legal representative all present at the prison and everyone else on video link (including the two other panel members).

11. The oral hearing panel heard evidence from the Applicant, his Prison Offender Manager (POM) and his Community Offender Manager (COM). As indicated above, the Applicant was legally represented throughout the hearing. The Secretary of State was also formally represented.

12. The Applicant's POM and COM did not recommend his release, nor did they support any progression to open conditions.

13. The Applicant told the panel that the index offence was not intentional. He denied the earlier offences.

Request for Reconsideration

14. The application for reconsideration is dated 31 August 2021. It was submitted by the Applicant's solicitor and runs to 8 paragraphs which clearly set out the grounds submitted.

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

Ground i) - That the decision is irrational because the Applicant's denial was the 'dominating ground' for the panel in refusing to direct release which is unlawful as established in case law; and

Ground ii) - That the decision is irrational because the panel erred when agreeing with witnesses that a pre-PIPE (a particular regime designed by psychologists) was a core risk reduction work as it is not 'treatment'.

The Relevant Law

16. The panel correctly sets out in its decision letter dated 28 July 2021 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019

17. 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)).

18. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

19. 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."*

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

Denial/maintaining innocence

21. In **Oyston [2000] EWCA Crim 3552**, at paragraph 43 Lord Bingham said,

> *"Convicted prisoners who persistently deny commission of the offence or offences of which they have been convicted present the Parole Board with potentially very difficult decisions. Such prisoners will probably not express contrition or remorse or sympathy for any victim. They will probably not engage in programmes designed to address the causes of their offending behaviour. Since they do not admit having offended they will only undertake not to do in the future what they do not accept having done in the past. Where there is no admission of guilt, it may be feared that a prisoner will lack any motivation to obey the law in future. Even in such cases, however, the task of the Parole Board is the same as in any other case: to assess*

the risk that the particular prisoner if released on parole, will offend again. In making this assessment the Parole Board must assume the correctness of any conviction. It can give no credence to the prisoner's denial. Such denial will always be a factor and may be a very significant factor in the Board's assessment of risk, but it will only be one factor and must be considered in the light of all other relevant factors. In almost any case the Board would be quite wrong to treat the prisoner's denial as irrelevant, but also quite wrong to treat a prisoner's denial as necessarily conclusive against the grant of parole."

22. There have been other authorities prior and since **Oyston**. The Applicant in his application makes reference to **R v Secretary of State for the Home Department exp Zulfiqar (The Times, 26 July 1995) (Divisional Court)**. There is also **R v Secretary of State for the Home Department ex p Hepworth and others (25 March 1997, unreported, Laws J)**; **Sharman v Parole Board for England and Wales [2002] EWHC 2792 (Admin)** where Silber used the term 'Oyston Guidelines' ; **R (on the application of Quaddy) v Governor of HMP Long Lartin [2013] EWHC 2029 (Admin) (Jay J)**; **R (on the application of Gourlay) v Parole Board [2014] EWHC 4763 (Admin) (King J)**; **R (on the application of McCourt) v Parole Board for England and Wales [2020] EWHC 2320 (Divisional Court)**; and most recently **R (on the application of Raw) v Parole Board [2021] EWHC 1934 (Admin)**. The case law confirms the Oyston Guidelines and therefore,

- The Parole Board must assume the correctness of a conviction and must give no credence to denial. However, denial does not lead to a *presumption* against release.

- Denial of guilt will always be a factor to which the Parole Board must have regard when making its assessment. In some circumstances it may be a significant factor and may even be 'determinative' (**Gourlay**). However, it should not be treated as '*necessarily conclusive against the grant of parole'*.

- The weight to be attached to the denial of guilt will depend on all the circumstances. The Parole Board must take into consideration any other factors indicative of a reduction in risk and consider whether they outweigh any negative effect of the denial.

The reply on behalf of the Secretary of State

23. The Secretary of State did not make any representations in reply.

Discussion

Ground i)

24. It is not uncommon for prisoners to maintain their innocence of their index offending or other previous or subsequent offending. As established by the authorities, denial is a factor to which a Parole Board panel will have regard, and a careful assessment, balancing all the competing factors must be made. However, denial of offences may lead to a gap in understanding which may affect whether a prisoner can progress. Denial may be a very significant factor for the panel. I reject

the submission from the Applicant that the panel erred in refusing parole on the basis that the Applicant's denial was a 'dominating ground' for the refusal. The wealth of authorities in this area are entirely against the Applicant on that point and denial can be determinative.

25. Whilst the denial can be determinative, I accept that there must be evidence that the panel balanced the factors, although how each panel does so is a matter for the individual panel. Parole Board panels give their reasons in a decision letter, as the panel did in this case. It is important to note that in **Oyston**, Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship".* Significantly, the Applicant in his application does not set out any specific factors which were missed by the panel or not given appropriate weight. In fact, the Applicant accepts that "*the panel, having clearly considered, with care, the documents in the dossier and the oral evidence, have provided a clear decision*".

26. Having reviewed the decision letter in this case, there is no doubt that this panel placed great weight on the Applicant's denial of the index offending and previous offending, the panel said as much in its conclusion (section 8 of the letter).

27. However, I find that the panel did carry out a balancing exercise and considered other factors as detailed within the letter. The panel highlighted the Applicant's good behaviour and his job in prison which he undertakes despite being of retirement age. The panel described him as "*not a management problem*" but detailed that he remains a Category A prisoner and stressed that his behaviour must be viewed within the context of high security conditions. The panel evaluated the proposed risk management plan and concluded that it was not sufficient to manage the risks that the Applicant currently posed.

28. The panel's decision included extracts of the Applicant's evidence. The Applicant told the panel that he had addressed his offending behaviour during therapeutic work completed on his earlier sentence. The Applicant denied having any current risk factors. The panel remarked that it had "*great difficulty understanding*" his reasoning for believing this work had resolved his issues given he had gone on to commit the index offence three weeks after his release.

29. As is evident from the detailed conclusion section of the decision letter, the panel found that the Applicant lacked insight into his offending and possibly risk situations in the future, he lacked victim empathy and had further core risk reduction work to complete. The panel concluded that the Applicant's reasons for attacking multiple victims are not yet understood, nobody could predict the circumstances in which there might be repetition of this offending and previous prison sentences and treatment had not deterred him.

30. It is therefore not simply the denial of the offending which concerned the panel, it was the panel's assessment of the consequences of the denial as set out which

formed the main reasons for its refusal to progress him. I do not accept that the panel erred in doing so or was irrational in doing so as this was an entirely permissible conclusion to reach, especially given the Applicant's history of offending as outlined above.

Ground ii)

31. The Applicant further submits that the panel's decision was irrational because the panel erred when agreeing with witnesses that a pre-PIPE (a particular regime designed by psychologists) was a core risk reduction work as it is not 'treatment'.

32. The term 'core risk reduction work' is one used regularly within the context of parole recommendations and decisions. It may include many things such as accredited offending behaviour programmes, time spent on particular regimes, a prisoner understanding his own triggers or even consolidation of skills learned previously. In this case there was suggestion by witnesses of a possible way forward of time at a pre-PIPE regime followed by an accredited programme to address sexual interests and sex offending. The witnesses referred to this as core risk reduction work, not 'treatment'. The panel found no reason why this particular pathway could not be followed if that was what was suggested. The panel also pondered whether a motivational course may assist to begin with.

33. It is important to say that the referral from the Secretary of State specifically tells the Parole Board that it is not being asked to comment on any specific treatment needs or offending behaviour work required. Whilst the panel in this case set out the recommendations of witnesses which included suggestions for a specific sentence pathway, it did not go beyond the terms of the referral in my opinion. The panel's decision was very clear in finding a number of outstanding concerns with regards to this Applicant which remained to be addressed. The panel concluded that his risk remained too high to be released (or even progressed to open conditions).

34. Consequently, this ground fails.

Decision

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

Cassie Williams
17 September 2021