[2021] PBRA 165

the Parole Board
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Application for Reconsideration by Buckney

Application

1. This is an application by Buckney ('the Applicant') for reconsideration of the decision of a panel of the Board ('the panel') which on 19 October 2021, after an oral hearing on 7 October 2021, issued a decision not to direct his release on licence and not to recommend that he should be transferred 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, and history of the case

3. The Applicant is aged 35 and is serving concurrent sentences of custody for life for two offences of under section 18 of the Offences against the Person Act 1861 (one of causing grievous bodily harm with intent and the other of wounding with intent). The sentences were imposed on 10 April 2006 when he was aged 19. His minimum term ('tariff') was set at 5 years less the time which he had spent in custody on remand before sentence. It expired on 23 January 2011.

4. The Applicant was released on licence on 8 June 2015 and appeared to be doing well but in October 2018 he committed an offence of affray for which he was recalled to custody and received an 18-month sentence to run concurrently with his life sentences.

5. By August 2020 the Applicant had progressed to an open prison but he absconded from there (anticipating that he would be returned to a closed prison because a mobile telephone which he had been unlawfully using had been found) and remained unlawfully at large until he handed himself in about 7 months later. He was returned to a closed prison and received a 10-month sentence for absconding, again to run concurrently with his life sentences.

6. On 23 March 2021 his case was referred by the Secretary of State to the Parole Board to decide whether to direct his re-release on licence. Because he

has previously absconded from an open prison he is not eligible for a further period in such a prison.

7. On 21 June 2021 the case was reviewed on paper by a single member of the Parole Board who directed that it should proceed to an oral hearing, and the case was then allocated to the panel. The panel comprised a judicial member and two independent members of the Board.

8. When the oral hearing took place on 7 October 2021 oral evidence was given by the two officials responsible for the Applicant's supervision (one in prison and the other prospectively in the community). Neither official supported re-release on licence.

9. The panel's decision was issued on 19 October 2021 and this application for reconsideration was made on 8 November 2021 by the Applicant's solicitor on his behalf.

The Relevant Law

The test for re-release on licence

10. The test for re-release on licence was whether the Applicant's continued confinement in prison was necessary for the protection of the public. This test was, as one would expect, correctly set out by the panel at the start 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/and
(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. It is made on the basis of irrationality. No procedural unfairness is alleged.

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.

Request for Reconsideration

19. The Applicant's solicitors advance the following grounds for reconsideration of the panel's decision:

(1) The panel, having accepted that the Applicant's risk was not imminent and that the proposed risk management plan was suitable, irrationally declined to direct re-release his re-release on licence; and

(2) The panel did not attribute any weight to the facts that (a) there was no evidence of the Applicant committing any offence during the 7 months when he was unlawfully at large in the community and (b) there was no concern about his behaviour during the 7 months since his return to custody.

Documents considered

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

(a)The dossier provided by the Secretary of State for the Applicant's case, which now runs to page 393 and includes a copy of the panel's decision letter;
(b)The representations submitted by the Applicant's solicitors in support of this application;
(c)An e-mail from PPCS stating that on behalf of the Secretary of State they

offer no representations in response to this application.

Discussion

21. I am grateful to the Applicant's solicitors for their clear and concise representations in support of this application for reconsideration. I will deal with their two grounds separately.

Ground 1

22. The fact that the Applicant's risk was agreed not to be imminent and that the proposed risk management plan was suitable was a relevant factor but did not necessarily mean that the test for re-release on licence was met.

23. As regards imminence or the lack of it, a panel of the Board is required not only to assess a prisoner's risk in the short term but to look further into the future and to consider his longer-term risk. It is clear that that is what the panel did in this case.

24. A risk management plan, however robust, can provide external controls but those can only go so far in providing the necessary protection for the public. What is required is an effective combination of external and internal controls. The panel's conclusion in this case was that the Applicant's internal controls were insufficient to enable his risk to be managed safely in the community and therefore his continued confinement in prison was necessary for the protection of the public.

25. As the panel put it in its decision:

'The panel agrees the plan is robust and probably the best that could be devised in the circumstances. The panel also believes this plan or something similar could deliver adequate risk management, provided [the Applicant's] internal controls were equally strong.

'The panel accepts the evidence of the professional witnesses that there is presently insufficient evidence upon which to be satisfied [the Applicant's] internal controls have developed sufficiently for [him] to be safe to be released. In those circumstances, the panel is not satisfied the proposed plan would be effective.'

26. This was an entirely correct approach, and the panel's conclusion that the Applicant's internal controls were insufficient was fully justified by the evidence. The panel explained in some detail its reasons for that conclusion, and none of those reasons has been challenged in this application as being irrational. I have found them compelling. I cannot therefore uphold this ground.

Ground 2

27. It was entirely reasonable for the points to be made on the Applicant's behalf that he had not committed any offences in the community whilst unlawfully

at large or in custody since his recall. They were good points but there were compelling points going the other way which the panel was entitled to prefer.

28. I am afraid I am not persuaded that the panel failed to attach appropriate weight to the points in the Applicant's favour.

29. At the start of the '*Conclusion and Decision'* section of its decision the panel expressly stated: *'The panel has considered the evidence in the case very carefully and does not lose sight of the fact that there is no evidence [the Applicant] committed any offence whilst on the run.'*

30. The panel also acknowledged the Applicant's good custodial behaviour: in the section at the end of its decision offering assistance for future panels it stated: '*Based on your history, it is likely that [the Applicant's] conduct in closed conditions will be entirely satisfactory because [he seems] to do well in a regulated environment*. 'The Applicant's problem had been that he had been unable to achieve a similar standard of behaviour when not in a regulated environment.

31. I am therefore unable to uphold this ground either.

Decision

32. For the above reasons I am afraid I cannot direct reconsideration of the panel's decision.

Jeremy Roberts

24 November 2021