[2021] PBRA 57

the Parole Board
working with others to protect the public

Application for Reconsideration by BENNETT

Application

1. This is an application by Bennett (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 26 March 2021 not to direct his release.

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 decision letter, the dossier and the application for reconsideration. I have also seen an email dated 16 March 2021 providing proposed additional licence conditions and an exclusion zone.

Background

4. The Applicant is serving two sentences of imprisonment for public protection (IPP).

5. The first IPP sentence was imposed on 3 March 2008 following conviction for wounding with intent to do grievous bodily harm. The minimum tariff was set at 30 months less time spent on remand. This tariff expired on 13 January 2010. The Applicant also received a concurrent extended determinate sentence comprising 12 months in custody with a six-month extended period on licence following conviction for assault occasioning actual bodily harm.

6. The second IPP sentence was imposed on 27 April 2012 following conviction for assault occasioning actual bodily harm and threats to kill, committed within two months of the Applicant's release on licence for the first IPP sentence. The minimum tariff was set at five years and expired on 27 October 2015.

7. The Applicant was aged 26 at the time of the first sentence and 30 at the time of the second sentence. He is now 39 years old.

Request for Reconsideration

8. The application for reconsideration is dated 8 April 2021 and has been submitted by solicitors acting for the Applicant.

9. It submits that the panel's decision to recommend open conditions was irrational. No matters of procedural unfairness are raised.

10. This ground is supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

11. The Applicant's case was referred to the Parole Board by the Secretary of State in May 2020 to consider whether or not it would be appropriate to direct his release and, if release was not directed, to advise the Secretary of State on whether the Applicant should be transferred to open conditions.

12. On 16 October 2020, the Applicant's case was directed to an oral hearing. Directions were set for various reports, including a psychological risk assessment (PRA) and updates from the Applicant's Prison Offender Manager (POM) and Community Offender Manager (COM). These reports were provided prior to the oral hearing.

13. The PRA (20 January 2021) recommended release for the Applicant, to undertake ongoing work in the community supported by an intensive risk management service, and ideally residing in specialist designated accommodation supported by psychologists to help people recognise and deal with their problems.

14. The POM (17 February 2021) recommended a transfer to open conditions. Given the COVID-19 restrictions in the community, she had concerns about whether the risk management plan could be fully implemented and further noted the Applicant's previous reluctance to disclose pertinent information about his substance misuse.

15. The COM (19 February 2021) also supported a move to open conditions, to allow the Applicant to consolidate his learning and demonstrate his ability to maintain this when tested in a different environment. She noted the risk management plan was somewhat weakened by COVID-19 and that the Applicant would require extensive support to manage himself successfully in the community.

16. The case proceeded to an oral hearing on 17 March 2021. This was held remotely by telephone (due to COVID-19 restrictions) before a two-member panel, including a psychologist specialist member. The panel heard oral evidence from the POM, COM, prison psychologist (author of the PRA) and the Applicant. The Applicant was legally represented throughout.

17. The prison psychologist remained supportive of release. She said the Applicant needed ongoing consolidation work, but this was not core risk reduction work and could be undertaken in the community.

18. The POM changed her recommendation from that in her report. She now supported release on the basis that the current COVID-19 restrictions are expected to be lifted and the Applicant would have more support from the proposed specialist designated accommodation, the intensive risk management service, and his family than he would have in open conditions.

19. The COM also changed her recommendation from open conditions to release, particularly since specialist designated accommodation was available from 14 June 2021 for six months and the Applicant would have support from a multidisciplinary

service working with people with complex needs and significant risk issues for up to two years.

20. The panel did not direct the Applicant's release. It noted this was *"a finely balanced decision".* It recommended that he should be transferred to open conditions.

The Relevant Law

21. The panel correctly sets out the test for release in its decision letter dated 26 March 2021.

Parole Board Rules 2019

22. 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)).

23. 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

24. 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."*

25. 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.

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

The reply on behalf of the Secretary of State

27. The Secretary of State has submitted no representations in response to this application.

Discussion

28. It is submitted that the panel's decision to recommend open conditions was irrational. In recommending open conditions the panel did not direct release, and so I frame this application as equivalent to submitting that the panel's decision not to direct release was irrational. In doing so, I accept it is an eligible decision for the purposes of Rule 28.

29. The application first asserts the panel did not release the Applicant as his "*family support is embryonic and the process of rebuilding the relationship with his family is fragile*". The application then disagrees with this statement.

30. The first part of the assertion is incorrect. The panel's decision says the Applicant's resettlement plans (and not his family support) are embryonic.

31. Turning to the second part of the assertion, regarding the fragility of the Applicant rebuilding the relationship with his family, it is argued that the Applicant said he spoke to his family daily, his POM said the Applicant had already established supportive family ties, and his COM said the family relationship was very much improved.

32. It is clear from the record of the oral evidence in the decision that the Applicant is in contact with his family. It also notes his COM's view that there is "*some fragility if [the Applicant's] family relationships break down*". The victim of the assault occasioning actual bodily harm that led to the second IPP sentence was a member of the Applicant's family and, although they may well now be on better terms with each other, it is not irrational to conclude that this could be a fragile relationship.

33. The decision also notes that family members are seeking an exclusion zone to prevent the Applicant from simply turning up at their home. It is also not irrational for the panel to conclude from this that the Applicant's relationship with members of his family must be fragile: a strong relationship would not require them to seek an exclusion zone for their own protection enforced by a potential return to custody in the event of a breach.

34. The application also disagrees with the panel's conclusion that there was no guarantee that the proposed risk management plan will be delivered.

35. The panel's analysis is much more nuanced than this argument suggests. While the panel does note that the COVID-imposed restrictions on delivery of aspects of the risk management plan may not be guaranteed to be removed from 21 June 2021 this is not the main reason for its conclusion. It carefully balances the proposed release plan against the Applicant's history of repeated non-compliance and non-disclosure.

36. It is also argued that the panel's failure to follow the recommendations of the professional witnesses was irrational.

37. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk

management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, following **R (Wells) v Parole Board [2019] EWHC 2710**

38. The panel explained in its detailed reasons how it had weighed and balanced the competing views and facts. It was correctly focused on risk throughout. It was reasonably entitled to test the Applicant's evidence robustly and reach the conclusions it did on the facts as it found them to be. The legal test of irrationality is a very strict one. This case does not meet it.

Decision

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

Stefan Fafinski
11 May 2021