

[2021] PBRA 64

Application for Reconsideration by Barker

Application

1. This is an application by Barker (the Applicant) for reconsideration of a decision of an Oral Hearing Panel of the Parole Board (OHP) 6 April 2021 not to direct his release. The OHP had convened via remote video link on 29 March 2021, due to Covid-19 restrictions in place at the time.
2. The referral by the Secretary of State had required the Board to consider whether to direct the Applicant's release. If release was not directed, the Board were asked to consider whether the Applicant was ready to be moved to open conditions and if so, to make such a recommendation.
3. 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. Under Rule 28(1) the only kind of decision which is eligible for reconsideration is a decision that a prisoner is not suitable for release on licence.
4. I have considered the application on the papers. They consist of the Dossier containing 443 pages, the OHP's decision and representations on behalf of the Applicant.

Background

5. The Applicant is now 54 years of age. He has a long history of offending which includes offences of violence, the most serious of which were for wounding with intent. He was sentenced in July 2008 to an indeterminate sentence having pleaded guilty to two offences of serious violence. He was 41 years old when he committed the index offences. The tariff expiry date is recorded as being 18 April 2011. The offences occurred in a private house where the Applicant was visiting. He had drunk a great deal of alcohol, taken anti-depressant medication and medication for alcohol withdrawal, lost his temper and armed himself with a knife from the house which he used to injure both occupants one of whom suffered life threatening injuries. The judge described the offences as being extremely serious and found that the Applicant represented a significant risk to the public.
6. The OHP found that the Applicant's major risk factors (that is those matters that would make it more likely he would re-offend) included:



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- a) A willingness to resort to violence and use weapons;
 - b) Alcohol misuse;
 - c) Impulsivity, poor problem-solving skills and lack of victim empathy; and
 - d) Pro-criminal attitudes and associations.
7. As for protective factors (those matters that would make re-offending less likely), the OHP found that these were based upon the Applicant completing some offending behaviour work during his sentence, avoiding violence and positive behaviour in prison following recall.

Release and Recall

8. The Applicant was released on licence on 8 May 2019 following the decision of a differently constituted Panel in March 2019. That Panel had carefully considered the risk management plan that was before it and were satisfied that the Applicant was committed to remaining alcohol free and to use the support being made available to him. In those circumstances the Panel concluded that the risk management plan was sufficient to manage his risk in the community.
9. The licence was revoked on 2 December 2019 after the accommodation where the Applicant had been staying notified the probation service that he had left that address and his whereabouts were unknown. That remained the position until 14 December 2019 when the Applicant was returned to custody. Up to the point of his unannounced departure from where he should have been living, the Applicant had appeared to be complying overall with his licence conditions although he had received warnings (two months apart) for drinking alcohol, poor behaviour and a missed probation appointment.
10. The OHP found that the Applicant's recall was appropriate as he had shown that he remained vulnerable to alcohol misuse, that he had effectively disengaged from supervision and had left a key protective factor (secure accommodation). On his arrest and return to custody, the OHP noted that he was found to have been heavily intoxicated. Since recall, the OHP also noted that the Applicant's conduct in prison had been broadly compliant and that for a while he had engaged with substance misuse support services but he had stopped doing so from the end of January 2020 indicating that he did not believe he required any further support from them.

The Request for Reconsideration

11. The grounds for seeking a reconsideration are as follows:
- a) The OHP failed to consider a progressive move to open conditions.
 - b) The OHP failed to consider that a period in open conditions would allow time for the proposed risk management plan to be strengthened.

- c) The decision that the Applicant should remain in closed conditions was irrational in light of the evidence regarding risk.

The Relevant Law

Parole Board Rules 2019

12. 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)).

Open Conditions

13. 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** and in others.

Irrationality

14. 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."

15. 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.
16. The application of this test has been confirmed in previous decisions on applications for reconsideration under Rule 28. See for example the case of **Preston [2019] PBRA 1** and others.
17. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)**, **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the

correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:

- (a) the progress of the prisoner in addressing and reducing their risk;
- (b) the likeliness of the prisoner to comply with conditions of temporary release;
- (c) the likeliness of the prisoner absconding; and
- (d) the benefit the prisoner is likely to derive from open conditions.

The reply on behalf of the Secretary of State

18.No submissions have been made on behalf of the Secretary of State in response to this application.

Discussion

19.As I have mentioned, the reconsideration mechanism does not apply to the OHP's decision not to recommend a move to open conditions. It follows that the first two grounds put forward on behalf of the Applicant must fail. I therefore will focus upon the third ground which will in fairness to the Applicant, enable me to consider and decide upon what in effect underpins his application, namely that the refusal of the OHP not to grant his application for release was irrational having regard to the evidence placed before the OHP.

20.The evidence from the professional witnesses heard by the OHP was that there was no support for the Applicant's release into the community but there was some support for a move to open conditions. Panels of the Board are independent and are not obliged to adopt the opinions and recommendations of professional witnesses. It is the responsibility of panels to make their own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. A panel, in recognition of the importance of its decision to the prisoner and to the public, is under a duty to explain its reasons for the decisions it takes and ensure as best it can that its stated reasons are sufficient to justify its conclusions (see ***Wells v The Parole Board [2019]EWHC 2710 (Admin)*** and ***Stokes v The Secretary of State [2020] EWHC 1885 (Admin)*** both of which cases provide helpful guidance which I am bound to follow).

21.The Applicant submits the OHP's decision not to release him or permit any progression was irrational in the light of all the evidence. I am required to analyse the OHP's decision with care and to decide whether the conclusions they reached can be safely justified on the evidence they considered.

22.In my judgment, in a careful, thorough and fair decision, the OHP in its Decision Letter having made clear that they considered all of the written and oral evidence set out clearly its conclusions all of which I find they were fully justified in reaching. By way only of example, I cite the following findings:

- a) That the index offences were committed when the Applicant was taking prescription medication and was binge drinking.

- b) That although not convicted of any further offences of violence on licence or in prison, the Applicant's risk was imminent and high, and the risk assessments were fair and accurate.
- c) That there was concern that in many ways the proposed risk management plan was less robust than the one in place on the previous release when the Applicant in effect walked away from licence supervision and remained unlawfully at large. The conclusion reached was that the current plan was not adequate to manage the Applicant's risks particularly in light of the Applicant's evidence to the OHP that he admitted taking alcohol while on opiate-based medication when last in the community.
- d) There was no evidence that the Applicant had sufficiently changed his thinking patterns as evidenced by his decision to disengage from probation when last released.

23. It is further submitted that the OHP did not "reasonably consider" a progressive move. I will only observe that the OHP twice spelled out the factors it is required to consider in this regard and went on to explain precisely why such a move could not be recommended.

Decision

24. For the reasons I have given, I do not consider that the decision not to release was irrational. On the contrary I find that the conclusions reached can be safely justified on the basis of all of the evidence and accordingly, this application for reconsideration is refused.

HH Michael Topolski QC
20 May 2021