[2022] PBRA 60

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Application for Reconsideration by The Secretary of State for Justice in the case of Grynhaus

Application

1. This is an application by The Secretary of State for Justice (the Applicant) for reconsideration of a decision of an oral hearing dated the 15 March 2022 to direct the release of the prisoner Grynhaus (the Respondent).

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 Application for reconsideration, the Response to the Application by the legal representatives of the prisoner (the response), the decision letter dated 15 March 2022 and the dossier that was considered by the panel.

Background

4. The Respondent received an Extended Determinate Sentence (EDS) on 10 July 2015 for five counts of indecent assault of a child under 16, two counts of sexual assault of a child under 16 and one count of failing to surrender. The custodial term was set at 5 years in custody, with an extended licence period of 4 years. The Respondent became eligible for release on licence on 3 February 2022. His Conditional Release Date (CRD) is 4 April 2024, and his Sentence Expiry Date is 5 November 2031. This is the first review of his case.

Request for Reconsideration

5. The application for reconsideration is dated 12 April 2022, provided after the Applicant was given an extension of time to file the application. It was therefore received on time.

6. The grounds for seeking a reconsideration are summarised as follows:

(a) Irrationality

- The Panel has not satisfied the Secretary of State that the test for release has been applied appropriately when considering [the Respondent's] risk upon release.
- No accredited risk reduction work has been completed and therefore, the risk is still present. The Panel does not clearly evidence any reduction in [the Respondent's] risk.
- In not meeting the test for release, the Secretary of State believes that the conclusions drawn by the Panel are contrary to its own findings and the evidence before it.
- The Panel has given disproportionate weight to, and misdiagnosed, protective factors. 'The Panel identified a number of protective factors which the Secretary of State do not think are protective factors, or that the Panel have given too much weight to.'
- The Panel has failed to fully explain its reasoning for going against the recommendation of report writers.
- The panel has failed to consider all evidence.

Current parole review

7. The Secretary of State's referral is dated 5 May 2021. It was considered by a single member of the Parole Board on 22 September 2021, who directed an oral hearing. As this was an extended sentence, the Respondent had a Parole Eligibility Date, a Conditional Release Date and a Sentence Expiry Date. The earliest point when release can be considered is the Parole Eligibility Date, and this review is with respect to that date. The Respondent was 50 years old at the time of sentence and 57 years old at the time of the decision.

8. The panel that heard the case consisted of a Judicial member, a Psychologist member and an Independent member. The hearing was on 9 February 2022 via a video link. The dossier contained historic and current information about the Respondent including details about his offending; reports from psychologists, his prison and Community Offender Managers and a number of representations from the Respondent's legal representatives. Prior to the hearing commencing, the panel heard one of the victims read out their Victim Personal Statement. The Secretary of State had made no representations in writing and did not attend the hearing.

9. Evidence was taken by the panel from the Respondent, the Prison and Community Offender Managers, the author of the psychological risk assessment in the dossier and the Respondent.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 15 March 2022 the test for release.

Parole Board Rules 2019

11. 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)).

Irrationality

12. 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."*

13. 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.

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

Other

15. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

16. In **Oyston [2000] PLR 45**, at paragraph 47 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."

The reply on behalf of the Respondent

17. A detailed response to the application was provided by the Respondent's legal representative.

Discussion

18. I consider that the best way to consider this application is to examine each aspect as outlined in the Application itself in turn, rather than use the summary above. For each issue I will take into account both the Application and the Response. Of necessity there will be some repetition. The Application has three broad headings. These are, paraphrased, failure to consider all the evidence on risk and failure to apply the test for release; failure to give appropriate weight to protective factors; and failure to fully explain their reasons for going against the recommendations of the professional witnesses.

19. Failure to consider all the evidence on risk and failure to apply the test for release.

20. Because of the broad nature of that part of the Application relating to failure to meet the test for release, I will deal with this part of the Application at the very end of this discussion.

21. Several points are made by the Applicant under failure to consider all the evidence, and I take each point in turn.

    i) *That the panel accepted the view of professionals that the Respondent continued to present a high risk of serious harm to children and (the Applicant states) would be higher if taking the OSP scores into account, as also accepted by the panel*.

    In making this complaint, I consider that the Applicant has misunderstood how risk is generally assessed by the Parole Board overall. I will first state how these assessments should be approached and then consider the Application in light of this approach. I consider the specific assessment tool of OSP after this general discussion. I have not explored the risk assessment carried out by the psychologist witness as the Application does not focus on their risk assessment.

    The risk of serious harm is an assessment of the outcome in relation to harm should the Respondent re-offend. This assessment does not consider the *probability* of re-offending. By way of example, if someone has murdered someone, their risk of serious harm might be assessed as high because it may be that if they *were* to reoffend, there is a risk that the victim would suffer serious harm. However, the same person might be assessed as having a *low risk of reoffending violently*. This might be for a number of reasons, but essentially assessments of reoffending are statistical assessments taking into account number and type of convictions, age at time of conviction and length of time since the last conviction.

There are therefore two broad type of assessments, one of serious harm and one of probability or likelihood of reoffending. These are different assessments and one can be high when the other could be low. Furthermore, risk of re-offending is based on a statistical prediction of proven re-offending using cohort information from past offenders and is generated by the assessment tool after the inputting of a variety of data. These assessments are found in a document used by the probation service and called Offender Assessment System (OASYS) assessments. The risk of harm assessment is a clinical assessment carried out by a qualified assessor (usually a probation officer).

It is therefore entirely possible that a panel, properly applying the test for release when considering risk of serious harm and also the probability of re-offending, might release someone who they consider remains a high risk of serious harm. While making that decision, any panel would want to explore that risk, but also the risk of re-offending, and make its decision based on its assessment of all risks, the management of that risk, and all other evidence.

I should make a general point here about releasing prisoners that are assessed by the panel to pose a high risk of harm should they re-offend. Many prisoners are released by the Parole Board with an assessment that their risk of serious harm (should they re-offend) is high, almost all prisoners whose index offence is of a serious nature will remain a high risk of serious harm until such time as they have proved that their risk has been reduced once they are in the community, and not before. The issue is whether that risk has been carefully considered, along with the management of that risk.

A panel, having taken evidence from all relevant sources including the prisoner (if they choose to give evidence) and any professional witnesses qualified to provide evidence about any assessment they have made should then make its own assessment of that risk, whether risk of serious harm and/or risk of further offending. In so doing, any panel may either agree with or differ from the professional's assessment or OASYS assessments. Indeed, it is their duty to make their own assessment, and due deference should be given to the expertise of the panel in the discharging of its duties, as explained in the case of **DSD** (above).

I accept that a panel should give an explanation as to how it arrived at its assessment(s) of risk of serious harm and risks of re-offending, albeit it is not necessary for a panel to do more than provide a short explanation.

In this case, I can see from the decision letter that the panel fully documents the assessments provided by all the professional witnesses that undertook assessments of both types of risk, these were the forensic psychologist and the community offender manager (COM).

With respect to the OSP scores specifically, these are assessments about future re-offending with respect to sexual offending (OASYS Sexual Offending Predictor). As explained in the decision letter, this particular reoffending assessment tool relies heavily on the *number of convictions* as an indicator of future risk. The Respondent scored 'low' on this assessment. This is because he was convicted on one occasion for several sexual offences.

The panel therefore quite rightly explored this 'low' assessment of risk of further sexual offending with the witnesses and agreed with them that the score was underestimated given the context of the offending and the length of time during which the offending occurred. I find no irrationality in their approach to the question of risk of re-offending. It might have been useful if they had said a little more about exactly where they would place the risk of sexual offending, but these matters are not an exact science and, in my view, nowhere near the test for irrationality as provided for in the in the case of **DSD.**

The panel also agrees with the professionals that the risk of serious harm is high, and gives sufficient explanation as to why they have come to this conclusion. The panel also explores imminence of risk in some detail, indicating that in its view the risk would not be imminent and that there would be signs of rising risk so that professionals managing the Respondent in the community would be alerted to concerns before risk became imminent.

Under this part of the Application, the Applicant also asserts that the Respondent has not undertaken any risk reduction work, and that the panel did not 'clearly' evidence reduction in risk.

I will make a general point about offence focused work. Many prisoners have access to accredited and non-accredited offence focused work as well as one to one work, designed to address identified risk factors. It can be helpful for a prisoner to undertake this work, and following completion of the work there may be evidence of reduced risk, as assessed by professionals.

It does not automatically follow however that a reduction in risk is *only* possible following offence focused work. Some panels may have before them evidence that offence focused work has not been successful in achieving positive change. It is also the case that some prisoners do not have access to this work for a variety of reasons, or are unable to take it up, or are on long waiting lists for the work, or are reluctant to undertake it.

When a prisoner has not undertaken any offence focused work the Parole Board panel must consider any evidence of change. Indicators of change may include custodial behaviour and engagement, employment within the prison estate, engaging with relevant services such as substance abuse and mental health services, learning skills or successfully completing educational courses, working with charities and other agencies on behalf of others, evidence of self-reflection, insight into their behaviour and the impact on victims, and maturation. This is not an exhaustive list. However, it does mean that a panel may well find evidence of change and decide to recommend progression to open conditions or release a prisoner who has not undertaken any offence focused work.

I reject therefore any suggestion (although not specifically made by the Applicant) that because the Respondent has not undertaken any offence focused work there can be no evidence of reduction in risk, and I have given my reasons in relation to this above. The accompanying point made by the Applicant however is deserving of further exploration, this is that the panel does not 'clearly' evidence any reduction in risk.

By way of completeness, I also reject the Respondent's legal representatives' suggestion that the panel should take into account the fact that the Respondent was not able to undertake relevant offence focused work because their risk scores were too low. It is accepted that there appears to be an anomaly in that work recommended to the Respondent to address his risk factors was not available to him because of what I consider to be a technicality, and clearly not his fault. However, this is not the concern of the Parole Board and does not form part of the test it must consider. It would be wrong for a panel to give any credit to a prisoner because he was not placed on a course that may (or may not) have assisted him in reducing risk.

I therefore considered whether the panel explored evidence of reduction of risk, and also management of any remaining risk. The panel accepts, as indicated in the decision letter, that the risk factors identified by the psychologist at the time of the index offences remain the same at the time of the hearing. In relation to evidence of reduction of risk, the decision letter shows that the panel has considered good custodial behaviour; good insight into the reasons for offending and a motivation to remain pro-social and not re-offend. The panel also notes that the Respondent has undertaken a victim empathy in-cell pack (this is a workbook a prisoner can undertake on their own and is then usually reviewed by a prison official).

The panel additionally states that it found the evidence of the Respondent at the hearing to be *'deep and thoughtful'* and found that he had reflected long and hard on what he had done and the impact on his victims. This particular observation clearly goes to the panel's consideration of the Respondent's insight into the offending.

Against this, the Applicant points out that good custodial behaviour cannot be a good indicator of change in this case. I do accept that in offences of a sexual nature, especially where the prisoner has offended against children, and where the behaviour of a person otherwise has not been anti-social, good custodial behaviour is not always relevant to showing reduction in risk.

Good custodial behaviour, however, implies ability and motivation to comply with rules, and this can be taken into account by a panel when it considers the management of any risk.

I accept that there appears to be some qualification in the decision letter of the panel's assessment of risk reduction. For example, the letter states that the Respondent was unable to explain what led to the offending, but follows that sentence to say that the Respondent has demonstrated sufficient insight into his risks and risky situations, and implies that this insight will give the Respondent sufficient internal controls (presumably for release). The sentence that indicates that he gave *'deep and thoughtful'* evidence to the panel is followed up with surprise as to how long (years) it took the Respondent to appreciate the impact on victims. However, while I accept the point made about qualification, I consider that this is evidence that the panel was carrying out a careful weighing exercise, putting signs of positive change and reduction of risk against any evidence of remaining concern. In my opinion, albeit sometimes clumsily put, there is

evidence of thorough exploration of risk and its reduction in the letter. Another example of this is also raised by the Applicant. In the letter, at different points, the panel notes that the Respondent denies sexual interest in underage girls, and also states that the panel considers that the ability to be aroused by pubescent girls is a risk factor. In my view this is further evidence of a careful exploration of the balance of evidence. The fact that some of the consideration is clumsy in the attempt to weigh up evidence does not detract from the reasonableness of the approach of the panel in this case, and I am mindful of the words of Lord Bingham in the case of **Oyston**: … *"it would be wrong to require elaborate or impeccable standards of draftsmanship."*

A panel is responsible for considering the credibility of any witness, and in particular the evidence of a prisoner. The letter indicates that very full evidence was taken from the Respondent, and that the panel found the Respondent's evidence convincing in relation to insight and motivation to desist from offending in the future. The panel also took into account evidence that the Respondent, after years of offending without being discovered, had made a decision to desist before he was arrested. As stated, it is the duty of a panel to make decisions about the credibility or otherwise of a witness on any one matter. In my opinion the letter evidences a thorough assessment of the evidence of all witnesses including the evidence of the Respondent, challenging him as they saw fit. The letter indicates an appropriately careful approach was taken by the panel in making its decision about the Respondent's evidence and I can find no irrationality in its approach to his evidence.

Remaining with the issue of assessment of risk reduction, I accept that where a panel makes decisions about risk that go against the opinions of professionals, it needs to be clear where and how it has come to a different conclusion. The Respondent has been assessed by a forensic psychologist and in effect their report was that all the risk factors remained current (agreed by the panel), and that in order to evidence reduction in risk the Respondent needed to undertake offence focused work prior to release. The panel clearly considered this view but stated that while the panel accepted this work should be undertaken, it could be undertaken in the community after release.

A panel has to make its decision based on the evidence before it, and I am satisfied that this panel took reasonable care in considering the evidence before it.

ii) The next part of the Application I will explore is the submission that the panel has given disproportionate weight to, and misdiagnosed, protective factors.

I will make some general points about protective factors. These are factors that will help an offender remain pro-social and desist from re-offending. They might be *external* or *internal*. External factors are, for example, licence conditions that require a prisoner to attend supervision meetings, drug testing, or require someone to stay out of a particular area (exclusion zone) or prohibit unsupervised contact with children. Internal factors include something that is inherent in the offender or his circumstances that will prevent re-offending, this might be a genuine commitment to abstain from offending or the things that might lead to

offending, for example abstinence from drugs or alcohol. It might be having learnt skills and strategies to manage anger and avoid conflict. It might be the ability to seek advice and support at times of stress and need. And it may include having some kind of support structure, professional, personal or both. A panel, having assessed the risk factors still relevant to the prisoner, will also assess any protective factors in order to assess risk and its imminence overall.

In this case, the panel is clear on what protective factors are assessed to exist. These are:

"…motivation to be a positive member of his community, his business, his living circumstances, fear of returning to prison, having life goals, his intelligence and external controls."

I accept the Applicant's submission that some of these factors existed while the Respondent was offending. If they did not prevent him from offending at that time, evidence as to why they would succeed in the future would need to be in the decision letter. I note that there are such examples. One of these was evidence from the dossier and taken at the hearing about his familial and community circumstances and changes that had come about as a result of the Respondent's conviction. The internal protective factors that could be said to be new and not present at the time of offending is evidenced by the panel's assessment that the Respondent is now motivated to be a positive member of the community, and the fear of returning to prison. The latter in particular can be a powerful protective factor for someone who has never experienced the criminal justice system before nor been imprisoned before, as is the case here. These internal factors would go hand in hand with external factors which could be aided by the Respondent's assessed compliance. Taking the information in the letter as a whole, while I accept that there is always scope for further information about the details of any panel's consideration and findings, I do not consider that there is any evidence of irrationality on the area of exploration of protective factors. There was no '*misdiagnosis*' and a weighing up exercise was undertaken with an exploration of not just the protective factors with the risk factors, but also of the management of risk.

iii) The third ground relied upon by the Applicant is that the panel failed to fully explain their reasoning for going against the recommendations of report writers.

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 prisoner. 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, ***per R (Wells) v Parole Board 2019 EWHC 2710.***

As the Application states, none of the professional witnesses recommended release. The Application also states that the decision letter was 'woefully lacking' with respect to the reasons for disagreement.

Having carefully considered both the Application and the response submitted by the Respondent's legal representatives, I cannot agree that there is lack of reasoning given for the disagreement with recommendations. For example, the forensic psychologist had concerns about the Respondent's insight into his offending. The decision letter explains the psychologist's concern, but also explains why, having listened to the Respondent and taking the evidence as a whole, the panel's own conclusion is that the Respondent evidenced good insight into his risks. Another example of a difference in view is the panel's consideration of whether the Respondent should undertake work while in custody i.e., before release. This was the recommendation of the professional witnesses. The panel clearly considered this as evidenced in their letter which states that in its opinion the further work can be carried out in the community. The panel goes on to suggest that should the Respondent be reluctant to engage with this work, the COM could consider enforcement action under the licence conditions. A third example is that the panel came to a view that the Respondent had sufficient internal controls that, along with the external controls, would be capable of managing the Respondent's risk. This differed from the forensic psychologist's view, who was concerned that there would be opportunities for re-offending where the Respondent's internal controls might be insufficient. The decision letter fairly raises this concern, and its own consideration of the management of any risk.

The decision letter provides sufficient reasons for the panel's disagreement with the recommendations.

iv) I now turn to the matter of the test for release. The Application states that for all the reasons given in their application (which I have explored above), the test for release was not met in this case. As I have indicated, I do not agree with the grounds for irrationality as stated by the Applicant. The panel made a thorough assessment of risk, risk factors and protective factors, it took evidence from all witnesses, it carried out a weighing exercise with respect to any matters it disputed with the professional witnesses and investigated the risk management plan.

Decision

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

Chitra Karve
10 May 2022