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[2022] PBRA 78

Application for Reconsideration by Tang

Application

1. This is an application by Tang (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 17 May 2022 not to direct 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:

   a) The Decision Letter dated the 17 May 2022;
   b) A request for reconsideration in the form of written representations dated the 6 June 2022; and
   c) The dossier, numbered to page 646, of which the last document is the Decision Letter. The panel considered a dossier which ran to 629 pages.

4. The application was not made on the published form CPD 2, which contains guidance notes to help prospective Applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints and reminds Applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made and I am satisfied that the written representations provide reasonable explanation as to the proposed grounds for reconsideration.

Background

5. The Applicant is now 52 years old. On 27 June 2008, she was convicted after trial of an offence of s18 Wounding (the Index Offence) and the court imposed a sentence of imprisonment for public protection (IPP). The court set a minimum term of 2 years and 153 days before the Applicant could be considered for release by the Parole Board.

6. The circumstances of the Index Offence were that the Applicant followed and assaulted a 70 year old male late at night. She attacked him with a hammer or similar implement wrapped in a bag, hitting him several times in the back of his head and in the face.

7. The Applicant first became eligible to be considered for release on 28 November 2010 and this was her fourth review by the Parole Board.

8. The present review began with a referral from the Secretary of State on 31 December 2018. The case was considered on the papers by the Parole Board on 11 July 2019 and an oral hearing was directed. An oral hearing was scheduled on 7 February 2020 but was adjourned for the provision of further information. Subsequent hearings were adjourned, with the eventual hearing taking place on 9 March 2022. The panel, having heard evidence from the Applicant, her Probation Officer in the community, an official supervising her case in prison and two psychologists (one instructed by the Applicant's legal representative) did not direct her release but did recommend that she should be transferred to an open prison.

Request for Reconsideration

9. The Applicant's grounds for reconsideration are that the panel's decision was irrational, in that:

   a) The panel's conclusion around imminence of violence is irrational and also ultra vires. It accepted that risk of violence was currently not imminent but found that it could become so relatively quickly in the context of a relationship that became problematic, and that this elevated risk might not be evident to professionals after release from the designated accommodation;

   b) This reasoning is based on a sole incident, out of 15 years, of incarceration. The test is whether or not the risk of violence is imminent – there is no need or requirement to consider whether it could become imminent, as otherwise barely any prisoner would be released into the community;

   c) The assessment is irrational on the grounds that if the Applicant was a male prisoner convicted of a similar violent offence, who had engaged in minor violence in prison six years ago, the only relevance of such an incident to the current risk assessment would be to note that the prisoner had had ample opportunity over six years of responding to stressful situations without resorting to violence; and

   d) The panel's concerns about the robustness of the release plan were irrational.

The Relevant Law

10. The panel correctly sets out the test for release in its decision letter dated the 17 May 2022.

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)).

12. In **R (on the application of 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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

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.

15. 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*."

16. The importance of giving adequate reasons in decisions of the Parole Board has been made clear in the cases of **Wells [2019] EWHC 2710 (Admin)** and **Stokes [2020] EWHC 1885 (Admin)**, both of which contain helpful guidance which I am bound to follow on the correct approach to deciding whether a decision made by a panel in the face of evidence from professional and other expert witnesses can be regarded as irrational.

17. It is suggested in **Wells** that rather than ask "*was the decision being considered irrational?"* the better approach is to test the ultimate conclusions reached by a panel against all the evidence it has considered and ask whether the conclusions reached can be safely justified on the basis of that evidence, while giving due deference to the panel's experience and expertise.

18. Having reached conclusions upon the evidence it is clear that a panel is then required to explain its reasons, especially if they are going to depart from the recommendations made by experienced professionals. A panel can rationally depart from expert evidence, but a rational explanation for doing so must be given and it must ensure as best it can that its stated reasons are sufficient to justify its

conclusions. It follows that I must decide whether on a reading of the panel's decision, I am satisfied that the conclusions it reached are justified by the evidence it considered, and secondly whether I am satisfied that those conclusions are adequately and sufficiently explained or whether there are any unexplained evidential gaps or leaps in reasoning which fail to justify the conclusion that is reached.

19. The Parole Board will direct release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. In **R (King) v Parole Board [2016] 1 WLR 1947** it said at paragraph 31:

20. "*….as a matter of ordinary language, the words necessary for the protection of the public do not entail a balancing exercise in which the risk to the public is to be weighed against the benefits of release to the prisoner or the public. The concept of protecting the public does not involve any kind of balancing exercise. It simply involves safeguarding the public from the danger posed by the prisoner….the goal to be achieved is clear, namely the protection of the public; and the means by which it is to be achieved, namely by continued confinement of the prisoner, is equally clear. If the Board concludes that confinement is necessary because there will be a (more than minimal) risk of harm if the prisoner is released, then confinement of the prisoner will be required to avoid that risk*."

The reply on behalf of the Secretary of State

21. On 15 June 2022, the Secretary of State confirmed that he would not be making any representations about the application.

Discussion

Grounds a, b and c

22. Grounds a, b and c can be taken together as they seek to argue the same point in that the panel's decision not to direct release was based on an assessment of imminence and was weighted by an incident of violence that occurred in custody in 2016.

23. The Applicant's suggestion that the test for release is based on the likely imminence of risk is an incorrect interpretation. As set out in **King** the panel was required to consider the necessity of detention for the protection on the public and that confinement of the prisoner would be required to avoid '*more than minimal'* risk of harm.

24. At paragraph 2.3 of the Decision Letter, the panel had this to say:

25. "*Positively, since the last review (and since 2016) [the Applicant] has not used violence or been physically aggressive. She had a verbal altercation in 2021 where she instigated an argument in defence of her friend who she felt was being taken advantage of. The panel and witnesses discussed whether this amounted to offence paralleling behaviour. Whilst clearly the trigger was similar to what is now understood about the index offence, it is notable that [the Applicant] did not resort*

to physical violence, and no action was taken against her by the prison as a result of her behaviour."

26. Any reading of the Decision Letter establishes that the panel was primarily concerned with matters related to risk in terms of the Applicant's behaviour in custody and the potential for issues with identified risk factors to emerge on release which might lead to an escalation in risk. It is clear to me that the incident of violence in 2016 was not a significant event in the panel's determination of the case given that time had passed without similar issue save for a verbal altercation in 2021.

27. Witnesses were not in agreement in respect of the recommendations given to the panel. The panel's Decision Letter demonstrates that it gave proper consideration to the recommendations made and then, as it was required to do, went on to make its own assessment of risk and reached its own conclusion as to whether the Applicant met the test for release. Within its conclusion, the panel explained carefully where it agreed and disagreed with the views expressed by witnesses at the oral hearing. There were no unexplained evidential gaps or leaps, the panel correctly set out the test for release and applied that test in its assessment. It complied with the referral from the Secretary of State and followed the Parole Board Rules [2019]. There was nothing irrational in this.

Ground d

28. The plan to manage the Applicant's risk if released was based on an initial placement in designated accommodation prior to a move to longer term accommodation which, if the Applicant was assessed as suitable, would be available for up to two years.

29. In its assessment of the risk management plan, the panel had this to say at paragraph 3.7 of the Decision Letter:

30. "*The panel carefully considered the risk management plan proposed, and found it to be robust in the short term, but given that [the Applicant] would be on an IPP licence, it was unclear what the longer term plan would be if the [move on accommodation] was either unavailable or if the Applicant would not agree to live there. The short term plan in the [designated accommodation] would provide a good level of monitoring and support but given the extent of [the Applicant's] institutionalisation and her high level of need in the community, the panel had concerns whether those needs would be met by this plan*."

31. The Applicant argues that this assessment was irrational because in fact the move on accommodation would provide structure and support for at least 12 months and for up to two years. It is submitted that release via the designated accommodation and then to the move on accommodation would be more structured, supportive and less stressful than a move to an open prison.

32. The panel had been concerned by the likely longer term success of the risk management plan, particularly because the move on accommodation had not been confirmed. The Probation Officer's report to the panel established that the Applicant would first have to be assessed for the accommodation following release and that

she would first need to be placed within the identified designated accommodation due to the assessed risk of harm so that she could demonstrate her ability to adhere to the risk management plan.

33. Every risk management plan will need some fine tuning which can be done only after release; it is a question of degree. The question here is not whether a differently constituted panel might have come to a somewhat different conclusion but whether the conclusion this panel reached and the basis for it, met the high test for irrationality or not.

34. It is possible that other panels may have put different interpretations on the likely effectiveness of the risk management plan in the longer term. However, the panel was entitled to reach the conclusion that it did in its assessment of the plan and the Applicant's submission that the plan would be supportive in the longer term was reliant on that element of the plan becoming available. The panel had concerns, it explained why and there was nothing irrational in this.

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.

Robert McKeon
27 June 2022