[2019] PBRA 37

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Application for Reconsideration by Phillips

Application

1. This is an application by Phillips (the Applicant) for reconsideration of a decision of a Parole Board oral hearing panel which decided not to direct release but recommended to the Secretary of State that the Applicant be transferred to open conditions. The hearing was dated 16 August 2019.

2. I have considered the application on the papers. These comprise of the dossier, the provisional decision letter of the panel dated 29 August 2019, the application for reconsideration (email sent with attachment dated 12 September 2019) and the response of the Secretary of State by email. The Secretary of State did not make any representations to the board in response to the application

Background

3. The Applicant is serving an indeterminate sentence of Imprisonment for Public Protection with a minimum term of 2 years and 199 days. The tariff expired in November 2010.

Request for Reconsideration

4. The request for reconsideration is undated. It is a document headed 'Application for Administrative Review'.

5. The request for reconsideration seeks a review of the decision to recommend open conditions. It is clear in Rule 25 of the Parole Board Rules that a decision to recommend or not to recommend a move to open conditions, which the solicitors submit was either irrational or procedurally unfair, is not eligible for reconsideration under the new Rules.

6. However, a decision as to whether or not to direct the release of the prisoner, is one that is eligible for reconsideration under the Rules, and I have assumed that the Applicant challenges the decision not to direct release.

7. The Applicant invites the reconsideration assessment panel to direct release on licence with conditions. The powers of the reconsideration assessment panel are limited by the Rules. If a decision is irrational or procedurally unfair, reconsideration panel powers are limited to sending back to the original panel or ordering re-panelling.

8. The application does not indicate whether the Applicant submits that the decision was procedurally unfair or irrational or both. As there is no specific reference to procedural unfairness, I have assumed that the Applicant is submitting that the decision was irrational.

9. The Applicant sets out a number of arguments which I paraphrase below:

   (a) The panel applied the wrong test by failing to refer to the Parole Board guidance relating to risk to "*life and limb*".
   (b) The panel disregarded fundamental evidence of experts.
   (c) The panel made errors in its conclusions relating to evidence of the physical condition of the Applicant.

Current parole review

10. On 19 December 2017 the Secretary of State referred the Applicant's case to the Parole Board for her 4th review.

11. The Applicant was in closed conditions when the panel convened on 16 August 2019. In its terms of reference, the Secretary of State asked the panel first to consider whether it was appropriate to direct the Applicant's release. If not, the panel was invited to advise the Secretary of State on whether the Applicant should be moved to open conditions.

12. The panel heard oral evidence in two hearings as the matter had been adjourned. In July 2019 the panel heard from the Applicant herself, the Offender Supervisor, a General Practitioner involved in the Applicant's care, an Administrator, a Custodial Manager, and the Offender Manager. In August 2019 the panel heard evidence from the Applicant, the Offender Supervisor, the Offender Manager, and a Prison Psychologist.

The Relevant Law

13. Rule 25 (decision by a panel at an oral hearing) and Rule 28 (reconsideration of decisions) of the Parole Board Rules 2019 apply to this case.

14. Rule 28(1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case.

15. 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."*

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.

Discussion

16. **Erring in applying the test** – In this case the panel applied the correct statutory test relating to release and set out the terms of the test in the decision letter.

17. The Applicant submits that the "*full*" test was not explained. It is submitted on behalf of the Applicant that the full test of serious harm involves a risk to "*life and limb*" and that the panel fettered its discretion by considering harm in a "*colloquial*" sense and used evidence which was not relevant.

18. The Applicant cites a reference in the decision to causing harm by "*shouting*". The decision itself notes that this reference was a paraphrased reply from the Applicant herself. The Applicant herself was saying that shouting might cause harm. This was in the context of prison incident reports which had been referred to in the hearing, and which were discussed. The panel noted in its decision letter that the incidents of shouting were not assessed as relating to the Applicant's risk of causing serious harm.

19. The panel, in assessing current risk, referred to the evidence of the psychologist witness which indicated that the risk of violence, if it occurred, was likely to be in the form of robbery and that it may become imminent if the Applicant were to relapse or suffer a breakdown of a relationship. The panel considered that a relapse due to boredom or thrill seeking might also occur.

20. It was clear therefore that the panel linked the risk of serious harm to the index offences which were knifepoint robberies.

21. The Applicant submitted that it was too far an evidential leap to say that struggling to cope with her emotions is linked to physical violence. However, the Offender Supervisor, Offender Manager, and the Prison Psychologist, although recommending release, were concerned about the possibility of a relapse. The panel noted that relapse was associated with inadequate coping strategies. The Applicant had also told the Prison Psychologist that she would be likely to "*self-medicate*" with non-prescription drugs if her prescribed painkillers were not available. The index offences were committed in the context of relapse.

22. **Oral Hearing Decision** – I am satisfied that the panel applied the correct test for release. The oral hearing decision letter analysed the nature of any risk and concluded, as did the witnesses, that the risk was of violence (either reactive or

instrumental) and probably following a relapse and a return to non-prescription drugs.

23. It is submitted that the panel disregarded the fundamental evidence of experts – Panels of the Parole Board are not obliged to adopt the opinions and recommendations of any particular professionals or other witnesses. It is their duty and responsibility to evaluate the evidence as a whole, make their own risk assessments, apply the statutory test and to evaluate the likely effectiveness of any Risk Management Plan proposed.

24. In this case there was a clear concern about whether the Applicant had retained sufficient skills to resist any temptation to return to non-prescribed drugs. The panel explained that the Applicant had been in custody for over 11 years and had not, in their view, undergone sufficient testing in less secure conditions. The panel also noted that although there had been no adjudications or sanctions, there were several incident reports suggesting drug misuse and involvement in the drug culture. The panel concluded that there was insufficient evidence to indicate that the Applicant could sustain her much improved behaviour if released directly into the community.

25. I have considered whether in light of all the evidence the decision of the panel was irrational, as indicated in the case cited above. As I have indicated, a decision to disregard the evidence of experts cannot of itself be considered irrational. The panel acknowledged the views of the experts and explained why, in assessing its public duty, it concluded that the Applicant did not meet the test for release. I do not consider that the panel acted irrationally in reaching its decision on this issue.

26. It is submitted that the panel made errors in its conclusions relating to evidence of the physical condition of the Applicant – The panel indicated in its conclusion that it had considered this point. The evidence of the Prison General Practitioner was that, although the Applicant had a medical condition which required pain relief, she maintained the physical ability to act in a manner similar to the index offences.

27. I do not find that the decision, by the panel, to reject the submission that the Applicant was physically incapable of causing serious harm to others, was an irrational decision.

Decision

28. For the reasons I have given, I do not consider that the decision overall was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

Stephen Dawson
14 October 2019