[2019] PBRA 80

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**Application for Reconsideration by Defpotakis**

**Decision of the Assessment Panel**

## Application

1. This is an application by Defpotakis (the Applicant) for reconsideration of the decision of a two-member panel not to direct his release, following an oral hearing which convened on 12 November 2019.

2. I have considered this application on the papers. These were the current and most recent previous dossiers, the provisional decision letter of the panel dated 18 November 2019, the application for reconsideration dated 22 November 2019, a directed supplemental submission by e-mail from the Applicant's solicitor dated 2 December 2019 and the response of the Secretary of State on 3 December 2019.

## Background

3. The Applicant is now 38 years old. He is serving a sentence of imprisonment for public protection imposed in December 2005 after pleading guilty to an offence of meeting a child following sexual grooming. The two year tariff expired in June 2007. At the time of the index offence the Applicant was subject to a 3 year community order made in 2004 and was residing in premises designated by his supervising probation officer.

4. The first four post-tariff reviews were decided by panels that convened between 2007 and 2017. Each found that the Applicant did not meet the test for release and made no recommendation for a progressive move.

5. A panel convened at a closed prison to hear the Applicant's fifth review in July 2018. He was represented by the same solicitor as in the current (sixth) review. His then Offender Supervisor told the panel that there had been no recent poor behaviour, the Applicant had denied previous negative security reports and there had been no evidence to corroborate any negative behaviours for a sustained period. The panel agreed with the Offender Manager that there was no evidence of the Applicant posing a high risk of serious harm to other prisoners. The panel found no evidence to substantiate any recent offence-paralleling attitudes or behaviours.

6. The July 2018 panel found that the Applicant did not meet the test for release, but that he would benefit from being tested in a less restrictive setting and developing his release and resettlement plans. The panel recommended his progression and he was duly transferred to an open prison in October 2018.

**Request for Reconsideration**

7. The request for reconsideration contends that the provisional decision of the panel which convened on 12 November 2019 not to direct release was both irrational and procedurally unfair. The focus of complaint is on the way in which the panel dealt with the disputed security information both during the taking of oral evidence and in its evaluation of this contentious category of material in its reasons. There is strong criticism of the factual accuracy of the panel's summarising of the evidence in two specific respects.

8. The security information in the dossier was received, by the prison in which the Applicant was then located, on multiple dates between July 2014 and July 2019. The entries disclosed into their respective dossiers were brought to the attention of the last and current panels and evaluated differently, as explained above and below to show the context of the grounds now advanced for reconsideration.

**Current parole review**

9. In January 2019 the Secretary of State referred the Applicant's case to the Parole Board for his sixth review. The terms of reference asked the panel to consider whether it was appropriate to direct the Applicant's release. At that time he was in open conditions and had been adjudication-free since 2012.

10. A security report was added to the dossier in March 2019. Most entries related to previous prisons. The implications for the Applicant's day to day management in open conditions were noted in the first reports of his Offender Manager and his then Supervisor. For example, the Applicant had been assessed as unsuitable to take on the role of trusted mentor to other inmates.

11. In July 2019 the Applicant was returned to closed conditions following increased security concerns, which were brought to the attention of the Governor and later reflected within the additions to the dossier. The next part of the original terms of reference was therefore now engaged. If release was not appropriate, the panel was asked to advise the Secretary of State on whether the Applicant was suitable to be transferred back to open conditions.

12. The dossier contained the detailed minutes of the Immediate Suitability Review which took place at the open prison on 24 July 2019. Senior staff met to discuss the cumulative effect of the security reports which had been collated in respect of the Applicant over the past five years. The Applicant was due to take his first period of resettlement overnight release on temporary licence. Allowance was made for the historic nature of some of the allegations. None were proven. However, managers discerned a troubling pattern of apparent grooming of younger prisoners.

13. The Applicant was temporarily returned to closed conditions for a 28 day investigation report to be completed. Further intelligence was received, suggesting that he had threatened to stab another inmate. On 8 August 2019 senior managers concluded that he could no longer be managed in the open estate.

14. The Applicant thereafter remained in closed conditions. On 23 September 2019 a fellow inmate alleged that the Applicant had exposed himself indecently to him. There was no CCTV or other supporting evidence and no disciplinary action followed.

15. On 26 September 2019 the Applicant breached prison rules by being found with "vapes" in a prohibited area. The sanction on adjudication was the loss of his Incentives and Earned Privileges (IEP) enhanced status.

16. The panel heard oral evidence from the Applicant, his present and previous Offender Supervisor, his Offender Manager and an interventions facilitator. The Applicant was legally represented at the hearing. There was no support for release from the reporting witnesses. The provisional decision letter reflected their positive shared views on the merits of the Applicant being returned to open conditions to resume the phased preparation for resettlement that had been interrupted by his return to closed conditions. The panel's own assessment was that the Applicant continued to pose a high risk of serious harm to children and the public. It agreed with the professional witnesses that his identified risk factors were not yet safely manageable in the community. It therefore made no direction as to release.

**The Relevant Law**

17. 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.

18. 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.

19. 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."*

20. 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.

21. The Courts have in the past refused permission to apply for judicial review where the decision would be the same even if the public body had not made the error.

22. Section 31(3C) to (3F) of the Senior Courts Act 1981 now provides that the Courts must refuse permission to apply for judicial review if it appears to the Court highly likely that the outcome for the claimant would not have been substantially different even if the conduct complained about had not occurred. The Court has discretion to allow the claim to proceed if there is an exceptional public interest in doing so. See paragraph 5.3.5 of the **Administrative Court Guide to Judicial Review 2019**.

**Discussion**

23. Paragraph 2 of the application complains that the summary of the evidence within the provisional decision letter incorrectly reports the final allegation that was reported to the security department before the Applicant's removal from the open estate was made permanent. It is said that this mis-recorded information was the basis of the phrase in the reasons "there was too much information to be totally discounted." In fairness to the panel, this criticism must be viewed in the context of the provisional decision letter as a whole. In section 5, it is accurately stated that there had been an allegation that the Applicant had threatened to stab another resident in the neck. However, in section 8, it was said that "the allegation of stabbing a prisoner came to nothing". The queried "too much information" phrase appears four sentences earlier in the same section. On my reading of the letter, it was a concise and apt portmanteau term, intended to embrace all the security entries that had been brought to the panel's attention. The supposed link is not demonstrated and the omission of part of the description of the allegation on its second citation was not material. It did not begin to undermine the overall strength of the reasons, which were firmly anchored to other evidence set out in the remainder of the provisional decision letter.

24. Paragraph 5 makes another complaint of factual inaccuracy in relation to the reason why the Applicant lost his enhanced IEP status in September 2019. It is agreed between the parties that this was the sanction on his adjudication for taking a 'vape' off the wing. Section 5 of the decision letter summarised the unproven indecent exposure allegation and the proven 'vape' adjudication in adjacent paragraphs. The letter wrongly put the IEP reduction with the allegation when it should have been placed with the adjudication. However, the panel then went on to say that it did not consider these incidents affected assessments of risk. There is no merit in this complaint of irrationality flowing from the accepted misattribution of sanction.

25. Paragraph 5 of the application also contains a complaint that the panel did not reflect within its reasons (and therefore by implication did not take into account) the oral evidence of the 2018 interventions facilitator that he would not be at all concerned about the Applicant not writing about sexual matters in his logs. It is said that he was the only professional qualified to assess such logs. No objection was taken at the oral hearing to the concerns of other professionals being received in evidence. The oral evidence of the facilitator to the previous panel is noted within the dossier. His evidence to the current panel is summarised in section 5 of the decision letter. Why the facilitator is now said to have exclusive

expertise to help the panel on this matter is not apparent from a search of the dossier against his surname, nor is it explained within the application. The Applicant himself wrote (at page 521 of the dossier) that the facilitator had advised him that the logs were intended to record positive and negative thoughts; what went well and what went badly. Sexual thoughts, emotions and feelings plainly fall within that broad definition for any diarist. The panel was entitled to share the concerns of other professionals that the learning logs were merely recording practical matters – and so the Applicant was not making full use of them to show his understanding of this key risk area.

26. Paragraph 3 makes a separate complaint of procedural unfairness in relation to the conduct of the oral hearing. The Applicant's solicitor says the panel chair told him that little heed would be paid to the security information relating to his client allegedly grooming younger prisoners. He says that he relied on that indication and did not call evidence in rebuttal. At first sight, there is some force in this criticism, given the subsequent weight the panel attached to at least some of the security entries in its written evaluation of this category of hearsay reportage. The panel found there was too much information to be totally discounted and went on to draw an inference of manipulative behaviour, on the basis that a percentage of the entries could be taken to be authentic. I am troubled by the expression within its reasons of the panel's approach to this contentious material. It is obvious from the dossier (but not the reasons) that the bulk of the security information pre-dated the previous parole review in July 2018, where it had been considered by another panel and no findings adverse to the Applicant made. Whilst it was, of course, open to the current panel to make its own fresh assessment and reach a different view in the light of recent events in open conditions, that possibility should either have been left open or signalled to the Applicant's solicitor so that he could address it.

27. I find this complaint of procedural unfairness alone is made out on the papers before me. However, that is not the end of the matter. I have then to decide how to exercise the statutory discretion given to me in Rule 28(7):

> *"(7) The assessment panel **may** [panel's emphasis] direct that the provisional decision should be reconsidered … if it has identified a ground for reconsideration"*

28. Even if the current panel had ignored all the security information, I think it is highly likely that the outcome of this review would have been the same. There was ample other evidence which deservedly carried weight with the panel to show that the test for release was not met. There was a consensus amongst the reporting witnesses that the Applicant's interrupted journey through open conditions ought to be resumed. He had still to fulfil the expectations of the July 2018 panel. His risk of causing serious harm to children and the public remained high. Testing on periods of release on temporary licence had yet to begin. The panel was correct in recommending that the Applicant be transferred back to open conditions.

**Decision**

29. I found a single instance of procedural unfairness in the conduct of the oral hearing, but that identified ground did not merit the making of a direction for reconsideration under Rule 28(6)(a).

30. Accordingly, this application must be dismissed under Rule 28(6)(b).

Anthony Bate
13 December 2019