[2021] PBRA 25

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Application for Reconsideration by Reilly

Application

1. This is an application by Reilly ('the Applicant') for reconsideration of a decision of an oral hearing panel of the Board ('the OHP') which on 20 January 2021, after a hearing on 11 January 2021, decided not to direct his release on licence.

2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.

3. The following documents have been provided for the purposes of my consideration of this application:

   - The 560-page dossier provided by the Secretary of State;
   - The OHP's decision letter of 20 January 2021;
   - Representations submitted on 11 February 2021 by the Applicant's solicitor in support of the application; and
   - An email dated 25 February 2021 in which PPCS informed the Board that the Secretary of State offers no representations in relation to this appeal.

Background

4. The Applicant is aged 54. On 20 January 2003 he received concurrent sentences of automatic life imprisonment for three robberies and an attempted robbery. He was released on licence on 17 December 2018 but recalled to custody on 15 March 2018.

5. The Applicant spent the early part of his sentence in prisons in England. In 2006 he was transferred to a prison in Northern Ireland, where he was born and has family connections, and later to other prisons there. He took part in a pre-release programme in Northern Ireland but more than once failed to return on time from temporary releases on licence.

6. His release on licence in December 2018 was to designated accommodation in Northern Ireland.

7. His recall in March 2019 was the result of a number of breaches of his licence conditions (including misuse of alcohol).

8. On 17 April 2018 his case was referred by the Secretary of State to the Parole Board to decide whether to direct his re-release on licence and, if it did not do so, to advise the Secretary of State about his suitability for a transfer to open conditions.

9. On 2 May 2019 he was transferred back from Northern Ireland to a prison in England where he remains.

10. On 24 June 2019 it was directed by a single-member panel of the Board that the case should proceed to an oral hearing.

11. An oral hearing was listed to take place on 13 January 2020 but was deferred for various reasons. The deferral directions specified that that a psychological risk assessment should be carried out.

12. That assessment was duly completed by a prison psychologist on 23 July 2020 and shortly afterwards another psychological risk assessment was completed by an independent psychologist instructed by the Applicant's solicitors.

13. The case was then allocated to the OHP and the oral hearing took place on 11 January 2021 as stated above. The OHP had considered everything in the dossier and took oral evidence at the hearing from the two probation officers responsible for the Applicant's supervision in prison and prospectively in the community, from the Applicant himself and from the two psychologists. Having considered all of that evidence the OHP decided not to direct the Applicant's release on licence but to advise the Secretary of State that he was suitable for transfer to open conditions.

The Relevant Law

The test for release on licence

14. The test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the OHP at the start of their decision.

The rules relating to reconsideration of decisions

15. Under Rule 28(1) of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.

16. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by
    - a paper panel (Rule 19(1)(a) or (b)) or
    - an oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or
    - an oral hearing panel which makes the decision on the papers (Rule 21(7)).

17. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both of two grounds: (a) that the decision is irrational or (b) that it is procedurally unfair.

18. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. It is made on both grounds.

19. The OHP's advice to the Secretary of State about the Applicant's suitability for open conditions, though criticised by the Applicant's legal representative, is not eligible for reconsideration. The legal representative's complaint in relation to that advice is that the OHP should have directed release on licence and therefore the question whether to recommend a move to open conditions should not have arisen at all.

Irrationality

20. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin) (the "Worboys case")**, 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."*

21. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.

22. 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.

23. The Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under rule 28: see **Preston [2019] PBRA 1** and others.

Procedural unfairness

24. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed, and therefore producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate from the issue of irrationality which focusses on the actual decision.

25. It has been established that the things which might amount to procedural unfairness include:
    (a) A failure to follow established procedures;
    (b) A failure to conduct the hearing fairly;
    (c) A failure to allow one party to put its case properly;
    (d) A failure properly to inform the prisoner of the case against him or her; and/or
    (e) Lack of impartiality.

    The overriding objective is to ensure that the case was dealt with fairly.

Disagreement with professional witnesses

26. One situation which may give rise to a finding of irrationality or procedural unfairness is where a panel has made a decision contrary to the recommendations of all the professional witnesses and has failed to give adequate reasons for doing so.

27. A panel of the Board is not bound to follow the recommendations of professionals: its responsibility is to make its own independent assessment of the prisoner's risk and its manageability on licence in the community. However, if its assessment differs from that of the professionals it has a duty to explain the reasons for that disagreement.

28. The reason for requiring adequate reasons had been explained in a number of decisions including:
R v Secretary of State for the Home Department ex parte Doody (1994) 1 WLR 242;
R (Wells) v Parole Board (2009) EWHC 2710 (Admin);
R (PL) v Parole Board and Secretary of State for Justice (2019) EWHC 306;
R (Stokes) v Parole Board and Secretary of State for Justice (2020) EWHC 1885 (Admin).

29. The principal reason for the duty to give reasons in any case is said to be the need to reveal any error which would entitle the court to intervene: without knowing the panel's reasons the court would be unable to identify any such error and the prisoner's right to challenge the decision by judicial review would not be an effective one. In **Wells,** Mr Justice Saini pointed out that the duty to give reasons is heightened when a panel of the Board is rejecting expert evidence.

"Duty of enquiry"

30. Another situation which may give rise to a finding of irrationality or procedural unfairness is where a panel has made a decision in the absence of an important piece of evidence which might have made a difference to the decision and which the panel might reasonably have been expected to obtain (adjourning the hearing, if necessary, for that purpose). This area of the law is still in the course of development. The principle involved is sometimes referred to as a "duty of enquiry" and it is relied upon by the Applicant's solicitor in this case.

Request for Reconsideration

31. In support of the Application, the Applicant's solicitor advanced four grounds, as follows:

    (1) The OHP's decision to recommend open conditions in this case was irrational in the circumstances.

(2) The OHP failed to record accurately evidence given by one of the probation officers that the Prison Service had *"an apparent blanket policy of only accepting prisoners to open conditions if they are on a reducing medication script of 40ml or less"* to help him to avoid the use of illegal drugs. (The Applicant was on a script of 65ml and was not reducing it: he told the OHP that he was not currently looking to reduce it but would do so when he felt ready.)

(3) The OHP's decision *"not to adjourn this case for [the Applicant's] suitability for open conditions (sic) was irrational and a failure of duty of inquiry amounting to procedural unfairness".* Further and/or in the alternative, *"the aforementioned decision not to adjourn/ defer for the requisite further information/ material is Wednesbury unreasonable."*

(4) The OAP should have adjourned the hearing to allow the probation officer who would be responsible for the management of the Applicant's case in the community *"to make the requested and necessary move-on accommodation referrals after the proposed [designated accommodation], so that [the OHP] had access to, and to review, all the relevant material";* and/ or the OHP *"should have adjourned/deferred to enable various referrals for accommodation and suitability for open conditions in light for the Applicant to take place".*

Discussion

32. The OHP's first task was to decide whether the test for release was met, in other words whether the Applicant's continued confinement in prison was necessary for the protection of the public. The question of the Applicant's suitability for open conditions only arose if the OHP concluded that his continued confinement was necessary. In that event, which proved to be the case, the OHP's second task - having decided that the test for release was not met - was to advise the Secretary of State about the Applicant's suitability for open conditions.

33. The legal representative's submissions appear to be based largely on the proposition that, since the professional witnesses were all of the view that there was no need for the Applicant to remain in closed conditions, the OHP had to choose between open conditions and release on licence (and open conditions should have been rejected because the Applicant was unlikely to be accepted there). That is, I am afraid, the wrong way of looking at the issues. The OHP considered the matter in the correct order: Stage 1 of its decision-making process was to decide whether the test for re-release was met, and Stage 2 (when they had decided that it was not) was to decide what advice to give to the Secretary of State about the Applicant's suitability for open conditions.

34. The OHP set out in their decision letter the reasons for their finding, at Stage 1, that the Applicant's risk of serious harm to the public remained too high to be safely manageable on licence in the community and that his continued confinement in prison was therefore necessary for the protection of the public.

35. I have considered very carefully whether the reasons given by the OHP for that finding were (a) adequate and (b) defensible. If they were both, the complaint of irrationality must fail.

36. I am satisfied that, so far from being inadequate, the OHP's reasons were set out clearly in impressive detail and cannot be faulted. Other panels might have reached a different conclusion but the OHP's view was an entirely defensible one and by no stretch of the imagination irrational.

37. In explaining their view that the Applicant's risk of serious harm to the public remained too high to be manageable on licence in the community, the OHP set out the relevant features of the Applicant's history, including the circumstances of his previous failure on licence in the community. Their assessment was that the Applicant's risk of future violent offending was "at least moderate" and that the risk of serious harm being caused by any such offending was "moderate to high".

38. As regards the manageability of those risks in the community, they acknowledged that the Applicant had not committed any offence of violence during his relatively brief period on licence in Northern Ireland. They also accepted that the risk management plan proposed by probation was appropriately focussed on the Applicant's main areas of risk. However they found - on evidence which clearly supported that conclusion - that the Applicant's insight into his behaviour was limited, that he did not understand the extent to which alcohol was a risk factor for him and that there was insufficient evidence that he possessed the necessary internal strategies to support the external controls which would be provided by supervision in the community. They pointed out that any progress which the Applicant had made as a result of the counselling and substance-focussed in-cell work which he had completed since recall was yet to be tested outside of the closed prison estate.

39. The legal representative places some reliance on the fact that, although all four professional witnesses were recommending a move to open conditions rather than release on licence, on one reading of their evidence they were of the view that the Applicant's risk would be safely manageable on licence in the community. If that was the correct reading of their evidence, that might provide a basis for arguing (on the principle explained above) that they failed to give adequate reasons for departing from the evidence of the professionals. To see whether that was the case it is necessary to examine precisely what the professionals said in evidence.

40. One of the probation officers felt that the proposed risk management plan could potentially manage the Applicant's risks in the community in the short term, but his recommendation was for a progressive move to open conditions for a gradual transition to support long term success.

41. The other probation officer said, at one point in her evidence, that the Applicant's risk would not be imminent upon release and that confinement was not necessary as things would need to go wrong in the community before the public was put at an unacceptable level of risk. However, she also said that, whilst she considered that the Applicant's risk could be managed whilst he was at designated accommodation, he had yet to be sufficiently tested to ascertain whether his risk could be managed

longer term in the community. She highlighted that the Applicant had made a series of poor decisions when last in the community, and his risk had escalated as a result. Her preference therefore remained for a progressive move to open conditions.

42. One of the psychologists told the OHP that she had seen the most recent dossier and, having also heard the Applicant's oral evidence, her recommendation for a move to open conditions had remained unchanged. She was of the view that the Applicant's risks could be managed in the community but a release via testing in open conditions was likely to reduce the future likelihood of events similar to those that led to his previous recall. In her view his insight into the triggers to his past offending was greater than his insight into his behaviour that led to his recall. She considered that a period in open conditions would enable him to evidence that he could cope without support, or that he would be willing to seek support when it is needed.

43. The other psychologist also told the panel that her recommendation remained for open conditions. Having heard the Applicant's oral evidence she was of the view that his insight was less developed than her initial assessment had suggested. She was of the view that his professional support network in the community would be paramount and she was concerned that he had not used that support when last in the community. She shared the view of the other witnesses that his risk might be manageable in the short term and she recognised the likely positive impact of the counselling which the Applicant had recently undertaken, but she highlighted that the impact of this on his ability to cope in the community was yet to be tested.

44. This evidence, when viewed as a whole, clearly did not support the case for release on licence. Professionals and the Board are not concerned only with a prisoner's risk in the short term: they are required to consider the longer-term risk, which is what the OHP and the professionals did in this case. As will be explained below, there was no significant difference between the views of the OHP and those of the professionals.

45. I can now turn to the specific grounds advanced in support of this application.

Ground 1: The OHP's decision to recommend open conditions in this case was irrational in the circumstances.

46. The OHP's decision to recommend open conditions was made only after they had first concluded that the test for re-release on licence was not met. Once they had reached that conclusion, they had to advise the Secretary of State either that the Applicant was suitable for open conditions or that he was not suitable. The advice that he was suitable for open conditions was of course more favourable to the Applicant than the alternative.

47. It appears to be being suggested that it was irrational to advise that the Applicant was suitable for open conditions because there might be problems in getting him accepted by any open prison when he was on a relatively high medication script. If (which I do not think is the case) there had been any irrationality in giving the advice which the panel gave, the effect of that irrationality would have been that

the OHP should have advised the Secretary of State that the Applicant was unsuitable for open conditions (at least until he had reduced his medication script to an appropriate level) rather than that he was suitable.

48. The OHP gave the following reasons for advising the Secretary of State that the Applicant was suitable for open conditions:

"… after undertaking a balanced assessment of risks and benefits, the panel agreed with the professional witnesses that [the Applicant has] satisfactorily addressed [his] risk factors to a degree that they would be manageable in the less restrictive regime in open prison conditions and whilst [on periods of temporary release on licence] where [he] would be unescorted. [The Applicant's] risk of abscond is assessed by the panel and all witnesses as not being heightened and the panel accepted that [he has] no doubt as to the lengthy period [he] would likely spend in custody if you chose to abscond.

"The panel was of the opinion that a return to open conditions will test whether [the Applicant has] internalised the lessons [he has] learnt and can act upon them in conditions that are more realistic and where [he] will be exposed to external stimuli. [The Applicant] will also be tested in terms of [his] ability to comply and self-manage in less restrictive prison conditions.

"[The Applicant] remain[s] on a script and [his] current prescription level is considered by professionals to be a protective factor in that it stops [him] from seeking illicit drugs from elsewhere. The panel heard evidence during the hearing that enquiries had been made with a limited number of open prisons and some will not accept someone on such a high dose and others may do so but only if the dose is reducing. The panel was hopeful that it would be recognised by open establishments that [the Applicant's] current script is considered to be a protective factor and that [he] would be able to make such a move if the Secretary of State accepts the panel's recommendation. However, the particular open prisons available to [his] or the acceptance policies that they operate were not factors within the remit of the panel or the Secretary of State's referral to the panel."

49. These reasons were clear and fully justified on the evidence. They accorded with the views of all four professional witnesses. The OHP were entirely correct in stating that the acceptance policies operated by open prisons are not within the Board's remit: they are entirely within the remit of the Secretary of State who is responsible for the prison service and who will have to decide whether to accept the OHP's advice about the Applicant's suitability for open conditions.

50. I should point out that what would clearly have been irrational and improper would have been for the OHP to use possible problems with acceptance at open prisons as a reason for directing release on licence when their own assessment was that the Applicant's risk to the public was too high to be managed safely on licence in the community. Such an approach would have exposed the public to an unacceptable risk of serious harm and would in all likelihood have been the subject of a successful reconsideration application by the Secretary of State on the ground of irrationality.

Ground 2: The OHP failed to record accurately a reference by one of the witnesses to "the Prison Service's apparent blanket policy of only accepting prisoners to open conditions if they are on a reducing script of 40ml or less".

51. The OHP's summary of the evidence about possible difficulty in obtaining a place at an open prison was:

    "The panel heard evidence during the hearing that enquiries had been made with a limited number of open prisons and some will not accept someone on such a high dose and others may do so but only if the dose is reducing."

52. I accept for the purpose of this decision the legal representative's assurance that one of the witnesses stated in evidence that the Prison Service appeared to operate a "blanket policy" of not accepting a prisoner who is on a script unless his script is for 40 ml or less and is reducing (I think that is what is meant in the legal representative's submissions).

53. I am not convinced that there is really any significant incompatibility between this and the OHP's summary. Even if there is, however, any inaccuracy in the OHP's decision letter on this point cannot possibly be relevant to the OHP's assessment of the Applicant's risk to the public and its manageability on licence in the community. This ground cannot, therefore, have any bearing on the rationality of otherwise of the OHP's decision that the test for release on licence was not met.

Ground 3: The OHP's decision "not to adjourn this case for [the Applicant's] suitability for Open conditions was irrational and a failure of duty of inquiry amounting to procedural unfairness". Further and/or in the alternative, "the aforementioned decision not to adjourn/defer for the requisite further information/ material is Wednesbury unreasonable."

54. Something is obviously missing from the wording of this ground. I think that what is being suggested is that the OHP should have obtained further evidence about whether the Applicant would be accepted at an open prison.

55. Such evidence would, however, have been wholly irrelevant to the issue whether the Applicant's risk of serious harm to the public would be safely manageable on licence in the community, which was the issue which the OHP had resolved against the Applicant, thereby inevitably concluding that the test for release on licence was not met. There would therefore have been no point in adjourning to obtain the suggested further evidence, which could not have affected the OHP's "Stage 1" decision.

56. That being so, the panel's decision not to adjourn the hearing for the evidence to be obtained cannot possibly be categorised as irrational under the "duty of enquiry" principle (or treated as "Wednesbury unreasonable").

Ground 4: The OHP should have adjourned the hearing to allow the probation officer who would be responsible for the management of the Applicant's case in the community "to make the requested and necessary move-on accommodation

referrals after the proposed approved premises, so that [the OHP] had access to, and to review, all the relevant material; and/ or the OHP "should have adjourned/deferred to enable various referrals for accommodation and suitability for open conditions in light for the Applicant to take place."

57. Again, there would have been no point in adjourning for these purposes. The evidence which it is suggested should have been obtained could not have affected in any way the OHP's decision that the test for release was not met. That decision was not based on the lack of evidence of suitable move-on accommodation: it was based on the Applicant' lack of the necessary internal strategies to supplement external controls.

58. That being so, the panel's decision not to adjourn the hearing for the evidence to be obtained cannot be categorised as irrational under the "duty of enquiry principle" (or treated as "Wednesbury unreasonable").

Decision

59. For the reasons set out above I am afraid I am unable to accede to this application for reconsideration. The OHP's decision was neither irrational nor procedurally unfair, and it must stand.

Jeremy Roberts
2 March 2021