

[2019] PBRA 62

Application for Reconsideration by Reid

Introduction

1. This is an application by Reid, (the Applicant) for reconsideration of the decision of a panel of the Board, after an oral hearing, not to direct his release on licence.
2. The case has been reviewed by a Reconsideration Assessment Panel ("RAP") which has considered the following material:
 - Dossier running to 1017 pages which includes the 13-page decision letter issued by the oral hearing panel ("OHP");
 - Representations running to 16 pages submitted by the Applicant's solicitor in support of the application.
3. No representations have been submitted on behalf of the Secretary of State.

Background

4. The Applicant is aged 31. He has a bad criminal record. He is said to have been diagnosed with PTSD as a child, and in February 2015 an IPDE assessment indicated a probable diagnosis of Anti-Social Personality Disorder. He certainly has some problematic personality traits, including suspicion of authority and a tendency to hostile and grievance thinking. He also has difficulties with impaired hearing.
5. He is currently serving two indeterminate sentences. The first was imposed on 28 July 2005 (when he was aged 17) for attempted robbery. The second was imposed on 11 February 2008 (when he was aged 19) for false imprisonment of another prisoner at the young offenders' institution where he was detained. His tariff for the first of these sentences was set at 27 months: for the second sentence it was set at 36 months. The tariff expired in February 2011. In that year he received a concurrent 18-month sentence for assaulting another prisoner, causing him actual bodily harm.
6. His behaviour in custody was poor for the first several years of his indeterminate sentences. It has greatly improved since then, though his problematic personality traits have adversely impacted on his relationships with some prison staff and have held back his progression. Rule-breaking (especially possession of mobile phones) has continued to occur from time to time, but there has been no instance of reported violence since 2011. On the positive side he has good relationships with his Offender Supervisor and Offender Manager. He also has a very supportive and pro-social



partner, though their relationship began while he was serving his current sentences, and obviously has yet to be tested in the community.

7. On 3 July 2017, after an oral hearing, a panel of the Board recommended that the Applicant should be transferred to open conditions. The Secretary of State agreed, and on 18 August 2017 the Applicant arrived at an open prison. He was returned to closed conditions on 27 October 2017 as a result of being found in possession of a mobile phone. He has admitted that the move to open conditions had been an unexpected shock to his system and that he had misbehaved in a number of other ways as a result. He had clearly not endeared himself to staff.
8. In December 2017 he was returned to open conditions at the same establishment as before, but was very quickly returned to closed conditions in circumstances which were the subject of considerable dispute.
9. At an oral hearing on 11 October 2018 his case was considered by a panel of the Board, which did not direct release on licence but did recommend a return to open conditions. The Secretary of State agreed with that recommendation, and on 16 November 2018 the Applicant was returned to the same open prison as previously.
10. It now appears (though the Secretary of State and the Board were not aware of it at the time) that in October 2018 a mobile phone and charger had been found in the Applicant's cell. The matter was apparently referred to the police for investigation. However, their investigation took many months to be completed. Some, but by no means all, of the delay might be attributed to the need for a technical examination of the phone to establish what calls it had made and received.
11. Following the Applicant's return to the open prison in November 2018 there were said to be no concerns about his behaviour until, on 6 December 2018, the security department reported that he had sent inappropriate pictures to a member of staff at a closed prison where he had previously been detained. That led to an immediate return to closed conditions. The allegation was strenuously denied by the Applicant, and it was subsequently established that the information on which it was based was wrong. How that incorrect information came to be provided in the first place is unclear. It is unfortunate that the matter was not properly investigated before the decision was made to return the Applicant to closed conditions.
12. On 16 January 2019 the Applicant's case was referred to the Board for the present review. MCA directions on 28 March 2019 directed an oral hearing, and the case was listed to be heard on 12 July 2019.
13. At the start of that hearing the two-member OHP was informed about the ongoing police investigation into the mobile phone and charger found in his cell back in October 2018. They were told that he had been interviewed under caution and that he was likely to be prosecuted in relation to that matter. They therefore adjourned the hearing until 16 October 2019.
14. The adjourned hearing duly took place as scheduled. The OHP was informed that the criminal proceedings for possession of the mobile phone were still outstanding: the Applicant was due to be produced at the Magistrates' Court on 15 November



2019. The OHP, understandably, did not think it appropriate to adjourn the case again to await the outcome of the proceedings, so the hearing went ahead.

15. Three professional witnesses gave evidence to the panel. They all supported release on licence. They were the Offender Supervisor, the Offender Manager and a police officer from the Integrated Offender Management ("IOM") team which would be jointly responsible with probation for managing the Applicant's case if he was released on licence. The Offender Supervisor and the Offender Manager know the Applicant very well. Although the Applicant had been the subject of psychological risk assessments in the past the panel was not assisted in its risk assessment by up to date expert evidence from a forensic psychologist.
16. The most recent psychological assessment had been carried out by a Senior Registered Forensic Psychologist employed by the prison service, in the lead-up to the previous review by the Board. Her report was dated 1 October 2018. She considered that prison environments (whether in open or closed conditions) were likely to exacerbate some of the Applicant's risk factors. She nevertheless did not feel able at that time to support release on licence or a move to open conditions. She did not give evidence at the October 2018 hearing, and indeed her report does not seem to have been seen by the panel which conducted that hearing. That panel, as noted above, recommended a move back to open conditions. There is no reference to the psychologist's report in the decision of the October 2019 OHP, which clearly placed no reliance on it.
17. Notwithstanding the recommendations of the professional witnesses at the October 2019 hearing, the OHP did not direct release on licence. It did however recommend a further period of testing in open conditions.
18. As noted above the Applicant's solicitors on his behalf have submitted a request for reconsideration of the decision not to direct release on licence, and there are no representations on behalf of the Secretary of State.

The Relevant Law

19. The OHP's decision not to direct the Applicant's release on licence is eligible for reconsideration under Rule 28(1) of the Parole Board Rules 2019.
20. The only two grounds for reconsideration under Rule 28(1) are irrationality and procedural unfairness.
21. Irrationality is a concept well known in judicial review proceedings in the High Court. 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 paragraph 116 of its judgment:

'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 was the test set out in a different context by Lord Diplock in the House of Lords in **CCSU -v- Minister for the Civil Service [1985] AC 374**.

22. Despite the high bar thus set for establishing irrationality, it is clear that a decision may be regarded as irrational if insufficient reasons are given for the decision or if the reasons given can be shown to have been flawed. It will be necessary to return to this point below.
23. Procedural unfairness may result from a variety of procedural irregularities. Not all such irregularities will affect the fairness of the proceedings and afford grounds for reconsideration.

The Solicitors' Representations

24. The Applicant's solicitors submit that the OHP's decision not to direct release on licence was both irrational and procedurally unfair. They place in the forefront of their submissions the decision of the High Court in **R (ex parte Wells) v Parole Board 2019 EWHC 2710**. The decision in that case was made on 17 October 2019, the day after the oral hearing in the Applicant's case: the OHP cannot therefore have been aware of it. **Wells** was a recall case in which, as in the Applicant's case, the panel had declined to direct re-release on licence but recommended a move to open conditions.
25. The solicitors submit, with particular reference to the decision in **Wells**, that in the Applicant's case the OHP was irrational and/or procedurally unfair in the following respects:
 - (a) The OHP accepted that the Applicant's risk of serious offending was medium. There was no increase from previous assessments. There was no evidence of imminent risk and the Panel did not consider imminence of risk in their decision.
 - (b) All professional witnesses strongly supported immediate release. No professional supported transfer to open conditions. There was extremely strong evidence from the professional witnesses as to open conditions being unnecessary and detrimental to the Applicant, with no benefit which would justify a decision to direct his continued imprisonment. The duty to give reasons is heightened when the decision-maker is faced with expert evidence which the OHP appears, implicitly at least, to be rejecting.
 - (c) The OHP failed to indicate their conclusions as to risk when directing continued imprisonment by transfer to open conditions and therefore there is inadequate reasoning.
 - (d) There are no convictions for violence since 2011.
 - (e) The Applicant has completed an extensive number of offending behaviour programmes during his imprisonment and there is no outstanding core risk-reduction work or identification of other courses to be completed which would justify his continued imprisonment.



- (f) The OHP failed to undertake an adequate assessment of the effectiveness of the risk management plan, which was robust and comprehensive, offering a significantly increased and integrated level of management, supervision, monitoring and support than open conditions would achieve.
- (g) As per **Wells** at [38] the extent of the reasoning given by the OHP for coming to the conclusion that the risks posed by the Applicant could not be managed in the community fell below an acceptable standard in public law.
- (h) The OHP failed to give adequate consideration or weight to relevant evidence and took into account and/or gave undue weight to matters which were irrelevant or unfair in their decision-making, in particular, issues relating to the Applicant's custodial behaviour, which were accepted (in the parole hearing and decision letter) as being of minimal or no weight in the decision-making process.
- (i) The OHP have misdirected themselves in law in that the Applicant sufficiently meets the criteria for release on licence. There is no evidence or reasoning that the Applicant presents a serious risk to the life and limb of the public necessitating his continued imprisonment.
- (j) The hardship of continued post-tariff imprisonment outweighs any risk to the public.

Discussion

26. There is a significant difference between the facts of **Wells** and the facts of the present case. **Wells** was a recall case in which a previous panel had been satisfied that the test for release on licence was met, and there was no evidence of an increase in risk of serious harm since then. That was an important point relied upon in the High Court decision. It does not apply in this case.
27. Nevertheless, the decision in **Wells** (the most recent relevant High Court decision, which the RAP is obliged to follow) contains helpful guidance on the correct approach to deciding whether a decision not to direct release in the face of unanimous evidence from professional witnesses can be regarded as irrational.
28. 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 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.
29. If, however, a panel is going to depart from the recommendations of experienced professionals, 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. The RAP has therefore examined closely the reasons expressed by the OHP for rejecting the views of the professionals that the Applicant's risk could be safely managed in the community and that his continued incarceration was no longer necessary. The OHP's key reasons were expressed as follows in its decision:



- (a) *"Whilst accepting that you appear genuinely motivated to succeed in the community, the panel was not satisfied that you have yet evidenced that you have developed the necessary internal skills and the panel could not therefore be confident that the proposed risk management plan would effectively manage risk at this stage."*
- (b) *"Whilst the current panel recognised the unsatisfactory nature of your return to closed conditions and the fact that no proceedings had followed, it nevertheless meant that you had not been exposed to the community at all since your incarceration at the age of 17 and even prior to that you had spent a considerable period in custody. You are now aged 31 and, as mentioned above, the nature of your behaviour since the index offence is such that it is difficult without testing in less secure conditions for the panel to assess the scenarios within which your risks may be triggered."*
30. On both of these points there was strong and carefully considered evidence from the professional witnesses. The Offender Manager, Offender Supervisor and IOM Officer were all of the opinion that the stringent risk management plan proposed by the Offender Manager would be effective to manage the Applicant's risk in the community. Testing of his current willingness and ability to comply with supervision and to avoid re-offending was clearly required, but the professionals were all of the opinion that that testing would be more effectively carried out in the community with the risk management plan proposed than by a further period in open conditions. The OHP's decision did not really address these powerful opinions or explain why they were being rejected.
31. Dealing with the specific points raised by the solicitors in their representations:
- (a) The fact that statistical predictions suggested a medium risk of re-offending was a relevant factor but the OHP had it clearly in mind and the existence of a medium rather than a high risk of re-offending does not necessarily mean that the test for release on licence is met.
- (b) Imminent risk is not a pre-requisite for a finding that a prisoner's continued confinement in prison is necessary. The absence of an imminent risk is, however, a relevant factor. The professionals did not believe the Applicant's risk was imminent, but the OHP's decision does not mention this point.
- (c) It is correct that there was extremely strong evidence from the professional witnesses to the effect that open conditions would be not only unnecessary but positively detrimental to the Applicant. The OHP's decision did not address this point.
- (d) There is force in the submission that the decision letter did not contain sufficient analysis of the Applicant's current level of risk of serious harm to the public. The test for release on licence is not, of course, whether there is a risk of the prisoner re-offending or a risk of his causing some harm to other people: the question is whether he poses a sufficiently great risk of serious harm to necessitate his continued confinement in prison for the protection of the public.



In the relevant section of the decision the OHP referred to the probation service's assessment of the Applicant's risk of serious harm in the community, which was that the Applicant posed a high risk to of causing serious harm to one individual and a medium risk to the public. The OHP stated that it considered those assessments to be realistic. It did not expand on that brief statement except to make some comments about the Applicant's risk to the specified individual. The evidence showed that any violence between the Applicant and that individual was likely to be instigated by the latter, and there would be licence conditions to prevent any contact between them.

- (e) It is correct that there was no evidence of violence on the Applicant's part since 2011. The OHP clearly had that well in mind. Absence of violence in the controlled environment of a prison is of some relevance to risk assessment, but is of course no guarantee that there will be no violence in the community.
- (f) It is correct that the Applicant had completed an extensive number of offending behaviour programmes during his imprisonment and there was no outstanding core risk-reduction work for him to complete. This was an important point on the issue whether the Applicant needed to remain in closed conditions, but was not of the same importance on the issue of possible release into the community.
- (g) There is force in the contention that the OHP failed to undertake an adequate assessment of the effectiveness of the risk management plan, which in the view of the professionals was robust and comprehensive, offering a significantly higher and integrated level of management, supervision, monitoring and support than open conditions would achieve.
- (h) The solicitors' point about the hardship of continued post-tariff imprisonment cannot carry much weight. If the test for release on licence is not met, the Board cannot as a matter of law direct release, no matter what hardship the prisoner's continued incarceration may cause him.

Decision

- 32. This is a complex and difficult case. The panel was not assisted by an up to date psychological risk assessment. It had therefore to make its own assessment of risk with the benefit of such assistance as the professional witnesses were able to offer.
- 33. The RAP has carefully considered the whole of the evidence in the case, the decision letter and the solicitors' representations. It is clear that the OHP went carefully through the convoluted history of the case and made appropriate findings about any factual disputes.
- 34. However, at the end of the day the RAP is persuaded that the reasons given by the OHP for its decision were not sufficient to justify its rejection of the recommendations of all the professional witnesses. The duty to give reasons is, as the solicitors point out, heightened when a panel is making a decision in the face of unanimous expert evidence supporting a different decision.



35. In most cases where an indeterminate sentence prisoner has been in prison for many years it will not be possible to say that his risk has been reduced to a level justifying release on licence unless and until his willingness and ability to comply with supervision have been tested by a significant successful period in open conditions. However, that is not an absolute rule and in this unusual case compelling reasons were provided by the professional witnesses for departing from the general approach. No real reasons were given by the OHP for rejecting the views of the professionals on that point.
36. In the light of the RAP's conclusions as set out above, this application for reconsideration must be granted and there must be a fresh hearing before a different panel.
37. Other points have been made by the solicitors in addition to those discussed above, but it is unnecessary to consider those.
38. The panel is not persuaded that there was any procedural unfairness in this case. It might be argued that the OHP should have adjourned the case again for the outcome of the criminal proceedings to be known, but its decision not to do so was well within its discretion and it is unlikely that an adjournment would have resulted in any different decision.

Jeremy Roberts
20 November 2019