

Application for Reconsideration in the case of Dowe

Application

1. The Secretary of State (the Applicant) applies for a direction that the release decision of Dowe (the Respondent) be reconsidered on the grounds that the decision was irrational and/or there was procedural unfairness.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on the basis either that the decision was (a) irrational or that it was (b) procedurally unfair.

Background

3. In 2005 the Respondent was sentenced to Imprisonment for Public Protection with a minimum period to serve of 5 years for an offence of robbery. He was released on licence in April 2018 and was recalled in November 2018. There were a number of matters that led to the recall. His partner made allegations of threats made by the Respondent to her and her mother. The Respondent then left the probation hostel without permission and further allegations were made by his partner. He was then recalled. None of the allegations made by the Respondent's partner were pursued to court.
4. By a decision letter dated 25 July 2019 a panel of the Parole Board, following an oral hearing, directed the Respondent's release. The hearing had been deferred once to enable further information to be supplied to the panel.
5. At the hearing both the Offender Supervisor (OS) and the Offender Manager (OM) supported the release of the Respondent on licence although the OM did so "*with a degree of caution*".
6. One of the risks examined at the hearing was the risk of being violent from the Respondent to his partner which was assessed as high. In addition to the allegations which had led to the recall, the Respondent had a relevant previous conviction and there were records of numerous call outs relating to being violent or aggressive in his current and former relationships. In order to protect against this risk, the OM proposed a licence condition that the Respondent should not contact his partner without prior approval. The panel did not impose that condition. They said in the decision letter that, given the existing relationship and lack of prosecution, a no contact condition would not be proportionate.

Grounds for Reconsideration

7. The Applicant submits that the decision was irrational because the evidence demonstrated that the Respondent was in a controlling relationship with his partner which created a significant risk of serious harm to her. Accordingly, it is argued the decision to release is irrational. He further submits the panel acted irrationally by failing to adjourn the case for further enquiries to be made as to the content of phone calls made from prison by the Respondent to his partner. A further ground for reconsideration is that the Applicant contends that the hearing was procedurally unfair because the OM was inhibited by the Respondent's behaviour from saying what she wanted. The Applicant complains that the panel failed to keep the Respondent and his solicitor under control and allowed their behaviour to intimidate her.
8. I asked for further particulars of the Applicant's grounds as the first letter was in very general terms. As a result, further evidence has been supplied by the Applicant.
9. Phone calls: Much of the evidence to demonstrate a controlling relationship centred on phone calls. There was evidence that the Respondent had made a large number of phone calls to his partner both before and after recall. The Respondent's partner visited the Respondent in prison on a number of occasions and evidence was submitted to say that there did not appear to be any problem between them. The Respondent gave evidence that he was still in a relationship with his partner and they intended to marry. The Applicant submits that the panel should have adjourned the case to obtain recordings of phone calls made by the Respondent to his partner from prison. There was also some evidence that the Respondent had access to a mobile phone in prison which could have been used to contact the Respondent's partner. The Applicant asserts that since the hearing the calls have been listened to. Some of them were abusive; most were terminated abruptly, and many were not answered. The OM in the statement she has made in response to my directions says that she has listened to the calls and *"there is not a great deal to report back but it is evident that the calls are quite cold in nature and not on a regular basis"*.
10. In her statement, the OM complains that the Respondent was dismissive of her during the hearing and muttering under his breath and resulted in her not being able to have a proper opportunity to answer questions. She complains that the Respondent and his solicitor were laughing and sniggering at her answers. The OM says that, even when she asked the Respondent to stop behaving in that fashion, the panel chair sided with the Respondent and his behaviour was not challenged.
11. The OM is supported by her supervisor. Her statement contains a great deal of comment about the assessment of the evidence by the panel but relevantly to this issue she says that, *"The panel seemed at pains not to agitate Mr Dowe given the unpredictability of his conduct, at the expense of clarifying/exploring the evidence provided and not allowing the OM ... to give her evidence fully and effectively"*.
12. A police officer who was present complains of the Respondent's behaviour towards him and the failure of the panel to control it. In relation to the actual complaint



made by the OM, he says that the Respondent talked over the OM during her evidence and giggled with his solicitor.

13. While the Respondent's solicitor fails to descend to any detail, the solicitor disputes that the Respondent and he behaved in the way suggested and queries whether what is being sought by Applicant is really a reconsideration of the release decision or the imposition of a no contact condition without prior approval with the Respondent's partner in the light of the new evidence. He also asserts that this application should not have been made without consultation with the new OM.

Discussion

14. As the Parole Board has made clear in previous decisions on reconsideration applications, the same test for irrationality which is used in Judicial Review will be used in reconsideration cases. 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 first enunciated by Lord Diplock in **CCSU -v- Minister for the Civil Service [1985] AC 374**. It follows that irrationality is difficult to establish. Further, due deference has to be given in assessing irrationality to the expertise of Parole Board panels in assessing risks.

15. Was the decision to release irrational? Central to the decision and the basis of this application is the risk of violence and serious harm to the Respondent's current partner. The panel examined all the evidence of risk of the Respondent's violence or aggression to his partners both past and present with care. While the series of events which led to the Respondent's recall had started with complaints of threats from his partner, no prosecution resulted. The matter was not even reported by the police to the Crown Prosecution Service for a prosecution to be considered. While the panel had to consider the material which led to the recall, the panel had limited evidence on which to consider the truth of this allegation. Had there been more evidence, no doubt there would have been a prosecution. Having heard the Respondent's evidence, the panel concluded that on the evidence before them, they were able to conclude that a serious altercation took place, that threats were issued of a sufficiently serious nature to prompt a call to the police, and that they remained mindful of the circumstances in which such allegations can be retracted and that the absence of a conviction was not of itself definitive of the state of health of a relationship. That conclusion was perfectly justified on the evidence and was taken into account by the panel in reaching its final decision. It was a realistic and, in my judgment, a sensible conclusion.
16. The panel went on to decide on the evidence that the Respondent's partner remained in a relationship with him. They based that on the Respondent's



evidence and the fact that his partner continued to visit him in prison and that there had been no concerns about those visits. The panel was realistic about this and accepted that they were not in a position to assess whether she was visiting because she was concerned about repercussions from the Respondent if she didn't. They concluded that due to the Respondent's history, violent and controlling behaviour was an area of risk that required monitoring in the community. The panel understandably felt it was unfortunate that the Respondent's partner was unwilling to communicate with the new OM whereas she had with the previous one.

17. The panel in reaching its decision took into account the high volume of phone calls in the period when the Respondent was in the community on licence.. The Respondent gave evidence about them. The conclusion in the decision letter was that while the panel was concerned about the volume of the calls they had no evidence that they were abusive. That is an accurate statement and there was never any prospect that the panel would receive any evidence about the contents of the calls except from the Respondent. It was not irrational to reach that conclusion. It may be that other panels would have reached different conclusions, but this panel had heard the evidence and assessed it and they were perfectly entitled to reach that conclusion. They clearly factored in the number of calls into their final decision.
18. There was evidence about phone calls made by the Respondent to his partner from prison. There were concerns about their number. An explanation was given for that by the Respondent. The number of the Respondent's partner was also found on the Respondent's PIN phone list but with another name. The Respondent did not give any explanation for that except to say it was an old list. There was also evidence that the Respondent had used a mobile phone while in prison to make a mobile call to his OM. It is suggested that an inference could be drawn from that that the Respondent had made calls to his partner on a mobile. The allegation that the Respondent had a mobile phone in prison was investigated but could not be substantiated. It is possible that another prisoner allowed the Respondent access to a mobile phone. All these matters were considered by the panel. They expressed concerns about the calls but accepted that his explanations for some of them were plausible. They had no evidence that the conversations were unwelcome or abusive. There was no evidence of the contents of the calls before the panel and they had got the impression that there hadn't been any monitoring of them.
19. In addition to the matters that I have set out, the panel received evidence that the Respondent's conduct since his return to custody had been excellent and he demonstrated a good work ethic. Importantly, there were recommendations for release from both the OM and the OS. The panel had to attach significant weight to these recommendations even if the recommendation of the OM was a cautious one.
20. The panel concluded that the risk presented by the Respondent could be managed under the risk management plan and directed release. I do not consider that that decision on the information before the panel was arguably irrational.



21. It is further argued that it was irrational of the panel not to adjourn the case to obtain evidence of the contents of the phone calls made from prison by the Respondent to his partner. I accept that if it is demonstrated that a panel acted irrationally in not obtaining material which was not contained in the dossier that this would be a valid ground for reconsideration. It is clear from the Divisional Court's decision in **DSD** that it is a ground for Judicial Review, and it follows that it is a ground for reconsideration.
22. When considering this ground, the same high bar for irrationality applies. The case had already been deferred once to obtain further information; the Parole Board was under a duty to offer a speedy review of detention, and further delay was capable of leading to injustice. By the time of the hearing, the OM had been trying unsuccessfully to obtain this information for several months. It was never suggested to the panel that they should adjourn to provide a further opportunity to acquire this information. The impression given to the panel was that the contents of the calls could not be ascertained. They conclude that there does not appear to have been any monitoring of the content of the calls, so the panel had no evidence of the contents of the calls nor would they be likely to be able to obtain that evidence. The panel would have been aware that some calls are monitored and recorded. They would not know whether the Respondent's calls had been, or whether those recordings could be obtained. If it appeared at the time of the hearing that it might still be possible to obtain recordings of the calls, then I would expect the panel to be told that. It was understood by everyone that the contents could be important.
23. It may be that had the contents of the calls been before the panel the decision might have been different, but I am not in a position to determine that. It would depend on what those contents revealed about the relationship. There is a difference between what the OM said to the panel, that there was not much of interest, and what the Applicant says in his response to my directions namely that at least some were abusive.
24. On the basis of the information available to the panel, it is not properly arguable that the failure to adjourn for further information about the calls was 'irrational'.
25. The Applicant further argues that the hearing was procedurally unfair in that the behaviour of the Respondent and his solicitor prevented the OM from properly answering the questions in the way that she wanted. There is a factual dispute about this, but I will assume for the purpose of this decision that the OM did not give as comprehensive answers to questions as she would have wished. A recording of the OM's evidence has been listened to as well as considering all the paperwork. I accept that it would be procedurally unfair under the meaning of that phrase in the Parole Board Rules 2019 for the panel to allow the behaviour of one party to prevent the other party from putting their case fully. In considering this ground it is important to remember that panels conduct parole hearings in a more informal manner than a court hearing. This is principally so that the prisoner can play a full part in the proceedings and doesn't feel inhibited. Without that, a fair assessment of risk is difficult to achieve. This apparent informality does sometimes lead to OM's addressing prisoners directly during the hearing which it is important that the Chair of the panel prevents, as otherwise the hearing



becomes a free for all. That clearly happened in this case. It also should be borne in mind that most of the OM's evidence will be contained in reports that have already been read and considered by the panel. The hearing is concerned with any update being given orally and any comments that the OM wishes to make on the evidence. Furthermore, any panel is likely to assume that an OM who is taking charge of serious criminals in the community would not be intimidated from getting across the points she wishes to make to the panel. If she did feel restricted in what she could say then I would have expected her to draw that to the attention of the panel, which she did not do, although it is suggested that the panel should have realised her difficulty. In the absence of any legal representation, it falls to the OM to represent the Secretary of State and if she or he does not think the Secretary of State's case is being properly considered then he or she needs to make that clear to the panel. In all those circumstances, I am not satisfied that this hearing was procedurally unfair. It also needs to be borne in mind that she recommended release and it may be that her main complaint is the failure to add a licence condition restricting contact.

26. This leads on to the final ground for reconsideration which is that it was irrational of the panel to direct release of the Respondent without a condition limiting his contact with his partner. The panel considered this but concluded that since the Respondent was still in a relationship with his partner and he was not charged with any offence relating to her, a condition not to contact her without prior permission would be disproportionate. Before imposing any licence condition that would restrict the freedom of any prisoner, the panel needs to be satisfied that the condition is necessary to protect against harm and is proportionate. Where the condition relates to a present partner, proportionality becomes very difficult to establish. It is very much a matter for the discretion of the panel who have heard the evidence and considered it. On the evidence that they had it is not possible to say that the decision was irrational.

Decision

27. In light of my findings detailed above, I do not consider that the decision was irrational or procedurally unfair. Accordingly, the application for reconsideration in the case of Mr Dowe is dismissed.
28. Having considered all those matters and reached my conclusions, I do also have concerns about the situation. I consider that the Respondent's solicitor may be right in his assessment that the real complaint which is made is that no licence condition was imposed to try and ensure the safety of the Respondent's partner. While I do not consider that it was irrational on the evidence at the time of the hearing not to impose condition restricting contact between them there is now some evidence of the contents of the calls.
29. In my judgment that could found the basis for an application for the imposition of an additional licence condition similar to the one applied for initially but refused. However, that is not a matter which can justify an order for reconsideration.
30. If the Applicant considers that in light of the new evidence of the content of the phone calls, there are grounds for believing that the Respondent's partner is at



imminent risk of serious harm from the Respondent then it is open to him to recall the Respondent immediately on his release.

John Saunders
17 September 2019