

## Application for Reconsideration by M. A.

### Decision of the Assessment Panel

#### Application

1. This is an application by M. A. (the Applicant) for reconsideration of the decision of a panel not to direct his release, following an oral hearing which convened on 13 August 2019. I have referred to him by his initials, as it is necessary to detail his recent medical history in order to see its impact on his current parole review and how the application is now put.
2. I have considered this application on the papers. These were the dossier, a hospital letter produced on the day of the oral hearing and shown to the panel (requested by me and forwarded on 1 October 2019), the provisional decision letter of the panel dated 14 August 2019, and the application for reconsideration dated 27 August 2019. No representations were received from the Secretary of State.

#### Background

3. The Applicant is 59 years old. He is serving an extended sentence of imprisonment imposed in 2015 for sexual offences against a boy aged 7 to 13, between 1984 and 1990. The Applicant has previous convictions for similar offences. The sentence comprised a 7-year custodial term and a 3-year extension period. He became eligible for parole on 1 September 2019. If not directed by the Parole Board before then, the Applicant can expect to be conditionally released in December 2021. The 'at risk' period for the attention of the panel when it convened was therefore 2 years and 4 months.
4. The Applicant has been in the therapeutic community of a closed prison since January 2017. By early 2018 he had noticed a tremor in his right arm at rest and altered gait. In March 2018 he attended hospital, where a consultant neurologist diagnosed idiopathic Parkinson's disease. The consultant warned that there are other illnesses that can resemble Parkinson's and the diagnosis was not certain.
5. The Applicant saw the consultant again in December 2018. The arm tremor was absent, but his gait was slow, and his posture was unstable. The consultant advised that the prescribed dosage of his medicine should be increased and arranged for the Applicant to be seen in six months' time.
6. On 3 July 2019 the Applicant had his next hospital appointment. He was seen again by the same consultant neurologist. By then the current parole review had



been underway for over eight months and an oral hearing was scheduled for 13 August 2019. The Applicant's understanding of what he was told at that hospital appointment was quickly communicated to his solicitor and, via his Offender Manager, to the Secretary of State, who each took urgent action to bring this information and associated general research to the attention of the Parole Board in Stakeholder Response Forms dated 4 and 9 July 2019 respectively.

7. The Applicant's solicitor said that her client had been diagnosed with Multi-System Atrophy (MSA), which (like Parkinson's) is a progressive neurological illness with similar symptoms, but MSA progresses faster and does not respond as well to medication. The Applicant's mobility was deteriorating.
8. The Secretary of State said that the Applicant had received a "verbal diagnosis" of MSA and the wide range of known symptoms that can occur were listed. It was said that (in men) they could include erectile dysfunction.
9. The Applicant brought to the hearing and showed the panel a letter from the consultant neurologist to his general practitioner dated 8 July 2019. This noted the symptoms described by the Applicant at the hospital review appointment on 3 July 2019. None related in his case to sexual function. The Applicant reported disturbed sleep and nocturnal restlessness. There was right-sided tremor and postural instability. The consultant advised that several features were suggestive of MSA, which is one of the Parkinson's Plus conditions rather than idiopathic Parkinson's disease. The consultant suggested that an MRI scan could help provide a more accurate diagnosis. The medication was changed, with a further review in six months' time. No prognosis was given.
10. The consultant's letter dated 8 July 2019 should be added to the dossier.

### **Request for Reconsideration**

11. The application was drafted by the Applicant's solicitor, who also represented him at the oral hearing. It makes 13 points which together are said to show there was procedural unfairness and irrationality on the part of the panel. These can be grouped under three headings: (a) pointing out apparent errors in the summation and recital of some of the evidence, (b) criticisms of some of the panel's findings and analysis and (c) a submission that the panel ought to have adjourned to give the parties time to remedy gaps in the evidence, especially in regard to the Applicant's health and the incomplete Risk Management Plan.

### **Current parole review**

12. In November 2018 the Secretary of State referred the Applicant's case to the Parole Board for his first review. The terms of reference asked the panel to consider whether it was appropriate to direct the Applicant's release.
13. On 12 April 2019 a single member of the Board considered the case on the papers and did not direct release. That first panel concurred with the Offender Manager's February 2019 assessment that the Applicant posed a high risk of serious harm to



children. This was still the most recent structured risk assessment in the dossier when the oral hearing took place in August 2019.

14. The first panel highlighted that the Risk Management Plan was far from being fully formed and could not be said to be adequate. Amongst the concerns was the lack of clarity in relation to the planned accommodation of the Applicant post-release.
15. Following written representations from the Applicant's solicitors, an oral hearing was granted on 7 May 2019 by a Duty Member of the Parole Board. One of the directions required the Offender Manager to provide by 16 July 2019 a fully confirmed Risk Management Plan, including designated accommodation.
16. In early July 2019 the recent diagnosis of MSA was brought to the attention of the panel, whose Chair made consequential directions on 18 July 2019. The Offender Manager's addendum report of 11 July 2019 explained that this was why a fully confirmed Risk Management Plan could not be provided as previously directed.
17. The panel duly convened on 13 August 2019 and heard oral evidence from the Applicant, the Offender Supervisor and his Offender Manager.
18. There was a difference of opinion between the two report authors as to the progress the Applicant had made in reducing his core risks whilst in the therapeutic community. The Offender Supervisor considered that he had gained insight, was motivated not to re-offend and his risks had reduced because of his poor health. The Offender Manager was of the view that the Applicant had not yet completed the range of treatment necessary to evidence a reduction in risk. She was unable to be confident about how the risk might change due to the Applicant's health.
19. There was a consensus amongst these reporting witness that any direction for release could only be justified if there was a robust Risk Management Plan in place, including appropriate accommodation. No such plan had been completed by the time of the oral hearing. Accommodation of the kind ordinarily designated by the Probation Service was no longer regarded as suitable to cater for the Applicant's health needs and no substitute placement had yet been found.
20. The panel found that the Applicant continued to pose a high risk of serious harm. 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

21. 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.
22. 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.



23. 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

24. The request for reconsideration points out a few apparent errors in the summation and recital of some of the evidence. I do not regard any of these as material when the provisional decision letter is read as a whole. It is a concise record of the written and oral evidence presented, from which the rationale for the decision of the panel can be clearly and fairly understood.
25. The request goes on to criticise some of the panel's findings and analysis. This part of the representations largely reflects the Applicant's instructions and repeat the arguments that the panel did not accept. They are also based on an assumption (based on general research), as to how quickly his libido may reduce and other relevant aspects of his health will change. The consultant's letter of 8 July 2019 was silent on these matters and did not offer a prognosis, which is understandable as it served a more limited clinical purpose and was not intended to stand as a full medical report. The panel was reasonably entitled to interpret and weigh the available evidence in the way it did. In addition, these points do not undermine the key, determinative finding of the panel that the existing, partially-developed Risk Management Plan was inadequate to cater for his known risk factors in the community. That justified conclusion accorded with the consensus of professional opinion. It is obvious that the Applicant could not have been safely released at the time of the hearing; his solicitor does not strongly suggest otherwise. The panel stated and applied the right test. It was correctly focused on risk throughout. Its overall assessment of the evidence and the decision that logically followed from it were both fair and rational for a review concluded on that day.
26. The alternative and more powerfully-argued submission is that, instead of concluding the review on 13 August 2019, the panel ought to have adjourned to give both parties time to remedy gaps in the evidence, especially in regard to the Applicant's health and the incomplete Risk Management Plan. It is said, for example, that the panel should have requested more information about MSA if it was unwilling to take the Applicant at his word. I think this is an unfair criticism of



the panel. First, the primary duty of the panel is to make the judgment asked of it in its terms of reference from the Secretary of State. It is for the parties to gather and present the evidence which will help the panel perform that task. Second, it had a recent account of the Applicant's symptoms as told to the consultant neurologist on 3 July 2019. Third, this submission overlooks the comprehensive directions made by the panel chair on 18 July 2019 which focused on this important matter. The panel asked for a medical report setting out the diagnosis and prognosis for this condition. The consultant's letter did not fulfil that direction.

27. The Offender Manager was not able to fulfil the Panel Chair direction for a finalised Risk Management Plan by 9 August 2019. She reported in a second addendum report on 12 August 2019 that no such plan was in place, owing to the change in his accommodation needs triggered by the recent diagnosis of MSA. Nobody at the Oral Hearing was able to tell the panel how long it would take to make the necessary assessments and establish availability. The Applicant's solicitor has since found out and cites some information from a prospective Local Authority provider, but I cannot take account of that as it was not available to the panel. The fairness and rationality of its decision-making process can only be assessed on the basis of what was known to the panel at the time of the Oral Hearing.
28. Deciding whether or not to adjourn an oral hearing involves the use of judicial discretion, having regard to the competing factors. There are listing principles that Parole panels keep in mind. It is in the interests of the prisoner whose case is in front of the panel, those waiting behind him for their hearings and the general public that there should be a timely determination of each review. If a case has to be adjourned, it should only be to a known date within a reasonable period. A case ought not to drift. Cases are actively managed by the Parole Board to promote the efficient use of resources and reduce "on the day" adjournments or deferrals. The directions here of the first panel, the Duty Member and the panel chair show that was done to an exemplary standard in the course of this review.
29. Without an estimate as to how long it was going to take to find accommodation available to the Applicant in the event of his release, the length of any adjournment for this purpose was speculative. The matter was explored thoroughly by the panel. Its decision not to delay concluding this parole review was both rational and fair. Consistent with this balanced approach, the panel encouraged those responsible for the Applicant's supervision to continue work to develop the Risk Management Plan. They were reminded that, if the plan is finalised within the next 12 months, the Secretary of State can refer the case back to the Board for an early review.

## Decision

30. The complaints of procedural unfairness and irrationality are not sustained on the papers before me.
31. Accordingly, this application is dismissed.

Anthony Bate

 3rd Floor, 10 South Colonnade, London E14 4PU

 [www.gov.uk/government/organisations/parole-board](http://www.gov.uk/government/organisations/parole-board)

 [info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)

 @Parole\_Board

 0203 880 0885



7 October 2019

 3rd Floor, 10 South Colonnade, London E14 4PU

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