

[2019] PBRA 42

## Application for Reconsideration by Devine

### Application

1. Devine (the Applicant) applied for the reconsideration of a decision by the Parole Board dated 23 September 2019 not to direct his release but to recommend to the Secretary of State that he be transferred to open conditions. The decision is challenged on the grounds that it was irrational and/or procedurally unfair.
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.
3. Rule 25 provides that applications for reconsideration can only be made for decisions whether to release. Rule 25(5) makes clear that a recommendation for open conditions made by a panel is final and is not subject to an application for reconsideration.

### Background

4. In March 2008 the Applicant was sentenced to an Indeterminate sentence for Public Protection (IPP) for an offence under s.18 of the Offences Against the Person Act 1861. His minimum term was set at 2 years 6 months and expired in September 2010.
5. The Applicant had been transferred to open conditions in 2013 but his behaviour gave cause for concern relating to drugs, and on his second temporary release he did not return to the prison and remained unlawfully at large for 18 days. In closed conditions he made progress engaging with drug services and bereavement counselling and was transferred to open conditions for a second time in April 2014. However, a month later he was admitted to hospital after taking an unknown substance which he claimed was as a result of being "*spiked*." He was returned to closed conditions, but again made progress and was released by the Parole Board to designated accommodation designed and supported by psychologists to help people recognise and deal with their problems on 16 May 2016. He was recalled on 22 December 2016.

### Request for Reconsideration

6. The application for reconsideration is dated 11 October 2019 and is made on the basis that the panel's decision not to release the Applicant but to recommend a transfer to open conditions was both procedurally unfair and irrational. The application as to procedural unfairness submits that there was an unfairness of



process and a perceptual unfairness which is stated to be a failure to deal with the arguments or evidence advanced in an appropriate manner or at all. It is submitted that the panel failed to properly consider the evidence at the hearing. In particular it is submitted that there is no evidence contained within the decision letter that consideration was given in the decision-making process to the evidence of the drug worker, despite a large amount of weight having been placed on the Applicants drug misuse. It is also submitted that there is no evidence that the Panel gave consideration to the evidence of a Governor within the prison despite the weight placed on the adjudication of 20 February 2019 which this Governor heard.

7. The application for reconsideration on the basis of irrationality in the recommendation for a progressive move to open conditions is based upon the fact that the panel raised issues as to the policy of “*no tolerance*” of drugs in open conditions and that bearing in mind the Applicant’s history of drug misuse, he would be “*set up to fail*” whereas in the community he would have support to manage the risk of drug misuse.
8. The Secretary of State made no observations in response to this application.

### **Current parole review**

9. The Secretary of State referred the Applicant’s case to the Board in order to decide whether to direct release or if that was not appropriate, to recommend a transfer to open conditions. The three-member panel of the Board met initially on 29 April 2019 to consider the Applicant’s case. Having taken limited evidence, the panel reconvened on 14 August 2019 when two members of the original panel were able to continue, with the agreement of the Applicant. Subsequently there was a short adjournment to allow the Applicant to complete the training course addressing decision making and better ways of thinking.
10. The panel heard oral evidence from the Governor of the prison, the Applicant’s Offender Supervisor; the Applicant’s Offender Manager; from the Applicant’s drug worker; from the prison psychologist and from the Applicant. The Applicant was represented by his solicitor. The application was for release.
11. The panel was provided with a dossier, together with a reference from wing staff and a post programme report from the training course mentioned in paragraph 9. The panel were also provided with CCTV footage of two incidents.
12. The first of the two incidents related to events on 15 February 2019. The panel made a finding that the Applicant had made a definite and aggressive move towards another prisoner and sought to headbutt him. The second CCTV footage related to allegations of incidents on 20 February 2019 when there were two further incidents. The first involved an alleged punch thrown towards an officer. The panel referred to the evidence of the Prison Governor who heard the adjudication and the panel accepted that no punches were thrown. The panel found that it was clear that neither the Applicant nor the officer had dealt with the disagreement in the most appropriate manner. The matter was not proceeded with on adjudication.



13. The recommendations from professionals giving evidence were mixed. The Applicant's Offender Supervisor and Offender Manager considered that the Applicant's risk could be managed in the community. The prison psychologist considered that the Applicant was not ready to be released and was concerned with his coping skills and that the risk management plan may not be effective. She recommended a move to open conditions.
14. The panel issued the Decision letter on 23 September 2019. The letter extensively quoted the previous review which had detailed the progress of the Applicant since sentence, particularly in relation to the Applicant's journey as to his drug use, his emotional state and, his positive relationship with his drug worker.

## The Relevant Law

15. The decision of the Parole Board at an oral hearing as to whether or not to direct release of the prisoner is one that is eligible for reconsideration under Rule 28(1). This is the combined effect of Rules 25(1), 28(1), and 28(2).
16. The application on the basis of procedural unfairness is in relation to the decision process made by the panel. I have taken the view that this should apply to the decision not to direct release.
17. However, Rule 25(4) and Rule 25(5) state:  
*"(4) Where a panel receives a request for advice from the Secretary of State concerning whether a prisoner should move to open conditions, the panel must recommend either that—  
(a) the prisoner is suitable for a move to open conditions, or  
(b) the prisoner is not suitable for a move to open conditions.  
(5) Where the board receives a request for advice with respect of any matter referred to it by the Secretary of State, any recommendation made in respect of that request is final."*
18. Thus, the decision to recommend a move to open conditions, which the solicitors submit was an irrational recommendation, is not eligible for reconsideration under the Parole Board Rules.

## Discussion

19. The panel made two decisions: a decision not to direct release and thereafter a decision to recommend a progressive move to open conditions.
20. Dealing first of all with the decision to recommend a move to open conditions, this is not eligible for reconsideration and so the ground of irrationality which relates solely to this recommendation, must fail. There is no need to explore further what "irrationality" would mean in this context. However, I considered that the decision made by the panel was on firm ground and could not, in any event, be considered irrational.
21. The Applicant contends that the decision not to direct release was flawed by procedural unfairness. There is criticism that there is no account of the evidence given by the drugs worker who was supportive of a release into the community.



Reading the decision, it is clear that the drugs worker's support has been evaluated by the panel. The panel decision deals with the engagement of the Applicant with the in-house drugs team in positive terms through the medium of the discussion and weight given to the prison psychologist's evidence. She also expressed concern that the Applicant's engagement with the in-house drugs team and the training course may increase pressure on the Applicant to succeed in the community which might not help risk management. The role played by the drugs worker over a long period is clear from the quotation from the previous panel decision. The fact that the drugs worker's evidence is not specifically referred to cannot be a procedural unfairness when it has been evaluated through the medium of another witness. Specifically, the panel noted the Applicant's good engagement with the in-house drugs team, using them as a sounding board for advice and support on a regular basis.

22. As to the evidence of the Prison Governor: the panel accepted her evidence that no punches were thrown by the Applicant in the incident on 20 February 2019, the criticism by her of the inappropriate manner in which the officer had behaved and that the adjudication was not proceeded with. The fact that there was no specific account of the Governor's evidence is not a procedural unfairness when it is clear that her evidence has been accepted. The finding that the Applicant was unable to control his emotions during the incident is not inconsistent with the acceptance of the prison Governor's evidence.
23. The Panel were able in their judgment to prefer the evidence of the psychologist over the evidence of the Offender Supervisor and Offender Manager. They were fully entitled to do that. There was a full evaluation of the risk management plan. The panel gave reasons for not directing release which was that there was a combination of ongoing drug use, with only a relatively short recent period of abstinence, together with the inability to control the Applicant's emotions in February 2019. According to the decision letter, this led the panel to consider that further consolidation work and testing is necessary before the Applicant can return to the community. The panel was not satisfied that the Applicant had the internal control mechanisms to manage his risk at this stage.

## Decision

24. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

Pamela Badley  
18 October 2019

