

Application for Reconsideration by Barclay

Introduction and Summary

1. This is an application by a prisoner for reconsideration of the decision of the panel of the Board which decided not to direct his release on licence and not to recommend a move to open conditions. The decision was made after an oral hearing.
2. The applicant is serving automatic life imprisonment for two offences of wounding with intent.
3. Representations provided by the applicant's solicitors submit that the decision not to recommend a move to open conditions was irrational. It is not submitted, and could not sensibly be submitted, that the decision not to direct release on licence was irrational.
4. There are two reasons, explained in more detail below, why this application for reconsideration must be refused:
 - (a) The recently introduced reconsideration mechanism does not apply to decisions to recommend or not to recommend a move to open conditions;
 - (b) In any event the panel's decision of the panel was not irrational.

The Relevant Law

5. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)). A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28.
6. If a decision is eligible for reconsideration, the only grounds for reconsideration are that it is (a) irrational or (b) procedurally unfair.
7. 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*.

8. 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.
9. The fact that Rule 28 uses the same word as is used in judicial review cases clearly demonstrates that the same test should be applied when considering an application for reconsideration of a panel's decision.

Solicitors' representations

10. The solicitors submit that (a) the decision was irrational (b) it over-emphasised the negative points and under-emphasised the positive points (c) it cannot be supported by the evidence in the dossier, or the evidence that was heard at the oral hearing, (d) the panel relied on the fact that the applicant had not completed any offending behaviour programmes but that is not the only way in which a reduction in risk can be demonstrated (e) all witnesses said that the risk that the applicant posed was not imminent (f) the test for progressing him to open conditions was met (g) the panel made several material mistakes of fact (h) it considered irrelevant factors and (i) it failed to take into account relevant ones.
11. The solicitors particularly emphasise the fact the panel's decision was contrary to the opinions and recommendations of the Offender Manager, the previous Offender Supervisor and the current Offender Supervisor.

Observations on behalf of the Secretary of State

12. The Secretary of State's observations are limited to pointing out that the decision said to be irrational is not amenable to reconsideration under the Rules.

Discussion

13. The panel in this case made two decisions: (1) a decision not to direct release on licence and (2) having made that decision, a decision not to recommend a move to open conditions.
14. The representations on behalf of the applicant do not suggest that the first decision was irrational. Such a suggestion would clearly not have been sustainable. None of the professional witnesses supported release on licence; the applicant had been in prison for a long time under a life sentence; and release direct from closed conditions into the community would have been unusual and would have created too high a risk.



15. As explained above, the decision not to recommend a move to open conditions, which the solicitors submit was irrational, is not eligible for reconsideration under the new rules.
16. That would be sufficient to mean that this application must be refused. However in any event the test for irrationality is clearly not met.
17. 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. As was observed by the Divisional Court in *DSD*, they have the expertise to do it.
18. If a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses without giving any reasons for doing so, that might be a ground for saying that the decision was irrational. Similarly if it were to give reasons which were flawed or which did not on proper analysis support their conclusion, that might also be a ground for saying that the decision was irrational.
19. However, in the applicant's case neither of those situations arose. The panel gave clear and convincing reasons for its own conclusions and for departing from the views of the professional witnesses.
20. In reciting the details of the applicant's progress during his sentence the panel faithfully included the positive points as well as the negative ones.
21. Whilst it is correct that completion of offending behaviour programmes is not the only way of demonstrating a reduction in risk, the panel was entitled to conclude on the evidence in this case that the applicant's risk areas were not clearly understood and therefore had not been addressed by appropriate treatment. The inevitable consequence of that finding was that work was needed to identify his outstanding risk areas and to address them as necessary.
22. There was a suggestion that a psychological risk assessment, if needed, could be carried out whilst the applicant was in open conditions. The panel was entitled to take a different view. If a psychological risk assessment is needed to identify outstanding treatment needs (as in the applicant's case) it should be carried out whilst the prisoner is still in closed conditions: a return to closed conditions to complete treatment would be unsatisfactory and possibly unfair.
23. Although the professional witnesses did not regard the applicant's risk as imminent, the panel's analysis of his risk inevitably led to a different conclusion. In any event imminence, whilst a relevant factor, is not the test for deciding whether a prisoner's risk is manageable in open conditions (or in the community).
24. The panel demonstrated its awareness of the test for open conditions and faithfully applied it. Given its assessment of the applicant's risk it is not surprising



that it decided that the risks of a period in open conditions outweighed the benefits. It was fully entitled to reach that conclusion.

25. The solicitors have not identified any material mistakes of fact made by the panel, and none are evident from a comparison between the decision letter and the information in the dossier.
26. Equally the solicitors have not identified any irrelevant factors taken into account by the panel, and none are evident from the decision letter.
27. The panel's careful and detailed decision letter demonstrates that it took into account all relevant factors. It arrived at conclusions which it was fully entitled to make on the evidence before it.

Decision

28. For the reasons set out above this application must be refused.

Jeremy Roberts
5 September 2019