

[2020] PBRA 129

## Application for Reconsideration by Fenwick

### Application

1. This is an application by Fenwick (the Applicant) for reconsideration of a decision of a three-member panel, dated 21 August 2020, not to direct his release on licence following an oral hearing.
2. I have considered the application on the papers. These consisted of the dossier running to 364 pages (including the decision letter) and six pages of written submissions from the Applicant's representative that sets out his application for reconsideration.
3. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.

### Background

4. The Applicant was sentenced to imprisonment for public protection (IPP) on 15 September 2008 for s18 wounding. The tariff was set at 3 years (with allowance for time on remand) and expired on 11 October 2010.

### Request for Reconsideration

5. The application for reconsideration is dated 26 August 2020.
6. The Applicant submits that the decision was irrational for the following reasons:
  - a) the decision went against the recommendations of all the professionals.
  - b) the panel's conclusion that the release plan was deficient did not take sufficient account of the support that would be provided by the professionals.
7. It is not suggested that the decision was infected with any procedural unfairness.

### Current parole review

8. The Secretary of State referred the Applicant's case to the Parole Board after he was recalled to consider whether he should be re-released on licence.



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9. The Applicant's case was considered by a single member in March 2020 and an oral hearing directed. A psychological risk assessment was also directed.
10. The matter was listed for an oral hearing on 31 July 2020 where the panel convened remotely due to the current restrictions imposed by the Covid-19 crisis. No objection was made to the hearing proceeding remotely.
11. The Panel had the benefit of detailed closing submissions in writing from the Applicant's solicitor. These set out a careful analysis of the oral and written evidence that was in front of the Panel and give reasons why the Applicant's risk is manageable.
12. In the decision letter the Panel sets out the history of the case. There was no dispute that the Applicant had not been violent for a long period of time, including when he was in the community.
13. The Panel also noted that all the professionals were recommending that the Applicant be released.
14. The Panel set out the release plan in some detail, but concluded that it would not be sufficient to manage the Applicant's risk in the community due to the gaps in it, and the apparent lack of motivation of the Applicant.
15. In light of that, no direction for release was made.

## The Relevant Law

16. The panel correctly sets out in its decision letter dated 20 July 2020 the test for release.

### *Parole Board Rules 2019*

17. 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. This is such a case.
18. Such a decision is eligible for reconsideration on the basis that (a) the decision is irrational and/or (b) that the decision is procedurally unfair. As procedural unfairness is not relied upon, I shall say no more about it.

### *Irrationality*

19. In **R (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."*

20. 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.
21. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28 (see **Preston [2019] PBRA 1** and others).

#### *The duty to give reasons*

22. The decision as to the assessment of risk is one for the Parole Board, who are not bound by the views of the professionals.
23. However, where the Panel makes a decision contrary to the recommendations of the professionals, it is incumbent on it to give clear reasons for this, and sufficiently justify its conclusion (**R (Wells) v the Parole Board [2019] EWHC 2710 (Admin)**).
24. In considering an application for reconsideration, I should remember that the question is to do with the liberty of the subject. In those circumstances, I should adopt an anxious scrutiny of the Panel's decision.

#### **The reply on behalf of the Secretary of State**

25. The Secretary of State has stated that he does not wish to make any representations in response to this application.

#### **Discussion**

26. It is important to remember the scope of the reconsideration mechanism. It is a review of the decision on the specific grounds above, and not a re-hearing.
27. The first ground is that the decision was contrary to the recommendations of the professionals, including that of the psychologist instructed at the direction of the Parole Board to give a recommendation.
28. The Panel clearly bore this in mind, but specifically set out that they took a different view to the professionals and set out reasons why this was their assessment. They noted the lack of violence for some time, but considered that the Applicant was not sufficiently motivated to work with the professionals in the community in light of his behaviour and attitude whilst out on licence prior to the recall.

29. In those circumstances although the recommendations of the professionals were important, I consider that that the Panel gave sufficient reasons as to why they did not accept those recommendations.
30. The second ground takes issue with the merits of the Panel's conclusion on the release plan.
31. Much of the submissions set out reasons why it is that the proposed plan would manage the Applicant's risk of serious harm. However, it is not open to me to review the decision on its merits.
32. I accept that the decision was not clear cut and it may well be that another Panel would have been persuaded by the Applicant's arguments at the hearing and in the written submissions and directed release.
33. That is not the test that I must apply. The question is whether the decision of the Panel was one reasonably open to it. This very much overlaps with the issues on the first ground.
34. The decision letter sets out the history of the Applicant's case in some detail and makes specific reference to the main points in the Applicant's favour.
35. In this case, the Applicant had a history of causing serious harm. He was released considerably over tariff, in part due to difficulties and a lack of compliance with the prison regime.
36. Although there was no violence in the community, the Applicant was recalled for further offending that the Panel described as having '*offence paralleling characteristics*'. The Panel commented adversely on the Applicant's engagement in the community.
37. Whilst it would have been open to the Panel to conclude that this was not sufficient to warrant his continued detention, given the above I consider that it was also open to the Panel to conclude that it was.
38. In those circumstances, the decision of the Panel was one reasonably open to them, and cannot be considered to be irrational.

## Decision

39. For the reasons I have given, I do not consider that the decision was irrational.
40. Accordingly the application for reconsideration is refused.

**Daniel Bunting**  
**15 September 2020**