

[2020] PBRA 134

## Application for Reconsideration by Morris

### Application

1. This is an application by Morris (the Applicant) for reconsideration of a decision of an Oral Hearing Panel (OHP) dated the 11 August 2020 not to direct release.
2. 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.
3. I have considered the application on the papers. These are:
  - The dossier, which contains 429 numbered pages;
  - The oral hearing decision letter dated 11 August 2020; and
  - The Reconsideration Representations of his legal representative, submitted August 2020.

### Background

4. The Applicant is 35 years old at the time of writing. He is serving a sentence of Imprisonment for Public Protection imposed on 7 July 2006 with a Tariff Expiry Date of 13 March 2008. The offence was robbery: he and his co-accused went to somebody's flat together, armed with knives, at 10.30 at night, made threats and took his property. He was released on licence without a hearing on 14 August 2017. His licence was revoked on 7 November 2019. The Applicant was 20 years old at the time of the index offence.

### Request for Reconsideration

5. The application for reconsideration is dated 27 August 2020.
6. The grounds for seeking a reconsideration are as follows:
  - (1) The Risk Management Plan should be considered sufficiently robust to manage the Applicant's risk;
  - (2) The Applicant would have sooner access to an appropriate programme in the community than in custody;
  - (3) Weight must be placed on the length of time the Applicant would spend in custody until his next review;
  - (4) Since the OHP heard the case it has been confirmed that drug and alcohol testing is available in the Designated Accommodation;



- (5) The Applicant has continued to address his risk factors since being in custody, and by completing a course directed at his anxiety, has armed himself with the tools needed to help him cope in the community;
- (6) *"We strongly disagree that the Panel disregarded the recommendations of the Offender Manager and Offender Supervisor. Evidence was provided by both professionals at the Oral Hearing which supported their recommendations for release. The professionals are the people who spend most time with [the Applicant], and who are able to identify an increase in levels of motivation, and changes in insight into risk factors and offending behaviour, and it appears this has been overlooked by the Panel."*
- (7) *"We submit that, for the reasons mentioned above, [the Applicant's] level of risk would be sufficiently managed in the community via the robust risk management plan proposed, and that given the excessive period until next Parole Board review, that a direction for him to remain in closed conditions is unjustified."*
- (8) *"The Panel has not specified any risk reduction work that the Applicant should complete, and arguably, [the Applicant's] custodial behaviour and expectation to complete an appropriate programme as part of his licence conditions already provides the Panel with the next steps they have indicated."*
- (9) *"We therefore submit that, what the Panel have highlighted as being necessary for [the Applicant's] next review [i.e., updates in respect of his custodial conduct, release and resettlement plans in the light of offending work around domestic violence, and recommendations based on an assessment of risk] has already been achieved since [the Applicant's] return to custody, and that for him to continue evidencing a reduction in risk, his release should be directed, as risk could be managed in the community."*

7. The representations are expressed to be intended to present the reasons as to why the decision [to deny a progressive move of either re-release into the community or transfer to open conditions] is irrational in light of the specific facts of this case.

8. There is no suggestion of procedural unfairness.

### **Current parole review**

9. The Secretary of State's referral required the Oral Hearing Panel (OHP) to consider the Applicant's release or, in the alternative, to make a recommendation for a move to open conditions.

10. The OHP consisted of three members, of whom two were judicial members. Because of the COVID-19 pandemic the hearing took place by way of telephone conference. The Panel had the same dossier as I have. The Panel heard evidence from the Offender Supervisor (OS), the Offender Manager (OM), and the Applicant. The Applicant was represented throughout by the same legal representative as currently acts for him.

### **The Relevant Law**



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11. The panel correctly sets out in its decision letter the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

### *Parole Board Rules 2019*

12. 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 (b)) 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)).

13. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

### *Irrationality*

14. 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."*

15. 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.

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

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

17. The Secretary of State has not chosen to make any representations in respect of the Application.

### **Discussion**

18. The Application is couched more in terms of disagreement with the OHP's conclusions than irrationality as discussed above. There is no suggestion, for example, that the OHP took into account irrelevant material, failed to take into account relevant material, or misunderstood the evidence, or that the OHP's conclusion was one to which no reasonable panel could have come on the evidence.



19. Further evidence, by way of a handwritten statement from the Applicant's partner, and indeed the assertion summarised at Paragraph 6(4) above, is included in the Application. This is a reconsideration, not a review or an appeal, and its terms are defined by the *Parole Board Rules 2019* set out above. In particular, I cannot take account of material which was not before the OHP unless the absence of the material gives rise to procedural unfairness, which is not averred, and which I do not find to be the case. As a matter of courtesy I have read the Applicant's partner's statement, she, and he, would think it unfair if I did not, but it cannot form the basis for a finding of irrationality.

20. Dealing with the balance of the points raised and set out in Paragraph 6 above:

- (1) This was a matter for the judgement of the OHP. Coming to a different conclusion from that argued for on behalf of the Applicant is not irrational;
- (2) At the time of the hearing it was not clear when an appropriate programme would start in the community. The OHP pointed out that the Panel's test is one of public protection and not expeditious access to programme work, and that it was entirely possible that the Applicant, if released, would move on from the Designated Accommodation without having started the programme;
- (3) The OHP was no doubt aware of the likely timetable before the Applicant's case would be considered by the Parole Board again, if that has any relevance to the assessment of risk;
- (4) This is discussed above;
- (5) The OHP was aware that the Applicant had completed a course directed at his anxiety. He has done no programmes on offending behaviour since 2013, and no work on domestic violence issues, which was what most concerned the Panel;
- (6) 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 must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. 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. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board** 2019 EWHC 2710. Here, the OHP has done so: it concluded that the Applicant presented a high risk of serious harm to his partner, unknown future partners and children who may witness or be caught up in domestic violence. In coming to that conclusion the OHP took into account, amongst other things, including the Applicant's offending history, the admitted facts surrounding the domestic violence charge of which the Applicant was, as it noted, acquitted. The Panel specifically discussed its approach to that unproved allegation, and it cannot be, nor is it suggested it can be, faulted;



- (7) Assessment of the Risk Management Plan in the light of the Panel's judgement as to risk is a matter for the Panel. The question of timetable has already been discussed;
- (8) The Panel has suggested that future panels would be assisted by, among other things, any offending behaviour work undertaken particularly around domestic violence. The Parole Board is specifically debarred by the Secretary of State's Reference from recommending particular programmes;
- (9) Again, this assertion suggests disagreement with, not the irrationality of, the OHP's decision.

## Decision

21. Neither taken individually nor collectively do the matters put forward raise an issue about the irrationality of the decision. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

**Patrick Thomas**  
**20 September 2020**

