

[2020] PBRA 161

Application for Reconsideration by Clarke

Application

1. This is an application by Clarke (the Applicant) for reconsideration of a decision of a two-member panel of the Parole Board, including a psychiatrist member, not to direct his release following an oral hearing conducted by video link during the Coronavirus lockdown, and at which he was legally represented.
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 comprising 328 pages, the Decision Letter dated 31 August 2020 and the Reconsideration Application. The Secretary of State did not make any formal representations in response to the application.

Background

4. The Applicant was sentenced on 6 December 2013 to an extended determinate sentence of eight years eight months imprisonment and five years extended licence following his guilty plea to Wounding with intent. His Parole Eligibility Date was 3 June 2019, by which time he had completed a substantial amount of offending behaviour work, his custodial behaviour was very good and he had spent a period of 11 months in open conditions.
5. The index offence was described by the sentencing judge as "*an appalling case of wounding ... [that caused] life changing and life-threatening injuries*". The judge noted a history of violence and aggression and that the Applicant had a significant alcohol problem.
6. Unfortunately, by the time the Applicant's case was first considered by the Parole Board, at an oral hearing in July 2019, he had been back-staged from open to closed conditions due to an incident which that panel considered to be offence paralleling and concluded that, notwithstanding the progress he had made, that incident in open conditions indicated that his risk was not manageable in the community. Accordingly, the panel did not direct his release.



7. The Applicant was sent to open conditions for a second time on 20 January 2020. Reports from his Offender Supervisor (OS) and Offender Manager (OM) in February 2020 recommended that, after a period of successful temporary releases, he would be suitable for release. However, the prison went into lockdown in March 2020 due to the COVID-19 pandemic and that meant that, through no fault of his own, by the time of his oral hearing on 17 August 2020, his temporary releases had comprised just one town visit. The evidence of the OM and the OS at the hearing was that further testing in open conditions was "*preferable*" but nonetheless both recommended release. The panel, however, making no recommendation for release, concluded that the Applicant needed to be well tested in the community before being safe for release and he had not had the sustained period of testing which was necessary.

Request for Reconsideration

8. The application for reconsideration is dated 21 September 2020.

9. The grounds for seeking a reconsideration are that:

- (a) The panel's decision was irrational, in that:
 - (i) It was against the weight of the evidence;
 - (ii) The panel placed undue weight on the previous panel's findings about the Applicant's behaviour prior to his back staging from open conditions;
 - (iii) The panel unduly fettered their discretion by taking an approach that they will not depart from the previous panel's findings unless there is new evidence to question it; and
 - (iv) The panel disregarded expert written evidence about the destabilising effect of the Applicant's involuntary withdrawal from prescribed medication upon his behaviour leading to back staging.

- (b) The panel's decision was procedurally unfair as:
 - (i) The decision letter failed to note that the OM was recommending release;
 - (ii) The panel ought to have obtained the Chair's notes or a recording of the previous hearing in order to determine whether that panel had misunderstood the evidence before it about the Applicant's behaviour prior to back staging; and
 - (iii) The panel were heavily influenced in their decision making by the absence of a psychiatric assessment, and the need for such a report should have been identified at the outset or the panel should have adjourned to enable such a report to be obtained.



The Relevant Law

Parole Board Rules 2019

10. 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.
11. 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**. Accordingly, this Reconsideration Panel did not consider whether the panel adequately assessed the Applicant's case for open conditions.

Irrationality

12. 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."

13. 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.
14. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

Procedural unfairness

15. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.
16. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:
 - (a) express procedures laid down by law were not followed in the making of the relevant decision;
 - (b) they were not given a fair hearing;
 - (c) they were not properly informed of the case against them;
 - (d) they were prevented from putting their case properly; and/or



(e) the panel was not impartial.

The overriding objective is to ensure that the Applicant's case was dealt with justly.

Discussion

17. It is not in dispute that the Applicant has a long record of violent offending and that much, if not all, of his offending arises after he has consumed alcohol. He accepts that he was back staged from open to closed conditions in September 2018 following an incident when, without permission, he left his community work placement and went to the pub where he consumed alcohol and had a number of telephone conversations with his then OS, during which he was agitated and abusive and threatening. He was then detained by the police and returned to prison.
18. The oral hearing panel in July 2019 was satisfied that this event was "*disturbingly offence paralleling*". It accepted that the absence of prescribed medication appeared to have been a relevant factor but did not fully explain the Applicant's behaviour and it noted that the incident occurred after a period of several weeks in which it appeared that his resolve to remain abstinent had started to diminish, as evidenced by him going to a pub, rather than non-licenced premises, on two occasions to drink coffee.
19. The Applicant maintains that that panel misunderstood this part of the evidence. He denies ever saying that he had gone to the pub for coffee in the lead up to his removal from open conditions, but rather that this had happened at an earlier time in his life. He presumes that the panel got this wrong as this was a single member panel, with the chair making notes whilst questioning witnesses and hearing evidence, with the potential for error in notetaking. However, this presumption is misplaced, as the Decision Letter dated 22 July 2019 clearly indicates that this was a two-member panel, not a single member hearing.
20. The panel in 2020 re-examined the issue in the oral hearing. It noted in its Decision Letter the Applicant's evidence that the occasions when he had gone to the pub for coffee related to an earlier time. It also noted that professionals had not observed any signs that he was destabilising during this period. There was no application before, during or in written closing submissions after the hearing that the notes of the previous panel should be obtained – the suggestion that those notes were necessary is made for the first time in the reconsideration application. The 2020 panel clearly considered the Applicant's account and noted that it differed from the findings of the previous panel. There is no evidence that it "*fettered its discretion*" by considering itself bound by the earlier panel's findings and it cannot be said to be irrational for the panel to have accepted those findings in the absence of new evidence, which was not requested.
21. I find support for the view that this panel was prepared to, and did in fact, revisit the circumstances of the previous failure in open conditions, and did not bind itself to the earlier panel's conclusion, by noting its acceptance of expert pharmacological evidence



(not put before the previous panel) which, it recorded, confirmed that the Applicant was in the withdrawal phase from his medication and the panel also noted the Applicant's evidence as to the effect of this withdrawal upon him. There is no evidence, as the Applicant now complains, that the panel disregarded this expert evidence.

22. The Applicant also erroneously asserts that the decision letter makes no mention that the OM was recommending release and that the only reference to this witness's evidence is a comment that the OM would hesitate to recommend release if there were difficulties accessing mental health support in the community. The implication is that the panel misunderstood the recommendation of this witness. There is nothing in this complaint, as the Decision Letter unambiguously records in Section 7 that his "*Offender Manager and Offender Supervisor recommend release*".
23. Finally, the Applicant complains that it is clear from the Decision Letter but not from the hearing itself that the panel were heavily influenced by the absence of a psychiatric assessment, that such a report was not identified at stages prior to the hearing, and that the fair course of action would have been to obtain such a report "*at the outset*" or to adjourn to enable such a report to be obtained. However, the Applicant does not say how it is clear from the Decision Letter that the absence of a psychiatric assessment was influential; the Decision Letter does not identify any insufficiency of evidence and the two-member panel included a psychiatric member who would have been well placed to identify any need for further evidence. The only reference to a psychiatric assessment is in relation to the panel's indication of possible next steps for future panels. The Applicant does not indicate what, if anything, such evidence would have added to the current panel's assessment.
24. I accept that if it is demonstrated that a panel acted irrationally in not obtaining material which was not contained in the dossier that this would be a valid ground for reconsideration. It is clear from the Divisional Court's decision in **DSD** that it is a ground for Judicial Review, and it follows that it is a ground for reconsideration. The Applicant, who was legally represented throughout, at no time prior to the Reconsideration Application suggested that psychiatric evidence was required. Indeed, in written closing submissions the Applicant through his legal representative submitted that "*If there was any recent evidence of deterioration with his mental health, disengagement from professionals, non-compliance or secretive behaviour, then it may be a matter requiring further exploration. However, in the absence of those factors...[it is submitted] that [the panel has] sufficient information on which to base [its] decision*". No reason is now given by the Applicant as to why the panel should have obtained psychiatric evidence.
25. In conclusion, I do not find that there has been any procedural irregularity or that the decision of the panel was irrational. The panel had the advantage of hearing from the OM, OS and the Applicant. The fact that professionals agree that risk is or is not manageable does not mean that the panel is bound to agree. It is their responsibility



to make their own risk assessments and to make up their own minds on the totality of the evidence they hear, including that of the Applicant. They would be failing in their duty, to protect the public from serious harm (whilst also protecting the prisoner from unnecessary incarceration), if they failed to do just that. Likewise, the panel is not bound by findings of previous panels but those findings are a matter which they are entitled to take into account and revisit if appropriate to do so, especially but not exclusively in the light of any new evidence or later developments.

26. It is clear on a reading of the decision as a whole that the panel, having considered the totality of the evidence, found themselves unable to take a different course from the earlier panel and unable to follow the recommendations of the professional witnesses. In my judgment, the panel clearly and fairly carried out their own independent risk assessment, taking proper and proportionate account of the earlier decision and of the evidence before them. I am unable to find fault in the approach taken.

Decision

27. 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.

Elaine Moloney
14 October 2020