

[2020] PBRA 71

## Application for Reconsideration by Rogers

### Application

1. This is an application by Rogers (the Applicant) for reconsideration of a decision of an oral hearing of the Parole Board not to release the Applicant dated the 5 May 2020.
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 application for reconsideration and an addendum with revocation directions from a Parole Board duty member, the oral hearing decision letter relating to the hearing on 1 May 2020, the decision being dated 5 May 2020 and the dossier comprising 414 pages (which now includes the oral hearing decision letter).

### Background

4. The Applicant was sentenced to life imprisonment, with a minimum term of 4 years and 1 day, on 25 October 2001 for 3 counts of rape, robbery and s.18 wounding with intent. The victims of the index offences were all sex workers whom the Applicant had approached for sex and then held them against their will at knife point. The Applicant robbed one of them of her takings and also cut a fourth sex worker with a knife so that she sustained serious injuries to her hands.
5. The Applicant was released on a second occasion from this sentence on 27 December 2017. He was recalled on 4 October 2018 following reports from the police that he had been arrested after driving a stolen vehicle and refusing to stop. The Applicant did eventually stop after police deployed a 'stinger' device and he was apprehended at the scene. In the vehicle the police found a quantity of illegal drugs, a police style baton and an amount of money. The police continued to investigate this matter for some time but eventually confirmed in January 2020 that they would not be taking any further action.

### Request for Reconsideration

6. The application for reconsideration is dated 18 May 2020.
7. The grounds for seeking a reconsideration are as follows:



3rd Floor, 10 South Colonnade, London E14 4PU



[www.gov.uk/government/organisations/parole-board](http://www.gov.uk/government/organisations/parole-board)



[info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)



@Parole\_Board



0203 880 0885

### **(a) Irrationality**

- That a number of key pieces of information that favour the Applicant's case have either not been given due weight or any weight whatsoever;
- All three professional's supported release;
- That the Applicant's statement in relation to his recall affected the panel's decision; and
- That the panel's assessment contradicts that of all professionals and provides no explanation for doing so.

### **(b) Procedurally unfair**

- That the Parole Board revoked the requirement for an updated report and then the panel concluded that the report which was 12 months old was of little value.

### **Current parole review**

8. The Secretary of State referred this case to the Parole Board in November 2018 for a recommendation as to whether the Applicant's continued detention remained necessary to protect the public and if it was, for advice on suitability for open conditions.
9. On 11 January 2019 a Parole Board case assessment member directed the case to an oral hearing which was listed to take place on 16 July 2019. That oral hearing did not proceed and was deferred, as at that stage the police investigation into the incidents which led to the Applicant's recall was still ongoing, and the Offender Manager was not able to provide any more information about it.
10. In the interim time, the prison psychologist who was the author of a full psychological risk assessment (PRA) dated 23 April 2019 contacted the parole board to express concern that she had been called as a witness to the re-listed oral hearing when her report was now over 12 months old. The prison psychologist asserted that a fresh risk assessment would be necessary before she would be able to provide an up to date and accurate risk assessment at the hearing.
11. This application was initially referred to a Parole Board duty member who directed an addendum to the current risk assessment on 13 February 2020. Following a further intervention by the Public Protection Casework Section, another Parole Board duty member then directed a full risk assessment on 20 February 2020.
12. Thereafter the Applicant's solicitors on 3 March 2020 submitted legal representations requesting that the direction for the fresh PRA be revoked since there had been no significant developments since the last one. The duty member on that occasion agreed this was a sensible approach and revoked both the direction for the fresh PRA and the direction that the prison psychologist be required to give evidence.
13. The oral hearing took place on 1 May 2020 with two Parole Board panel members and two witnesses (the Applicant's Offender Manager and the Applicant's Offender Supervisor). The prison psychologist's report was contained in the dossier before



the panel, but she did not give evidence. Due to the Covid-19 restrictions in place the hearing took place by telephone. The Applicant also gave evidence and was represented throughout by his solicitor.

## The Relevant Law

14. 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*

15. 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.
16. 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*

17. 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."*

18. 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.
19. 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*

20. 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.

21. 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.

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

22. The Secretary of State was invited to respond to the application but indicated that he had no representations.

### **Discussion**

#### *Irrationality*

23. The panel took evidence from the Applicant about the circumstances of his recall. The Applicant gave his account that he felt under threat by others who had threatened to hurt his family if he did not drive the vehicle in question. The Applicant accepted he knew there were drugs in the vehicle when he agreed to drive it and accepted that he was trying to get rid of them when the police eventually apprehended the vehicle.
24. Having heard the evidence, the panel reached two key factual conclusions about the circumstances of the recall. Firstly, the panel did not consider it plausible that the Applicant would agree to the demands of those threatening him so easily (thereby dismissing the 'duress' assertion relied on by the Applicant). This was on the basis that the Applicant did not stop when he became aware the police were following him, he has a history of using violence to resolve problems and his family's reputation. Secondly, that this would not have been a 'one off' incident. The panel concluded, on the balance of probabilities, that the Applicant's version of events was not credible and that he was more involved in serious and organised criminality than he was prepared to admit. The panel detailed in its decision the factors which had led to this conclusion (evading capture whilst driving a stolen vehicle outside the Applicant's exclusion zone, whilst in possession of cash, a weapon and a substantial quantity of drugs). The circumstances of and necessity for the recall were therefore established by the panel, as **Calder [2015] EWCA Civ 1050** required. This was based on the circumstances which indicated criminal behaviour which raised the Applicant's risk.
25. The Applicant now argues this conclusion is irrational in that it was not based on any evidence and the only possible basis for this finding is an 'unconvicted, isolated incident'. I do not find this decision to be irrational. The panel was not bound to apply the criminal standard to its findings of fact and rightly assessed



whether on the balance of probabilities the Applicant's version of events was plausible. The panel had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant. The Applicant was also legally represented throughout. Where there is a conflict of opinion, it was plainly a matter for the panel to determine which opinion they preferred, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.

26. The witnesses at the hearing (and the prison psychologist) supported the Applicant's release. The decision of the panel carefully details the main conclusions of the witnesses, as well as those of the prison psychologist who did not give evidence. The panel made clear that they agreed with some of the professional evidence (such as the finding of the prison psychologist that the Applicant's risk of sexual offending is medium and not imminent). However, the panel goes on to stress that in its opinion the circumstances of recall indicate that the Applicant's risk of violent offending had increased.
27. 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.
28. 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**.
29. It followed from the panel's conclusion on the circumstances of the recall, that the panel concludes that the Applicant was involved in serious and organised criminality which involved the distribution of class A drugs, which in turn had escalated the Applicant's risk of violence. The panel have carefully outlined in their decision, why they felt able to disagree with the professional witnesses who did not appear to have put the same degree of weight or emphasis on the circumstances of the recall. The panel expressly states where it has taken a different view to the professional witnesses and why (for example, they find that it is not clear why the Offender Manager was able to conclude the Applicant had good insight in to the recall events when he had not asked the Applicant about them). The panel goes on to find that the risk management plan can only be



effective in managing risk if the Applicant is prepared to comply with it and that his compliance on the last occasion was superficial.

30. Given that the panel's reasons for disagreeing with the professional witnesses are clearly expressed in its decision, the disagreement is not in itself reason to interfere with the decision and I do not find it to be irrational.

### **Procedural Unfairness**

31. The Applicant now argues that the panel should have given his solicitors an opportunity to apply for a deferral or argue that the prison psychologist's psychological risk assessment still have value, due to the lack of any significant developments in the interim. The procedural unfairness alleged is a failure on the panel's behalf to communicate their concerns about the 'value' of the report given its age.
32. Although the psychological risk assessment supported release, the panel noted both positive and negative aspects of the April 2019 psychological risk assessment. For instance, it states that the assessment references 'bitterness towards probation' and 'rumination and grievance thinking'. In mid-2019 the Applicant was said to have lost motivation and did not want to be released. The panel go on to note that the age of the PRA is relevant to its value but also note that very little has changed since that assessment apart from the Applicant's motivation (which had improved).
33. I do not find that the panel's treatment of the report was procedurally unfair. The direction to revoke the requirement for a fresh psychological risk assessment had been made at the Applicant's solicitors request, the Applicant was represented throughout the proceedings and it was open to the Applicant's solicitors to make any appropriate submissions about the weight to be attached to the prison psychologist's report at the hearing. The absence of significant developments since the report (apart from the improved motivation of the Applicant), was noted by the panel. The observation that the age of the report is 'relevant when assessing its value' is not illustrative of any unfairness particularly given that the only change since the report is rightly acknowledged to be in the Applicant's favour (an increase in motivation). The panel was under no duty to seek express representations on this point particularly given the procedural history which had given rise to the revocation of the direction for a fresh psychological risk assessment.

### **Decision**

34. 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.

**Kay Taylor**  
**1 June 2020**



3rd Floor, 10 South Colonnade, London E14 4PU



[www.gov.uk/government/organisations/parole-board](http://www.gov.uk/government/organisations/parole-board)



[info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)



[@Parole\\_Board](https://twitter.com/Parole_Board)



0203 880 0885



INVESTORS  
IN PEOPLE | Bronze