

[2021] PBRA 29

Application for Reconsideration by CATTERALL

Application

1. This is an application by Catterall (the Applicant) for reconsideration of a decision of a Panel made on 12 February 2021 after an oral hearing held on 19 November 2020 not to direct the release of the Applicant.
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, which comprise the Oral Hearing Decision Letter of 12 February 2021, the representations of the Applicant's solicitor dated 16 February 2021, the statement of the Secretary of State explaining that no representations will be made on his behalf and the dossier comprising 465 pages.

Background

4. On 17 April 2015, the Applicant, who was then 24 years of age, was sentenced to an extended determinate sentence of 56 months' custody with a 3-year extension for an offence of sexual assault on an 18-year old female stranger who was walking home from a night club.
5. The Applicant was charged with rape, but he pleaded guilty to sexual assault by digital penetration. He was identified because he dropped his gym card as he fled the scene. Initially, he claimed that his contact with the victim was consensual, but eventually he admitted that it was not.
6. The Applicant, who is now 29 years old, had 14 previous convictions for 22 offences which included robbery, burglary, drug-related offences and offences of dishonesty. He had a previous conviction in 2011 for a sexual assault which occurred in 2009.
7. According to the Decision Letter, the probation service assessment report of the Applicant set out a pattern of his behaviour of approaching vulnerable victims on the street, who were normally lone females. Some of the Applicant's conduct has led to him being convicted and he has also been cautioned by the police for approaching lone females begging for change.
8. The Applicant undertook a course designed to address his offending before he was released to designated accommodation designated accommodation November 2017, but he was recalled in September 2018 after his use of drugs. It was reported that while receiving medical treatment in August 2017, he was

aggressive to female staff and he received a "red card" which meant that he could no longer return to that hospital. His previous Offender Manager has observed that he was "very challenging from the offset" as well as being often resistant to the support that he was being offered.

9. In December 2019, the Applicant was released again but he was recalled after 4 months for contravening licence conditions, including by being in possession of cannabis, being involved in supplying drugs, being suspected of being in possession of two mobile phones, telling lies to premises staff about his whereabouts as well as acting in breach of his curfew and the Covid-19 rules. It was noted that this conduct followed a pattern of the Applicant's behaviour that occurred previously in designated accommodation where there had been reports of his involvement in bullying other residents and in drug supply. This led to the Applicant being moved to different premises on two occasions until he was finally recalled after numerous verbal warnings and after having moved to a third set of premises.
10. The Applicant in his evidence to the Panel denied these matters contending that false reports had been put on the system about him, that another resident who was asking to borrow money reported him to staff, who jumped to the conclusion about him dealing drugs because he spent much time in communal areas. The Applicant stated that in the period leading up to his recall, he found the environment at the designated accommodation and the general area troubling in relation to drugs and violence. He said that he focused on not breaching his curfew and that he forgot about the Covid-19 rules. The Applicant said that he did not deal in drugs, but he admitted bringing a small piece of cannabis into designated accommodations which he was holding for a friend. The Applicant said that he was trying to "fit in" at the designated accommodation
11. In deciding if the Applicant's recall was appropriate, the Panel considered the Applicant's evidence together with the logs of the designated accommodation which gave details of his conduct which showed *"a pattern of suspicion of use of drugs and alcohol, which includes the smell of cannabis in [the Applicant's] room, complaints from other residents, the removal of an empty bottle of spirits and empty packets of pregabalin from [the Applicant's] room, being found with other residents in breach of Covid-19 guidelines and under the influence of cannabis and bringing cannabis into the approved premises"*.
12. The Panel concluded that the Applicant's recall was *"appropriate because of the pattern of behaviour documented in 3 separate designated accommodation which showed that [the Applicant was] not abiding by the licence conditions designed to manage the risks [he] posed"*. It was noted by the Panel that since recall, the Applicant has accumulated a number of negative behavioural entries particularly during the period from July to September 2020 principally for threatening and abusive behaviour towards staff, particularly young female staff. In addition, he received an adjudication for fighting with another resident in August 2020. No issues with drugs had been reported although there was security information suggesting his involvement in drug supply in the prison. Drug tests have been suspended due to Covid-19 restrictions.



Current Parole review

13. The Applicant was represented at the hearing on 19 November 2020 by a firm of solicitors who confirmed that they had received the same dossier as the Panel. They asked for an order for the Applicant's release. The Panel heard evidence from the Applicant; offender Supervisor; the Prison Offender Manager; from an Independent Forensic Psychologist; from the Prison Forensic Psychologist and from the Community Offender Manager.
14. Directions were issued for two documents and a piece of information to be obtained after the hearing by 3 December 2020. The evidence that was added after the hearing consisted of designated accommodation logs, prison records entries and confirmation from that psychological work could not be done by her with the Applicant by video link.

The Panel's Assessment of Current Risk

15. The Panel agreed with the probation service assessment report completed in October 2020 that the Applicant was in a group of offenders who presented a high risk of general offending using an assessment of risk of re-offending and a medium risk of violent offending using an assessment of risk of re-offending. The updated assessment given by the Applicant's OM at the hearing confirmed this assessment and that an assessment of risk of re-offending indicated that he was at a very high risk of reconviction for a sexual offence. The Panel agreed with these assessments and concluded that the Applicant continued to pose a high risk of reoffending sexually against female members of the public. It was especially concerned by his tendency to engage in impulsive decision making and the degree to which his risk management continues to rely on external controls.
16. The Panel explored risk assessments of the Applicant and the manageability of his risk in the community at the hearing. Offender supervisor who had completed a report on behalf of the Applicant's prison offender supervisor, did not support release in his original report, but he had changed his mind by the time of the hearing. He then recommended that the risk management plan proposed by the Applicant's community offender manager was sufficient to manage the risk posed by the Applicant in the community. The offender supervisor confirmed that there were no entries to suggest that he had been observed to be under the influence of substances. He observed that if there were suspicions of involvement by the Applicant in drugs, it is likely that his cell would have been subject to being searched.

17. The Applicant gave evidence and explained that he no longer had a lifestyle of involvement in drugs and alcohol. He referred to health problems and



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bereavements he had suffered as well as positive entries relating to him on prison records. The Applicant stressed that the index offence occurred a long time ago and that he could now manage himself.

18. The independent clinical psychologist, then gave evidence. She had originally concluded on the basis of information then available to her that there was no evidence that his risk of sexual reoffending had increased due to the circumstances leading to recall and that there was no core risk reduction work to be done in custody with the consequence that he should be released.
19. In an addendum dated 9 November 2020, the independent clinical psychologist stated that in the light of the Applicant's behaviour in custody, she was then recommending psychological informed intervention to address his interpersonal deficits as she considered this to be linked to his risk of sexual violence. She was also concerned that the Applicant had not told her about the fight for which he had received an adjudication and that he denied any difficulties in custody which undermined the independent clinical psychologist confidence in what the Applicant had told her.
20. The independent clinical psychologist in her evidence also explained that her concerns about substance misuse had been addressed to a certain extent after hearing evidence and the explanations from the Applicant. Nevertheless, she remained concerned whether the Applicant's risk could be managed in the community with the proposed risk management plan. Her conclusion was that the Applicant still required one to one psychological intervention which ought to be completed in the community unless there was a stable placement in a regime designed and supported by psychologist to help people recognise and deal with their problems designated accommodation with immediately available psychological intervention and a drug testing regime. She considered that the work required was core risk reduction work. The independent clinical psychologist explained that professional support was very important for the Applicant and he might have real difficulties without this in place.
21. The prison psychologist gave evidence. In her report in September 2020, she had recommended release on the basis that the Applicant would benefit from one to one psychological work, but that this was not necessarily to be done before his release. When she gave evidence, The prison psychologist observed that she was "*wavering*" after reading the security information and that she had changed her recommendation to one that the Applicant should stay in closed conditions, but she had been reassured by hearing from offender supervisor that not much weight should be placed on the security information. So, she recommended release as he could be managed in the community as long as the Applicant's community offender manager felt everything was in place.



22. The offender manager recommended release explaining that a place would be available for the Applicant at designated accommodation for a period of up to 6 months. In respect of other elements in the Applicant's risk management plan, the offender manager explained that a follow-up programme addressing the use of violence and sex or other offending conduct was not currently available in the local area and she was not sure if the recommended psychological intervention could be done with under current restrictions, for example, by video link. She observed that it was likely that both she and not be able to see the Applicant face to face.
23. The Panel concluded that the risk management plan would not be sufficient to manage the risk posed by the Applicant without the possibility of starting the psychology work immediately or within any set time frame in view of the current restrictions on face to face work. The Panel refused to order release. In reaching that conclusion, the Panel was persuaded by the evidence of the independent psychologist that psychological intervention was core risk reduction work and until such time as this was addressed, the Applicant's risk of sexual reoffending could not be managed in the community.
24. The Panel noted the apparent improvement in the Applicant's behaviour since October 2020, but concluded that without undertaking the psychological intervention identified to equip him with the insight into and strategies to manage his risk factors the risk factors could escalate if he were released as it started to escalate when he was released on licence.
25. The Panel refused to order release as *"it is necessary for the protection of the public for [the Applicant] to be confined"* having *"taken account of the serious nature of the index offence, the indications of offence paralleling behaviour whilst on licence and the unavailability of core risk reduction work in the immediate future."*

Request for Reconsideration

26. The application for reconsideration is dated 16 February 2021.
27. It is contended that the Panel's decision not to direct the release of the Applicant is irrational.
28. The grounds for seeking reconsideration include the following grounds:

(a) The Panel should not have relied on the evidence on, the independent Forensic Psychologist as *"her original assessment from his previous release indicated that there was no core work but she has now changed her recommendation to indicate that the*



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counselling work was a piece of core work and [the Applicant] does not consider that his behaviour has changed to warrant such a change in recommendation and he (sic) hearsay evidence from the security intelligence should not have been so heavily relied on”;

(b) The Applicant believes that *“his risk could be managed in the [designated accommodation] with the robust risk management plan proposed whilst he waited for access to the 1:1 work with [replace with job role]”;*

(c)The Panel should not have stated that in the words of the Grounds for Reconsideration *“they did not accept the Offender Supervisor’s evidence that there should be little weight attached to the drugs intelligence”* and the Applicant *“does not consider it appropriate for the Panel to rely on hearsay evidence in this regard”* or to reach conclusions. contrary to his case, that he had used drugs for a significant period;

(d)The Panel erred by relying on hearsay in relation to allegations of substance misuse by the Applicant and also by finding that he threw a chair round when he kicked it when an *“officer was being nasty to him”;*

(e)The Applicant *“through no fault of his own had to wait nearly 3 months for a decision which caused him a considerable amount of distress and anxiety, during this stressful period his behaviour did not deteriorate and he considers that this carried no weight when it should have done as it demonstrated effective use of skills”*

The Reply on behalf of the Secretary of State

29.The Secretary of State has stated that he did not want to make representations and no representations have been made on his behalf

The Relevant Law

30. 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

31. Under Rule 28(1) of the Parole Board Rules 2019 (“the 2019 Rules”) 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)).

Irrationality



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32. 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

"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."

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

Hearsay

34. The rules for the admission of hearsay in the courts do not apply in oral proceedings before the Board because Rule 24 (6) of the 2019 Rules provides that

"(6) An oral panel may produce or receive in evidence any document or information whether or not it would be admissible in a court of law"

35. In **R (Brooks,) v Parole Board** (2004 EWCA Civ 1080) the Court of Appeal made it clear that the Board *"is not confined to material which would be admissible in criminal or disciplinary proceedings"* (at [29]). It then went on to consider the specific issue of hearsay evidence explaining that

*"31. In **Sim** it was specifically held at paragraphs 52 to 55 that hearsay evidence can be taken into account, even when it relates to matters which are disputed. ... at paragraph 56 Keene LJ said –*

"I cannot see that the Strasbourg Jurisprudence in fact adds anything of significance to the test of fair procedure which is required by the common law."

Keene LJ went on to say that at common law there is considerable authority which establishes that it is not necessarily unfair to admit hearsay evidence, even when the deprivation of liberty is at stake".

Discussion



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36. In dealing with the grounds for reconsideration, it is necessary to stress two matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgment of the Panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.
37. The second matter of material importance is that when deciding whether a decision of the Parole Board was irrational, due deference has to be given to the expertise of the Parole Board in making decisions relating to parole.
38. These points have particular force whereas in this case, the Panel has reached its conclusion on the basis of the opinion of the independent clinical psychologist whose evidence survived scrutiny by cross examination by the Applicant's solicitor. Her evidence was that even with the proposed risk management plan in place, core risk reduction work in the form of one to one psychological intervention had to be done in custody unless there was a stable placement in a regime designed and supported by psychologists to help people recognise and deal with their problems designated accommodation with immediately available psychological intervention and a drug testing regime. It is not suggested, let alone established, that this alternative to psychological intervention in custody was available.
39. The Panel explained why it accepted the recommendation of independent psychologist and pointed to the "*serious nature of the index offence, the indications of offence paralleling behaviour whilst on licence and the availability of core risk reduction work in the immediate future*". These were reasons which justify the Panel's decision and no suggestion has been made that this was unacceptable reasoning.
40. These factors were all valid and cogent factors because, as has been explained, the index offence was serious as was shown by the sentence imposed for the index offence, his other offending when on licence as explained above and the difficulties of providing the core risk reduction in the immediate future.
41. A further reason which justified the decision to refuse releases was that as the Panel explained to the Applicant "*without undertaking the psychological intervention identified to equip you with the insight into and strategies to manage your risk factors, risk could quickly escalate if you were released as it started to escalate when you were on licence*".



42. There are four reasons why this was a factor which the Panel was entitled to take into account. First, the probation service assessment report assessment completed in October 2020, which the Panel accepted, showed that the Applicant posed a high risk of general offending. Second, the assessment of risk of re-offending assessment of the Applicant given by his OM at the hearing and accepted by the Panel showed that the Applicant was "*at very high risk of reconviction for a sexual offence*". Third, there was ample evidence to support the conclusion of the Panel that the Applicant has a tendency to engage in impulsive decision making. Fourth, the Panel concluded that the Applicant "*continue(s) to pose a high risk of reoffending sexually against female members of the public.*"
43. In so far as the Panel is criticised for relying on hearsay evidence, this criticism fails to appreciate that, as has been explained, hearsay evidence is not inadmissible in Parole Board Proceedings. Nothing has been put forward, let alone proved, that insofar as the Panel relied on hearsay, it was unfair to do so.
44. There is no merit in the criticism of the Panel in the Grounds for Reconsideration that the Panel failed to attach any importance to the fact that the Applicant's behaviour did not deteriorate in the period between the date of the Panel hearing on 19 November 2020 and the date of the Decision Letter of 12 February 2021. The Decision Letter expressly noted "*the apparent improvement in [the Applicant's] behaviour from October [2020] onwards*".
45. At the end of the day, it is clear that the Panel was entitled to refuse release and its reasoning fell a long way short of the threshold for finding irrationality as it clearly was not in the words of the Divisional Court in **DSD** "*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*"

Decision

46. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

Sir Stephen Silber
12th March 2021



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