

[2023] PBRA 189

Application for Reconsideration by Alexander**Application**

1. This is an application by Alexander (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 16 October 2023. The decision of the panel was not to direct release.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, and/or (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are the current dossier consisting of 531 pages; the Application for reconsideration submitted by the Applicant; and the response by the Secretary of State (the Respondent).

Background

4. On the 30 October 1997 the Applicant was sentenced to life imprisonment in relation to an offence of murder. The minimum term fixed by the judge was twelve years and one day. The Applicant was aged 27 at the time he was sentenced and is now 53 years old.
5. The victim of the offence was a family member of the Applicant. The Applicant was at the family member's home. The Applicant became angry with the family member when he was refused financial help. The Applicant was under the influence of drugs and alcohol. He struck the family member with a kitchen item and then stabbed him in the neck with a knife, causing his death.
6. Prior to the commission of the index offence, the Applicant was noted to have an extensive criminal history. His offending included offences involving violence. The panel found that the Applicant's offence history indicated a pattern of aggressive and violent offending associated with drug and alcohol misuse.

Request for Reconsideration

7. The application for reconsideration is dated the 20 October 2023.



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8. The grounds for seeking reconsideration are set out below.

Current parole review

9. This was the Applicant's first parole review following his most recent recall to prison. The Applicant had been released initially from prison in April 2016 following a Parole Board hearing. He was recalled to prison in May of 2017 and released again in February of 2021. He was recalled again in June of 2022.
10. The recall in May of 2017 occurred in circumstances where the Applicant had been involved in a dwelling-house burglary. He was convicted of that offence and was sentenced to a further period of imprisonment. Whilst in prison he assaulted two female members of prison staff and was further convicted of those offences.
11. Whilst on licence, in June of 2022, the Applicant became involved in an allegation of domestic violence. The Applicant told the police at the time that there had been an altercation, but that he had been the victim. He was recalled. So far as this incident was concerned, no action was taken in connection with physical violence, however the Applicant was convicted of an offence involving the damaging of a mobile phone.

Oral Hearing

12. The review was conducted by an independent Chair of the Parole Board, a psychologist member of the Parole Board and an independent third member of the Parole Board. Oral evidence was given by the Prison Offender Manager (POM), a prison-instructed psychologist and a Community Offender Manager (COM). The Applicant was represented by a solicitor.
13. A dossier consisting of 509 pages was considered by the panel.

The Relevant Law

14. The panel correctly sets out in its decision letter dated 16 October 2023 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 (as amended)

15. Pursuant to 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)).
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.

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

23. Procedural unfairness was not argued in this case.

24. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

The reply on behalf of the Respondent

25. The Respondent has informed the Parole Board that he does not offer any representations concerning this application.

Reconsideration grounds and discussion

Ground 1

The panel failed to acknowledge the Applicant's progress in addressing drug misuse.

26. The Applicant's legal adviser submits that drug misuse was a critical factor in assessing the Applicant's risk and that the Applicant had addressed that problem in prison and was no longer dependent upon prescribed or illicit drugs. Further it was submitted that the Applicant was offered a place at a rehabilitation centre on release which would consolidate his commitment to abstinence.

Discussion

27. At paragraph 3.3 of the panel's decision the issue relating to drug misuse was addressed. The panel accepted that the proposed risk management plan, coupled with residential accommodation at a rehabilitation centre could address the Applicant's acknowledged risks relating to drug misuse as well as address issues relating to unstable accommodation, the need for training and employment and financial management. The panel, however, were not persuaded that the risks would continue to be manageable after leaving the rehabilitation accommodation. Additionally-and importantly- the panel identified risk factors beyond drug misuse. In particular a propensity to be associated with weapons; aggressive behaviour; an ambivalent attitude towards offending; an inability to manage relationships; and a negative lifestyle and associations. These factors were matters which the panel determined had not been adequately addressed, and would not be addressed by residence in a rehabilitation centre.

Ground 2

Protective factors

28. The Applicant's legal adviser submits that the panel erred in failing to identify protective factors including the fact that the Applicant himself had arranged residence at a rehabilitation centre, his positive relationship with professionals and his pro-social attitudes generally.

Discussion

29. At paragraph 2.37 the panel acknowledged that professionals took the view that protective factors were identifiable so far as the Applicant's risk was concerned. The panel noted that the professional view was that positive life goals were a protective factor, however the panel took the view that on releases from custody in the past, the Applicant had voiced similar positive views and goals, but that commitment had not been sustained, and the Applicant had been recalled to prison. The panel also took the view that family support was limited and that the Applicant had an unrealistic view of

the availability of support in the community. It is clear therefore that the panel took a different view to professionals. The panel indicated in their decision, that despite the views of professionals, there was clear evidence that the Applicant struggled to cope or engage in the community despite his positive engagement in prison. For this reason, the panel determined that there was limited evidence of protective factors sufficient to underpin risk.

Ground 3

Violence and assaults

30. The Applicant submits through his legal adviser that the panel placed excessive weight upon the issue of partner violence and the incident which brought about the Applicant's recall and also upon the issue of weapons and violence generally.

Discussion

31. Within the hearing, the panel explored with the Applicant, an incident of violence which led to the arrest and recall of the Applicant. The panel acknowledged that the facts of the alleged incident involving partner violence were unclear. However, the Applicant himself had admitted to being involved in a physical altercation and striking his partner in reaction to being hit in the eye. This incident did not lead to a conviction for assault, although the Applicant was convicted of damaging a mobile phone. The Applicant also accepted that he had told the police that he had kept a knife under a pillow of his bed. He gave various explanations for this decision, he accepted however that the knife was placed in this position because he feared an attack from others. In the context of the index offence in this case, the panel were clearly entitled to consider the evidence relating to knives, violence and an association with alcohol and drug misuse as being matters of concern.
32. The panel cited two factors which underpinned their decision not to release; firstly, a concern that the Applicant had a limited acceptance or adoption of his risks. At paragraph 4.2 of the decision the panel noted that the Applicant had a tendency to deflect responsibility for his behaviour towards external or historical factors such as (poor) upbringing, detention in prison or a lack of social and other support. The panel's view therefore was that the Applicant had a limited ability to adopt responsibility for his behaviour himself.
33. A second factor cited was the possible background of historical trauma, suffered by the Applicant, which professionals had identified as a factor associated with risk. The panel took the view that the need for trauma therapy was fundamental in addressing the Applicant's risk and disagreed with the professionals who took the view that the therapeutic work could be undertaken after release and in the community. The panel therefore took a differing view to the professionals and explained their reasoning for the view within the decision. In essence the reasons were a concern that the risks relating to violence and weapons had not been addressed and a concern that the issue of trauma had not been addressed and had to be addressed as a core risk factor.

Decision

34. This was a case where the issues were complex and multifaceted. The index offence was clearly exceptionally serious and was associated directly with violence arising from an inability to exercise emotional control. In applying the statutory test for release, panels of the Parole Board are not obliged to adopt the opinions, views or 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 receive, including any evidence from 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 fail to do just that. As was observed by the divisional Court in **DSD** they have the expertise to do it.
35. The test for irrationality, as set out in **DSD** is that the decision was "*so outrageous in its defiance of logic that no sensible person could have arrived at it*". This was a case with a fine balance of issues. The panel were entitled to consider the totality of the evidence. The panel clearly took a differing view to professionals. In my determination the panel, as they were obliged to do, explained the reasons for their decision and in particular the basis upon which they differed in their view of the evidence from the professionals. The panel highlighted two particular areas of concern as set out above, namely the lack of trauma therapy and the absence of evidence of addressing the risk of violence associated with weapons and drug and alcohol misuse. I am not therefore persuaded that the panel's decision was irrational in the sense set out above.
36. Having considered the application by the Applicant in this case I find that the panel's conclusions did not amount to an irrational decision.
37. In all the circumstances therefore this application for reconsideration is refused.

HH S Dawson
02 November 2023