

[2020] PBRA 138

## Application for Reconsideration by Smith

### Application

1. This is an application by Smith (the Applicant) for reconsideration of a decision of an oral hearing dated the 6 August 2020 not to direct release or recommend a progressive move to open conditions.
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, the application dated 4 September 2020 and the response from the Secretary of State dated 15 September 2020.

### Background

4. The Applicant is now 43 years of age. He is serving a discretionary life sentence for an offence of attempt robbery imposed on 23 December 2014. He received determinate sentences on that same day for other offences including two robberies. The minimum term, taking into account time served on remand, was set at four years and 250 days and expired on 30 May 2019. The Applicant was 36 years old when he committed the offences.
5. At the time of these offences, the Applicant was on life licence due to receiving a life sentence in 2002 for a number of offences of robbery and possession of firearm with intent, offences he had committed whilst unlawfully at large from an open prison.

### Request for Reconsideration

6. The application for reconsideration is dated 4 September 2020 and was submitted by the Applicant's solicitors. It was not made on the published form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints and, reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made.

7. The grounds for seeking a reconsideration are as follows:



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- (a) That the decision was irrational in that the decision letter at the top of page 11 regarding the Sentencing Judge's view does not make sense.
- (b) That the decision was irrational in not accepting the view of the Psychologist that the Applicant had completed all core risk reduction work.
- (c) That the decision was irrational in concluding that the Applicant could not be relied upon to comply with the risk management plan due to his history and unstable behaviour. The panel did not elaborate on the unstable behaviour and the Applicant omitted to tell them that he had suffered the loss of a family member recently.
- (d) That the decision was procedurally unfair as it did not consider adjourning to obtain a report regarding the Applicant's engagement with an intervention to address the use of violence which he had completed and/or to obtain further information regarding work he had completed with a Psychologist.
- (e) That the decision was procedurally unfair due to the way the panel dealt with allegations made against the Applicant during his time in custody.

### **Current parole review**

- 8. This was the first review of the Applicant's case. The case was referred to the Parole Board in August 2019. The referral was considered by a Member Case Assessment on 23 January 2020 and directed to an oral hearing.
- 9. The oral hearing was heard remotely on 6 August 2020 by a three member panel, which included a Psychiatrist member. The panel heard evidence from the Offender Supervisor, Offender Manager, a Psychologist employed by the Prison Service, a Psychiatrist and the Applicant. The Applicant was legally represented throughout.

### **The Relevant Law**

- 10. The panel correctly sets out in its decision letter dated 6 August 2020 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*

- 11. 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)).
- 12. 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

13. 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."*

14. 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.

## 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.

17. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.



## The reply on behalf of the Secretary of State

18. A response was received from the Secretary of State on 15 September 2020. The response was solely in relation to one point raised in the application.
19. The Applicant submitted at paragraph 9 of the application as part of his submissions relating to grounds (a) and (d) that the Psychologist told the panel in evidence that he had not seen the Judge's Sentencing remarks. The Secretary of State notes that this is not what is recorded in the decision letter. The letter states the Psychologist *"told the panel that he had not considered the sentencing judge's comments about your presentation at the time of the index offending prior to the completion of his report"*.

## Discussion

20. 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 as well as the witnesses. 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.
21. 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**.
22. 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.
23. Cases in which a party has been represented by a lawyer are highly unlikely to generate a successful appeal if there had been no challenge made to the alleged irregularity by the Applicant, save in the event for instance of a failure by the other party (for example, a failure to disclose material relevant to the ultimate decision to the Applicant).

## Irrationality - Grounds (a), (b) and (c)

24. The Applicant submits that the decision letter at the top of page 11 regarding the Sentencing Judge's view does not make sense. The decision reads, *"[the Psychologist] told the panel that he had not considered the sentencing judge's comments about [the Applicant's] presentation at the time of the index offending prior to the completion of his report. When asked about whether the judge's view*



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*that [the Applicant's] index offences were not linked to [the Applicant's] offending would have impacted on his risk assessment, [the Psychologist] said that on balance it would not. The risk factors that [the Psychologist] identified in the 2002 offences were the same risk factors in 2014".*

25. The Applicant submits that the sentence, "When asked about whether the judge's view that [the Applicant's] index offences were not linked to your offending would have impacted on his risk assessment, [the Psychologist] said that on balance it would not" does not make sense.
26. It must be borne in mind that the Applicant, his legal representative and the panel all had access to the full dossier which contained the Judge's sentencing remarks and were all present throughout the full hearing. The Judge clearly sets out his conclusion that the Applicant was "not suffering from any significant symptoms relating to his mental illness" at the time of the index offences. The decision letter also makes reference to this in section 3 'Analysis of Offending'.
27. Following the points about the decision letter not making sense, the Applicant goes on to submit in paragraph 11 of his application that "Instructing solicitors at this stage of the hearing note that [the Psychologist] was asked whether the judge's view that mental health did not play a part of [the Applicant's] offending made any difference to his assessment. [The Psychologist's] view that it did not." I therefore conclude that the mistake made in the letter was a trivial typing error, the Applicant knows exactly which part of the evidence it was referring to and anyone privy to the dossier and the letter would be aware that the panel meant 'mental health/illness' in place of 'offending'. Ground (a) fails.
28. The Applicant submits that the decision was irrational in not accepting the view of the Psychologist that the Applicant had completed all core risk reduction work. Whilst I accept the point made in the application that the Psychologist had completed a diagnostic assessment which highlighted violence as a historical risk factor, it is important to emphasise that the panel is not obliged to adopt the opinion or recommendation of the Psychologist. It is right to say that in this case the panel's decision went against the recommendation of all witnesses. As indicated above the panel is under a duty to set out clear reasons why and its stated reasons should be sufficient to justify its conclusions (**R (Wells) v Parole Board 2019 EWHC 2710**).
29. The panel's decision runs to 16 pages and sets out a comprehensive conclusion. The panel makes it clear that it placed reliance on its assessment of the Applicant's evidence in finding that his insight into his key risk factors was underdeveloped. The panel specifically addresses in the conclusion that it has considered all the recommendations and goes on to explain why it does not agree with them in detail. Accordingly ground (b) fails. This is also linked to ground (d) in that the Applicant submits that the panel should have had further information before disagreeing with the opinions and those points are addressed below.
30. The Applicant submits that the decision was irrational in concluding that the Applicant could not be relied upon to comply with the risk management plan due to his history and unstable behaviour. The Applicant submits that the panel did not



elaborate on the unstable behaviour and the Applicant omitted to tell the panel that he had suffered the loss of a family member recently.

31. As set out above, omitting to put information before a panel is not a ground for procedural unfairness.
32. The panel sets out in its decision letter in section 7 'Evaluation of effectiveness of plans to manage risk' that it has concerns regarding compliance with the risk management plan. The panel indicates that a similar plan did not prevent the applicant from his continued offending, and he has a history of absconding and failing to engage with professionals. It is not disputed that the Applicant committed his index offences when subject to life licence for offences committed when he had absconded. I cannot see how this could be considered an irrational conclusion based on the evidence the panel had.
33. The panel set out in the conclusion of the decision letter that it had also relied on the Applicant's recent poor mental health earlier in the year and the concerns raised regarding his behaviour that led to allegations being made. The panel has therefore set out what it has relied upon in its assessment of the likelihood of compliance. The panel heard the evidence and made a decision to apply weight to that aspect of the evidence. There are no compelling reasons for me to interfere with a such a logical conclusion and thus, ground (c) fails.

### **Procedural Unfairness – Grounds (d) and (e)**

34. The Applicant submits that the decision was procedurally unfair as it did not consider adjourning to obtain a report regarding the Applicant's engagement with an intervention to address the use of violence which he had completed and/or to obtain further information regarding work he had completed with a Psychologist. This links with ground (b) in that the Applicant submits that, before concluding that the Applicant had not completed sufficient work to address his risk, the panel should have found out more about work completed in the past.
35. The Applicant accepts that the intervention to address the use of violence was actually completed prior to the index offending. The Applicant accepts by way of detail in the application that the panel heard evidence from the Psychologist about what the course entails. The dossier, which was considered in full by the panel, contains numerous mentions of that intervention and what it aims to target.
36. Furthermore, the panel had reports and heard evidence from witnesses about other work that the Applicant had completed and their opinions on the risk that the Applicant poses having completed that work. Crucially, the panel also heard evidence from the Applicant himself and made an assessment of him. The Applicant talked to the panel about the one to one work he had completed with a Psychologist during his first life sentence and the therapy more recently. The full details of his evidence are set out in the decision letter.
37. The Applicant was legally represented throughout. No representations were made to adjourn the case on the day to obtain further information and no suggestion was



made to the panel that it had insufficient information at the time it made its decision. No representations were made at any earlier stage for the panel chair to direct this further material be added to the dossier. The panel went on to set out a detailed decision. All procedures as set down in law were followed. I see no evidence to support the contention that the Applicant was not given a fair hearing or was prevented from putting his case across. I conclude that his case was dealt with justly and accordingly find that ground (d) fails.

38. Finally, the Applicant submits that the decision was procedurally unfair due to the way the panel dealt with allegations made against the Applicant during his time in custody. The Applicant correctly accepts that the panel can consider such allegations but submits that the panel ought to have directed further information from the Police and Hospital before making its assessment of the allegations. The Applicant denies all allegations and told the panel his stance. Again, as stated above, the Applicant was legally represented throughout and an application to adjourn to obtain this information was not made.

39. It is clear from the very detailed decision letter that the Applicant was asked for his version of events regarding allegations made. It is also clear that witnesses were asked for their views about the impact of those allegations on their assessments. The panel did not make any finding of fact in relation to these matters and noted that there were not any charges that were proceeded with. However, the panel did set out in its decision letter that the allegations were concerning, and that they had an impact on the decision, as it is required to do under Parole Board guidance. The panel followed the appropriate procedures, allowed the Applicant to give full evidence regarding the allegations and the concerns and therefore fulfilled its duty to give the Applicant a fair hearing. Ground (e) therefore fails.

## Decision

40. 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.

**Cassie Williams**  
**28 September 2020**