

[2020] PBRA 24

## Application for Reconsideration by Mr Robinson

### Application

1. This is an application by Mr Robinson (the Applicant) for reconsideration of a decision of a three-member panel, dated the 14 January 2020, not to direct his release following an oral hearing.
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 consisted of the dossier running to 557 pages, the decision letter and the representations for reconsideration.

### Background

4. The Applicant is now aged 47 years old. He was sentenced to Imprisonment for Public Protection on 26 February 2008 for an offence of robbery. The tariff was set at 1 year and 9 months (with allowance for time on remand) and expired on 29 July 2009.
5. At the time of the index offence the Applicant was under the influence of illegal substances and he accepted that substance misuse underpinned much of his offending history.
6. The Applicant was released on licence on 27 June 2016 but recalled on 23 May 2017 after returning to substance misuse.
7. He was re-released on 10 October 2018 in what was described as a 'finely balanced' decision, but recalled approximately four weeks later after he had reacted aggressively to concerns about a relationship that he had engaged with and had absented himself from the designated accommodation with the consequence that his bed space was withdrawn.

### Request for Reconsideration

8. The application for reconsideration is dated 04 February 2020.
9. The grounds for seeking a reconsideration are as follows:



- (a) All witnesses agreed that the Applicant could be managed in the community, and the Panel could not reasonably conclude otherwise;
- (b) The Panel did not identify why it disagreed with the conclusions of the professional witnesses;
- (c) The Panel did not state that the Offender Manager was recommending release; and
- (d) The recommendations for release were to a rehabilitation facility, but one was not available at the time of the hearing.

10. In relation to (d) I take this to be a complaint of procedural unfairness by not adjourning the matter to investigate further.

### **Current parole review**

- 11. The Secretary of State referred the Applicant's case to the Parole Board in December 2018 following his recall to consider whether he should be released. If not, then the Panel was invited to advise the Secretary of State on whether he should be transferred to open conditions.
- 12. An oral hearing was directed in May 2018 and was listed on 9 September 2019 to be heard by a video-link.
- 13. This was deferred in advance as a link could not be set up. The case was relisted for a hearing at the prison on 09 January 2020.
- 14. The Panel heard oral evidence from the Applicant, as well as his Offender Supervisor and Offender Manager.
- 15. The dossier contained evidence of risk reduction work completed prior to release, as well as evidence pertaining to the recall and details of the Applicant's custodial behaviour and substance misuse since recall.
- 16. Both the Offender Supervisor and Offender Manager recommended release.
- 17. The Panel noted that although there was no formal offer of a place at a rehabilitation unit at the hearing, the Applicant's representative submitted that this could be clarified if there was a short adjournment. The Panel concluded that an adjournment was not necessary.
- 18. The panel correctly sets out in its decision letter dated 14 January 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.

### **The Relevant Law**

*Parole Board Rules 2019*



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19. Under Rule 28(1) of the Parole Board Rules 2019 a 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.
20. Such a decision is eligible for reconsideration on the basis that (a) the decision is irrational and/or (b) that the decision is procedurally unfair.

### *Irrationality*

21. 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."*
22. 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.
23. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28 (see **Preston [2019] PBRA 1** and others).

### *Procedural unfairness*

24. 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.
25. 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

26. The Secretary of State offered no representations in response to the application.

### Discussion

27. The key issues are whether it was open to the Panel to conclude that the test for release was not met and, if so, whether sufficient reasons were given in doing so.

28. **Ground (c)**: I shall first address the complaint that the recommendation of the Offender Manager was not sufficiently set out. In section 7 of the decision letter, the Panel noted that the Offender Manager "*could only support release to a rehabilitation unit at this time*".

29. I consider that this makes it clear that the Offender Manager was recommending release.

30. **Ground (a)**: 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 two professional witnesses.

31. 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.

32. 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**.

33. This was the second time that the Applicant had been recalled from his IPP licence. He accepted that he had an entrenched addiction to drugs. On this occasion he had been directed to engage with drug rehabilitation in the community but had prioritised his relationship over this.

34. Since recall, the Applicant had accepted misusing drugs on several occasions, and there was other intelligence that he was involved in the 'drugs culture'. He had not shown a consistent motivation to engage with the relevant substance misuse services.

35. I accept that there were positive aspects of his case; for example, there was no further violence and there was some evidence that the Applicant was now motivated to engage.



36. Against that backdrop, the Panel were required to conduct a balancing exercise of the various different factors.
37. I consider that it is clear that the decision that the Panel made was one that was open to it. No reasons are put forward to the contrary, other than the recommendations of the professionals.
38. Although the recommendations are important, given the Applicant's behaviour in custody and the lack of engagement with the substance misuse team the Panel was perfectly entitled to conclude that he lacked the necessary internal motivation to engage with rehabilitation on release.
39. In those circumstances, and given the link between his substance misuse and his offending, the decision to decline to direct release was within the range of permissible decisions.
40. This is provided, of course, that it was sufficiently reasoned, which I shall consider now.
41. **Ground (b):** The Panel's decision letter sets out the history of the Applicant's case. It sets out in some detail the events since the Applicant's release and recall, as well as the evidence at the hearing. No complaint is made that it does not accurately summarise the written or oral evidence or that (other than in relation to ground (c)) anything material was omitted.
42. Neither professional were recommending release in their written reports and both considered that, even if release were directed, further work was required. Both also had concerns over the Applicant's motivation. It is clear that if release were to be directed, then it would be to a residential placement.
43. The decision letter sets out reasons why the Applicant's substance misuse was a central feature of his case. It noted that the proposed release plan was 'comprehensive' in terms of the external controls that were in place and identified that the key issue was whether the Applicant had sufficient internal measures in place to remain abstinent.
44. Although the paragraph dealing with the question of whether the Applicant's risk could be managed in the community in section 8 is short, it must be read with the remainder of the decision letter. There, the Panel had set out (and, at times, commented on) the recent history of substance misuse and evidence of a lack of engagement with the relevant services, as well as the circumstances of the recall itself.
45. The Panel have explained why it is that they took a less optimistic view of the likelihood of success at a residential rehabilitation placement than the professionals. That was a view that they were entitled to take, and it is clear from the letter why they took that view.
46. **Ground (d):** Although it is not specifically stated in the Grounds of Application, I have considered whether there was any procedural unfairness in failing to adjourn



to receive confirmation of the availability of a place at a rehabilitation unit. The same high bar for irrationality applies.

47. I conclude that there was no unfairness. The Panel set out clear reasons why the Applicant did not have sufficient motivation and commitment to engage with a placement. In those circumstances, no purpose would have been served by an adjournment.

## **Decision**

48. For the reasons I have given, I do not consider that the decision was irrational, nor was it procedurally unfair.

49. Accordingly the application for reconsideration is refused.

**Daniel Bunting**  
**12 February 2020**

