

[2021] PBRA 102

Application for Reconsideration by Miller

Application

1. This is an application by Miller (the Applicant) for reconsideration of a decision made on 19 April 2021 refusing to order 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. These are the oral hearing decision letter dated 19 April 2021, a reconsideration application and a dossier totalling 643 pages.

Background

4. On 24 May 1985, the Applicant was sentenced to life imprisonment after pleading guilty to the murder of a 25-year-old woman and her 5-year-old daughter in their home. The minimum term of 20 years imprisonment expired in 2004.
5. Before committing the index offences, the Applicant had a long and persistent record of convictions mainly for theft and burglaries as well as a conviction for robbery for which he had been sentenced to 2 years' imprisonment.
6. He started serving his sentence for the index offences in closed conditions, but he was given the opportunity of being tested in open conditions on four occasions, but on each occasion, he failed to comply, and, on each occasion, he was returned to closed conditions.
7. The Applicant was released on a life licence in October 2016, but he was subject to an emergency recall in July 2017.
8. The Applicant was re-released in July 2018, but he was recalled to prison in October 2018 as he had disregarded the condition of his licence that required him to notify probation if he had a relationship intimate or not with anyone in a household residing with a child under the age of 18 years.



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



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885



INVESTORS
IN PEOPLE | Bronze

Current parole review

9. A three-member panel of the Parole Board, including a psychological member, heard the Applicant's case on 9 March 2021. There was insufficient time to hear all the witnesses on that date and so it was adjourned part heard to 9 April 2021.
10. At the initial hearing on 9 March 2021, the panel heard evidence from:
 - a long-time friend of the Applicant;
 - a neighbour of the Applicant's friend, who the Applicant regarded as a friend;
 - the Applicant's Prison Offender Manager (POM);
 - prison psychologist;
 - an independent psychologist commissioned by the Applicant's solicitors; and
 - the Applicant who was then 61 years old.
11. At the resumed hearing on 9 April 2021, the panel heard evidence from:
 - A Psychologist from the "*Changing Lines*" (CL), a regime designed and supported by psychologist to help people recognise and deal with their problems a service in London. was not familiar with the applicant's case, but she gave evidence about the support and interventions CL are likely to be able to offer to the applicant if his release is directed. The POM who gave evidence updating the Panel on the Applicant's behaviour since an earlier hearing;
 - the Applicant who gave further evidence; and
 - the Applicant's Community Offender Manager (COM).
12. The Applicant was released on life Licence in October 2016. He was made the subject of an emergency recall to prison in July 2017 when he was arrested and charged with a sexual assault of a female under 16 who with her father was visiting her 16 year old friend whose mother lived near the Applicant. They were unaware of the Appellant's history and were happy for him to socialise with them. It was alleged that the Applicant suggested going to the bedroom of the 16-year-old girl and he sat on her bed with both girls "*face-timing*" and looking at photos on their phones.
13. The Applicant denied that he had behaved improperly but he was charged with sexually assaulting x 2 and sexually penetrating the female under 16 , but he was found not guilty by a jury of sexually penetrating the girl on those occasions.
14. The panel noted that the licence conditions for the Applicant's release erroneous omitted prohibiting the Applicant from having unsupervised conduct with children. The panel concluded from reading the MG5 Police Summary and from hearing the Applicant's account of the incidents that led to his arrest that he "*engaged with the children in a way that was extremely irresponsible and risky especially for someone who had previously murdered a child*".
15. The Applicant accepted that he had previously taken the two girls to his flat unaccompanied to collect a phone charger and whilst alone gave each of them small glasses of alcohol. It was suggested that in his neighbour's flat he added wine to the female under 16's lemonade although the Applicant denies this. The Applicant

sought to minimise his responsibility by saying that the girl's father had said that it was "ok" to do so.

16. Although the Applicant contends the verdict of the jury showed that he "*did nothing wrong*", the panel noted that on reflection he acknowledged that he had been "*stupid and naïve*" and made an "*error of judgment*" in allowing himself to be in a position where such accusations could be made. The recent panel concluded that the Applicant "*behaved in an inappropriate manner with the [female under 16]*".
17. The Applicant was re-released on licence in July 2018 and his licence included conditions first, that he was not to have unsupervised conduct with any child under 18, second, that he was to notify his supervising office of any developing personal relationships whether intimate or not, with any one resident in a household with children under the age of 18.
18. Just three months after his release, the Applicant was recalled as Probation received an anonymous call that the Applicant was in a relationship with X who had an autistic son who was then 11 years old. The Applicant had not informed anyone about his contact with X and her son. Probation visited X who denied having a sexual relationship with the Applicant, but Probation concluded that the Applicant had had "*considerable interactions*" with that with whom the Applicant "*got on well with*".
19. The panel noted that there was no evidence that the Applicant was ever alone with the boy, but the neighbour's son accompanied the Applicant and another neighbour when she drove the Applicant back to his designated accommodation 5 miles away. The Applicant accepts that he made a "*terrible error of judgment*" by not informing probation of his contact with his neighbour at the time he did not consider it was "a relationship worth mentioning".
20. After his recall in October 2018, the Applicant's behaviour has been good but on the first day of the hearing before the panel, his POM reported the Applicant's deteriorating conduct. When the Applicant learnt that POM was not supporting his release, he became irate and aggressive with the result that the Applicant was escorted shouting back to his cell. The Applicant also lost his cleaning job and he had to be placed on an Accounting Course for a short period after stating "*something would happen*" if he was not allocated a single cell.
21. The Prison Psychologist considered that if the Applicant did not undertake further core risk reduction work, there would be a high potential risk of further violence if the Applicant were to be released at this point. His POM considered it difficult to assess the Applicant's risk of future violence in the light of the lack of understanding as to why he committed two murders, The POM assessed a high risk of future violence.
22. The panel agreed with the conclusion of both Probation Officers and both Psychologists that if the Applicant reoffends there is a high risk of serious harm of serious harm to children and adult members of the public and it would most likely involve sexual violence or serious physical harm. Those risks would be greatest if the Applicant was misusing alcohol or drugs or was dissatisfied with life in the community and were not caring about the consequences of his behaviour for himself or others.



23. Both psychologists were hampered by the absence of a full formulation or a workable theory as to why the Appellant engaged in such extreme violence in the index offences against a woman and her young child. The prison psychologist concluded that the risk of future further violence by the Applicant is not currently manageable in the community on account of his lack of insight as to why he committed the murders and in the light of the facts that no intensive violence related work has been undertaken during his sentence, that there is ongoing evidence of problematic personality traits, , recent outbursts of aggression when not getting his own way and his failure to learn from mistakes when released or tested in open conditions.
24. The POS reached the same conclusion as the prison psychologist who considered that outstanding risk reduction work needed to be completed by the Applicant in closed prison conditions.
25. The POM the Applicant's COM recommended against the Applicant's release as he considered that the Applicant needed to complete further risk reduction work and therapy in prison.
26. The independent psychologist commissioned by the Applicant's solicitors, recommended the Applicant's release, and he did not consider that the Applicant has outstanding core-risk reduction work to complete in prison. In support of this conclusion, he referred to the absence of any violence by the Applicant for many years and the improved level of supervision he would receive on release.
27. The Panel considered that although the risk management plan is an appropriate one and includes specialised support to help the Applicant manage problematic traits, it concluded that he had outstanding core risk reduction work to complete and that no risk management plan would be able to safely manage his risks in the community at present.
28. In deciding whether the Applicant met the test for release, the Panel considered the long period since the index offences, the absence of any evidence of violence since the index offences, his general good behaviour in prison and his expressed intent to comply with the licence conditions.
29. The Panel concluded that there were reasons which showed that there was outstanding risk reduction work to be completed before the Applicant could be safely released into the community and so it remained necessary for the protection of the public for the Applicant to remain confined in prison.

Request for Reconsideration

30. The application for reconsideration is dated 11 May 2021.
31. The grounds for seeking reconsideration are that the decision to refuse the order for the release of the Applicant was irrational in that.
- (a) The Panel was not entitled to conclude that it remained necessary for the protection of the public for the Applicant to remain in prison (Ground 1).

- (b) The Panel wrongly placed disproportionate weight on the Applicant's unconvicted conduct against a female under 16 and a 16-year-old child, on his failure to notify probation of a relationship which included a younger child and on a short period of poor behaviour by the Applicant in custody (Ground 2).
- (c) There was well-reasoned support for the Applicant to be released (Ground 3).

The Relevant Law

32. The panel correctly sets out in its decision letter dated 19 April 2021 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

33. 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)).

34. 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

35. 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."

36. 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 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.

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

38. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department**

[2004] QB 1044 sets out the preconditions for such a conclusion: “*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been “established”, in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal’s reasoning.*” See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide “*objectively verifiable evidence*” of what is asserted to be the true picture.

The reply on behalf of the Secretary of State

39. The Secretary of State has not made any submission in relation to the grounds of appeal.

Discussion

40. 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 or her 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.

41. The second matter of material importance is that when deciding whether a decision of the Parole Board was irrational, due deference must be given to the expertise of the Panel in making decisions relating to parole.

Ground 1

42. The Applicant contends that the Panel was irrational in concluding that it remained necessary for the protection of the public for the Applicant to remain in prison.

43. This contention ignores the conclusion of the Panel that it agreed with the opinion expressed by professionals that the Applicant has “*outstanding core-risk reduction work and [it concluded that no risk management plan is able to safely manage [the Applicant’s] risks in the community at present*”.

44. This conclusion is supported by combination of important factors apart from the savagery of the two murders committed by the Applicant which show why the Panel was entitled to reach that conclusion and which I will now set out in no order of importance. First, the Judge when sentencing the Applicant explained that neither he nor anybody else had been able to discover “*any ascertainable reason*” why the Applicant murdered the mother and the daughter.

45. Second, there remained at the time of the Panel's decision the inability of professionals at the present time *"to develop any clear understanding or formulation as to what drove [the Applicant] to commit those offences"*.
46. Third, there was the fact that the Applicant had *"not completed any intensive work to address [his] use of violence"*.
47. Fourth, the Panel agreed with the Prison Psychologist, who considered that the Applicant should *"remain in closed conditions to complete what she considers to be core risk-reduction work"*.
48. Fifth, the Applicant's POM was concerned that if released without further risk reduction work, the Applicant *"will again place [himself] in situations where [he] could seriously harm others"* and *"she firmly considered that [the Applicant has] outstanding core risk- reduction work that needs to be completed in closed prison conditions"*.
49. Sixth, the Applicant's COM takes the same approach recommending against release and he assesses that the Applicant has poses a high risk of future violence.
50. Nothing has been put forward to show that these opinions or any of them come anywhere close to reaching the very high threshold of being irrational. That threshold requires those conclusions to be in the words of the Divisional Court in **DSD** (supra) to be *"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."*
51. If which is not the case, I had any doubts on this matter, I would have held that the deference due to the Board as explained in paragraph 44 above means that the Board was entitled to reach its conclusion that it remained necessary for the protection of the public for the Applicant to remain in prison.

Ground 2

52. This ground is that the decision not to direct the release of the Applicant is irrational because Panel wrongly placed disproportionate weight on several matters including the Applicant's unconvicted conduct against a female under 16 and a 16-year-old child, his failure to notify probation of a relationship which included a younger child and the short period of poor behaviour by the Applicant in custody.
53. I am unable to accept these criticisms for three reasons. First, as has been explained, the reason why the Applicant's release was not ordered was that he needed to do core risk reduction work in custody because of the very serious nature of the two murders and that the Applicant had completed any intensive work to address his use of violence. This was a self- standing independent reason, and it does not depend on the allegations in relation to the female under 16 or the 16-year-old child or the failure to notify.

54. The second reason why I cannot accept this criticism is that the Applicant has accepted that his conduct in relation to the female under 16 or the 16-year-old child and the failure to notify each constituted errors of judgment on his part as I have explained. So, it was not irrational of the Panel to mention this.

55. The third reason why this complaint is misconceived is that it was in any event open to the Panel to reach the conclusions it did and deference due to the Panel as a specialist body constitutes a further reason why the second ground fails.

Ground 3

56. The third ground is that there was well-reasoned support for the Applicant to be released. The only support for the Applicant's release came from a profession who was an independent psychologist commissioned by the Applicant's solicitors.

57. His evidence falls a long way short of submitting, let alone establishing, that it was irrational to refuse to release the Applicant. None of the submissions put forward on behalf of the Applicant show that it was irrational to refuse to release the Applicant.

58. In any event, a further ground for rejecting this ground is deference is due to the Panel as a specialist body.

Decision

59. 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
7 July 2021