

[2021] PBRA 133**Application for Reconsideration by Gates****Application**

1. This is an Application by Gates (the Applicant) for reconsideration of a decision by a Panel of the Parole Board dated 7 July 2021 not to direct his release.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on the basis that the decision is (a) irrational or (b) procedurally unfair. This is an eligible case.
3. I have considered the Application on the papers. These are: the application for reconsideration received on 16 July 2021; the decision letter dated 7 July 2021; written representations by the Applicant's solicitors dated 31 July and the case dossier running to 454 pages. I have also listened to the audio recording of the oral hearing on 18 June 2021.

Background

4. On 18 January 2006, having been convicted of murder, the Applicant was sentenced to life imprisonment. The minimum custodial term was set at 15 years 4 months and 10 days, after taking account of time spent in custody on remand. The Applicant's tariff expired on 21 June 2021.
5. The Applicant was 30 at the time of the index offence which he committed on 19 April 2005. He had been drinking heavily in a public house and challenged his victim to an arm-wrestling contest which the latter won. An argument ensued during which the Applicant goaded the victim who suggested they settle their differences outside. The victim adopted a fist fighting pose in an alley, but the Applicant drew a knife from his pocket with which he stabbed him to death with repeated blows.
6. The Applicant had previous convictions dating from 1990 when he was a juvenile. They included convictions for being drunk and disorderly, theft, burglary, handling stolen property, obstructing police, obtaining by deception, driving over the prescribed alcohol limit, affray, criminal damage and possession of Class B drugs.
7. This was the first Parole Board review following the expiry of the Applicant's custodial tariff. The Panel conducting his pre-tariff review on 4 October 2018 had recommended a transfer to open conditions and he was moved accordingly, first to Prison A and then to Prison B. As a result of allegedly assaulting a fellow prisoner whilst working in the community, he was returned to the closed estate in April 2020.



Request for Reconsideration

8. In summary, the grounds for seeking reconsideration are that the decision not to grant release was both irrational and procedurally unfair.
9. It is submitted that the decision was irrational because:
 - a) It contains significant mistakes in relation to facts which are fundamental to the case; and
 - b) The decision letter inaccurately reflects what occurred at the hearing.
10. It is further submitted that the decision was procedurally unfair because:
 - a) The Applicant did not have a fair hearing; and
 - b) The Panel made a fundamental mistake of fact.
11. Although invited to do so, no representations have been submitted on behalf of the Secretary of State in response to the Application.

Current parole review

12. The Secretary of State referred the Applicant's case to the Board by notice dated 3 August 2020 to decide whether or not it would be appropriate to direct his release.
13. The current review was heard by a three member Panel of the Parole Board on 18 June 2021. As a consequence of the continuing pandemic, it was conducted by way of telephone link. The Panel considered a dossier running to 428 pages, ending with a report from the current Prison Offender Manager (POM) dated 19 May 2021. The latest Community Offender Manager (COM) report was dated 14 May 2021. Both recommended release to Probation designated accommodation. The dossier also included an updated report by a Prison Psychologist in Training dated 23 November 2020. She recommended a transfer to open conditions.
14. The Applicant was represented by his legal advocate. Oral evidence was given by the Applicant's previous POM, by the Psychologist in Training's Supervisor, by the current POM, by the current COM and by the Applicant himself. Both the current POM and the COM recommended the Applicant's release. Having confirmed that there was no outstanding offending behaviour work required for him to undertake, the supervising psychologist endorsed the recommendation of her trainee that the Applicant should move to open conditions for further testing. She assessed his risk of violence as moderate and not imminent.
15. At the conclusion of the hearing, the Panel Chair asked the COM to provide further information about a suitable route in and out of the proposed exclusion zone which would enable the Applicant to visit his son. That issue and the question when a designated accommodation bed would be available to the Applicant are the subject of an SHRF which is included in the updated dossier, but neither is relevant to this reconsideration.
16. Final written representations were submitted by the Applicant's solicitors on 8 July 2021.

The Relevant Law

17. The decision letter correctly sets out the test for release, namely that the Board must be satisfied that it is no longer necessary for the protection of the public that the Applicant should be confined.

Parole Board Rules 2019

18. Under Rule 28(1) of the Parole Board Rules 2019, the only type 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

19. 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.”

20. This test had been 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 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 uses the same word as is used in judicial review proceedings demonstrates that the same test is to be applied.

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

22. In considering the amount of detail needed to be included in a decision letter, there has been guidance from the High Court, 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 require elaborate or impeccable standards of draftsmanship”*

Procedural unfairness

23. The issue to be considered under this ground is whether there is evidence that the correct legal process was not followed either in the application of the Parole Board Rules or in the fair conduct of the hearing.

Discussion

24. The decision letter provides an analysis of the Applicant's offending behaviour, a review of his risk factors and an assessment of his current risk after consideration of the material available to the Panel.
25. In their written submissions, the Applicant's solicitors point out a number of factual inaccuracies which they state are contained in the decision letter and which they argue undermines the Panel's decision. I will deal with each in turn.
26. The decision letter states that the Applicant has "*Standard Status under The Incentives and Earned Privileges Scheme (IEP)*". This statement is contradicted by the evidence of the POM in his report dated 19 May 2021, served on the day of the Hearing, which confirmed that the Applicant had enhanced status, having been upgraded from standard status on 14 December 2020.
27. The decision letter failed to refer to seven home leaves undertaken by the Applicant to his brother's address. Although not referred to in the latest written reports, this was confirmed at the hearing. The decision letter does refer to the fact that he "*successfully completed a number of temporary releases with no concerns*".
28. The decision letter states that "*On 17 April 2020, whilst on [temporary release] working [...], [the Applicant was] involved in an altercation with another prisoner...[the Applicant was] returned to closed conditions*". There is no dispute that on that date, the Applicant was at his current prison. It is not entirely clear from the information in the dossier on what date the altercation happened, but it was referred to the prison by [redacted] on 17 April 2020 as having recently occurred. I do not consider that precision about the date is relevant.
29. Reference is made in the decision letter to the fact that the previous POM stated, "*there was CCTV*" and witness statements which suggested to her that the Applicant did not start the altercation. It is submitted on behalf of the Applicant that no witness statements were ever provided to any party and no such statements appear in the dossier. That is the position. However, the previous POM's evidence is supportive of the Applicant's case. Her evidence given at the hearing that, had she been present when the incident occurred and had no statements or CCTV materialised, she would not have recommended a return to closed conditions is relevant. Whilst not decisive on its own, it should have been expressly taken into account by the Panel but was not.
30. The decision letter refers to the fact that, in response to the question from the Panel relating to their being differences in recommendations between the professionals, the supervising psychologist referred to the fact that not everyone had seen the same information or had the same interpretation. Although not having the same interpretation of evidence is a matter of judgment and not uncommon, the fact that not everyone had seen the same information does give rise to concern where such information is relevant to the issues to be resolved. Furthermore, in this case the Panel failed to show how it weighed in the balance the contrasting recommendations of the professional witnesses.

31. The decision letter refers to the fact that, the trainee psychologist confirmed in her report having seen emails from [redacted] after she had carried out her assessment and not being able to discuss them with the Applicant. These emails were seen on 12 November 2020, but they do not shed light on who started the altercation or how it developed except that the other party was "*had clearly been hit on the side of the face and was bleeding*". Further discussion with the Applicant before the report was completed would have been beneficial. There was more than enough time for this to have been done. The report was completed on 23 November 2020 but MCA Directions for the case to proceed to an oral hearing were not made until 7 January 2021.
32. The decision letter refers to oral evidence by the POM that the Applicant "*had been locked up for 23 hours a day on a restricted regime*". The decision letter states in terms that the POM "*told the panel that [the Applicant] had been subject to a restricted regime, if [the Applicant] were not working in the kitchen, then [the Applicant] were in your cell 23 hours a day*". In fact, the POM's evidence was about the regime in general whereas the Applicant himself had been unlocked throughout the day in order to carry out his duties as a cleaner. Consolidating his learning in "*a less restrictive environment*" may therefore not have as much relevance as placed on it by the Panel in reaching a conclusion not to release him.
33. The decision letter states that "*[the Applicant] accessed Mental Health Services on 4 occasions but had not found it beneficial as he felt their focus was primarily on drugs*". In fact, in his oral evidence, the Applicant stated that he had engaged with a prison drug support team and Mental Health Services and found it beneficial. This is a direct contradiction which it is may have had an impact on the Panel's assessment of risk.
34. The decision letter states that the probation service assessment report of the risk of serious harm to the public in the event of the Applicant re-offending was very high. It further states that the COM endorsed that assessment at the Hearing. It went on to confirm that the Panel agreed this was a fair assessment of his risk. In fact, the 17 May 2021 probation service assessment report showed the assessment of risk as high, not very high, repeating the assessment in the 11 November 2020 probation service assessment report. When asked at the hearing about her own most recent report, the COM explained that the assessment of very high which it contained was the result of an error by her in using the dropdown box. She told the Panel specifically that the Applicant's risk was high, not very high, and further that it was not imminent.

Decision

35. On the basis of the case history set out above, I do not find that there was a significant procedural irregularity in this case. It was conducted in a manner which allowed the Applicant to give evidence and the professional witnesses to be fully questioned on his behalf. At the conclusion of the hearing, the matter was properly deferred to allow written representations to be made by the Applicant's Solicitors.
36. However, applying the test as set out in case law, I do find that the Panel's decision was irrational on the basis of the evidence it read and heard. A panel is not bound to follow the recommendation of professional witnesses. Indeed, in this case witness

opinion was divided. However, given the errors made in recording and interpreting the evidence, in particular the highly significant error in respect of the assessment of serious harm, the decision not to release him was one which no reasonable panel, properly directing itself on the evidence actually before it, could have reached.

37. The application for reconsideration is therefore granted.

HH Judge Graham White
10 September 2021