

[2021] PBRA 65

Application for Reconsideration by Hayes

Application

1. This is an application by Hayes (the Applicant) for reconsideration of a decision by a Parole Board Panel following an oral hearing (conducted by video link), on 8 April 2021, refusing to direct his release but to recommend that he be transferred to open conditions.
2. I have considered this application on the papers. These comprise of the dossier containing 498 pages, the application for reconsideration dated 4 May 2021, consisting of 7 pages of closely argued submissions, and the decision of the Panel dated 18 April 2021.

Background

3. On 11 July 2006, the Applicant, having pleaded guilty to a series of historical rapes and indecent assault, was sentenced, for rape, to an Indeterminate Sentence for the Protection of the Public (IPP) with a minimum term of 4 years, 11 months and 28 days (the tariff) before he was eligible to apply for parole. The tariff term expired on 8 July 2011.
4. The offences were committed over a period of over ten years interspersed with a prison sentence imposed for other matters.
5. The Applicant had a substantial criminal record for a large number and variety of offences including convictions for serious violence but these were his first for sexual offending.
6. The Applicant was twice released into the community, in October 2018 and in March 2020 following oral panel hearings but recalled, after 1 month in 2018 and 2 months in 2020, following poor behaviour and breaches of licence conditions.

Request for Reconsideration

7. The application for reconsideration comprises a seven page document, prepared by the Applicant's Legal Representatives and submits "*a number of points which [the Applicant] has asked us to raise in relation to the reasonableness of the decision.*"
8. The application is for the decision to be reconsidered on the basis that it is irrational. No challenge is made as to the other statutory basis of challenge, that the decision was procedurally unfair.



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9. It is not necessary to reproduce the application in full, but all sections have been considered and the aspects relevant to the issue of irrationality are dealt with below.

10. The grounds of the application can be summarised as follows:

- a) That the three professional witnesses supported release, the Risk Management Plan being sufficient to manage risk "*provided [the Applicant] engage fully and remained open with professionals.*" No further work remained to be completed in custody.
- b) That undue weight was given to events surrounding recalls and previous compliance whilst on licence.
- c) That previous panels did not consider open conditions to be suitable or sufficient and found the Applicant suitable for release.
- d) That the health complications of which the Applicant made the Panel aware reduced the risk he posed in the community. The Panel had failed to give this due weight or "*worse, any weight whatsoever.*"
- e) The public law duties imposed by s.6 of the Human Rights Act 1998 require weight to be given to the implications of the rights under the European Convention on Human Rights.

Response on behalf of the Secretary of State

11. The Secretary of State (SoS) by e-mail dated 14 May 2021 indicated that no representations were made in relation to the application.

Current Parole Review

12. The case had been referred to the Parole Board in June 2020, the Board being asked to consider whether to direct release or, in the alternative, to consider whether to recommend that the Applicant be transferred to open conditions. It was not, specifically, asked to rule as to whether the recall had been justified.

13. The Applicant, through his Legal Representative, applied for re-release and this was supported in oral evidence by a Prison Forensic Psychologist, the Applicant's Community Offender Manager (COM) and by a Prison Offender Manager (POM) who was standing-in for his designated Officer who was on sick leave.

14. The Panel decision outlined the circumstances of the two recalls, the Applicant's evidence in relation to them and an acceptance by him that, in 2020, he had breached his Licence Conditions through failure to disclose contact with a woman (TB) who lived with her two teenage children, and accepting that the recall had been justified. The panel formally found that the recall was appropriate. It examined the risk reduction work carried out by him, the circumstances of each recall and his custodial behaviour since recalls including the Applicant's explanations for his breaches and his concessions as to failures to fully meet licence requirements. It acknowledged that there had been

no recent concerns about his custodial behaviour and examined his evidence as to future plans should he be released. In particular, it considered the evidence of the professional witnesses who recommended release and the extra conditions proposed for his RMP. It found, however, that the Prison Psychologist had accepted that there remained a strong likelihood that the Applicant would revert to behaviour involving a lack of openness and non-compliance with Licence Conditions and, notwithstanding her previous recommendation for release, identified that there could be benefits in a period of testing in open conditions provided that psychologically informed support were available. It also found that this option had not been discussed by the POM or her stand-in but accepted that the COM had not identified therapeutic benefit from a Category D placement. It concluded that given the Applicant's past behaviour on licence and his "demeanour in the hearing" the Panel was not confident that he could be safely managed in the community.

The Relevant Law

15. The Panel correctly sets out in its decision letter dated 18 April 2021 the test for release.

16. Rule 28(1) of the Parole Board Rules provides that applications for reconsideration may be made in eligible cases either on the basis that the decision was (a) irrational or that it is (b) procedurally unfair. This is an eligible case.

17. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28 [**Barclay [2019] PBRA 6.**]

18. In **R (on the application of 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".

19. 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 uses the same word as is used in judicial review demonstrates that the same test should be applied. This test for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.

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

21.Procedural unfairness under the Parole Board Rules relates to the making of the decision by the Parole Board and an assessment is required as to whether the procedure followed by the Panel was unfair.

Discussion

Irrationality

22.In my judgment, the decision to refuse release cannot be said to meet the test of irrationality. The Panel has clearly set out both details of evidence heard by it and the basis for its decision, including a finding as to the Applicant's demeanour in the hearing. In the event of a decision which does not accord with the recommendation of witnesses, a Panel should clearly explain on a rational basis how it came to that decision. In the view of the Reconsideration Assessment Panel (RAP) this has been done.

23.That the weight to be given to specific aspects of evidence is basically a matter for the Panel and, in the view of the RAP it cannot be considered in any way unreasonable.

24.Although the Applicant makes reference to the overriding duties of a Panel to act within its duties under Human Rights legislation, no suggestion is made that the Panel did not do so in this case.

Decision

25.For the reasons I have given, I do not find that the Panel's decision was irrational or procedurally unfair and, accordingly, the application for reconsideration is refused.

Edward Slinger
20 May 2021