

[2019] PBRA 20

## Application for Reconsideration by Dent

### Decision of the Assessment Panel

#### Application

1. This is an application by Dent (the Applicant) for reconsideration of the decision of a three-member panel not to direct his release, following an oral hearing which convened on 13 August 2019.
2. I have considered this application on the papers. These comprised the dossier, the provisional decision letter of the panel dated 19 August 2019, the application for reconsideration dated 6 September 2019 and the response of the Secretary of State dated 11 September 2019, indicating that he did not offer representations.

#### Background

3. The Applicant is now 44 years old. He is serving an indeterminate sentence for public protection imposed in October 2006 for arson, being reckless as to whether life was endangered. The 9 month net tariff expired in July 2007. Alcohol misuse underpinned his index and most of his past offending. He accepted in the course of the present parole review that he has an entrenched addiction to alcohol.
4. The Applicant was released on IPP licence in July 2011 but recalled 18 days later. He was re-released at the direction of a second parole panel in January 2012 but recalled six months later. He was re-released at the direction of a third panel in October 2013 but recalled in June 2015. He has never been in open conditions.
5. The only previous decision letter in the dossier is that of the panel who convened for the Applicant's fourth review in December 2015. The merits of a phased return to the community via open conditions are not recorded as having been canvassed within the evidence of the reporting witnesses, and the point does not feature elsewhere in the reasons of the panel. Whilst the longer pre-recall period was a point at first sight in the Applicant's favour, the panel was very concerned by the level of deceit the Applicant had engaged in over many months. He was adept at disguising his drinking to avoid detection. He was able to deceive professionals regarding the extent of his relapse into heavy alcohol misuse. He assured the 2015 panel that he would abstain from drinking in the future. The panel noted that the Applicant had not re-offended and appeared motivated to address his enduring risk factors. The Risk Management Plan was found to be robust; his probation supervision would be more vigilant for a covert relapse. The panel was satisfied that the test for release was met, and directed it on stringent licence conditions.



6. The Applicant remained in the community for almost three years. He was recalled in February 2019 after poor behaviour and on suspicion of assaulting his partner. No prosecution ensued, but he admitted the offence to the panel during the oral hearing in August 2019. The circumstances of and necessity for the recall were therefore established by the panel, as **Calder [2015] EWCA Civ 1050** required.

### **Request for Reconsideration**

7. The Applicant contends that the panel acted irrationally in recommending that he progress to open conditions rather than be released, contrary to the views of the two reporting witnesses. There is no complaint of procedural unfairness.

### **Current Parole Review**

8. In February 2019 the Secretary of State referred the Applicant's case to the Parole Board for his fifth review. The panel was asked to consider whether it was appropriate to direct the Applicant's release. If not, the panel was invited to advise the Secretary of State on whether he should be transferred to open conditions.
9. The panel heard oral evidence from the Applicant, his Offender Supervisor, his Offender Manager and a support worker.
10. Both the Offender Supervisor and Offender Manager recommended release. The merits of a progressive move were explored with them. The panel concurred with the Offender Manager's most recent structured risk assessment. The panel found that the Applicant's risk of serious harm to a known adult and child (his ex-partner and son) remained high until he could demonstrate he could manage his emotions and control his substance misuse.
11. The panel did not share the report authors' confidence that the Risk Management Plan would be effective. The Applicant had a dismal record of compliance with past licence conditions and he did not impress the panel as being more likely to cope if re-released into the community for a fifth time. His coping skills were poor. There was a continuing risk of relapse into drug and alcohol misuse. The panel therefore decided that the Applicant did not meet the test for release.
12. However, the panel went on to conclude that a period of testing in open conditions was appropriate in order to test the Applicant's gradual re-integration into the community and to develop his employment skills. The panel considered that the benefits to the Applicant of a progressive move outweighed the risks, and concluded with a recommendation to the Secretary of State that he should be transferred to open conditions.

### **The Relevant Law**

13. Rule 25 (decision by a panel at an oral hearing) and Rule 28 (reconsideration of decisions) of the Parole Board Rules 2019 apply to this case.



14. Rule 28(1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case.
15. 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."*

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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

## Discussion

16. Panels of the Parole Board are not obliged to accept the plans, opinions and recommendations of professional witnesses. It is the collective responsibility of each panel to make its own risk assessment and evaluate critically the likely effectiveness of the plan that is proposed to manage the prisoner's ongoing identified risks. The panel has the expertise, through training and experience, to make such judgments.
17. There are several types of cases in which a period of testing in open conditions has been recognised by the Parole Board as often necessary before a decision can be made that the prisoner meets the test for release. This is particularly so where (for example) the prisoner has a history of rule breaking and previous failures under supervision and there is limited objective evidence of sustained change.
18. The request for reconsideration was settled by the Applicant's legal representative, who also appeared for him at the oral hearing. The submission is concise and measured, but it mainly re-argues matters that were aired at the hearing. It is not enough to say that the decision was wrong. It is not open to me to conduct a fresh balancing exercise of the relevant factors and give them different weight. I am not a second reviewing panel.
19. Here the draft Risk Management Plan remained heavily reliant on external controls, with the promise of supervisory and other resources being committed for an extended period. The Applicant had yet to show that he could be trusted to cope in the community when the time came to reduce or remove that level of support. His track record of repeated failures post-release entitled the panel to take a guarded view of the prospects that he would do better this time.



20. The Applicant had not previously been tested in open conditions. It was an opportunity for him to demonstrate self-discipline and gain skills to enable him to cope in that less restricted setting, especially during periods of release on temporary licence, so as to prepare himself gradually for release.
21. The panel explained in its thorough reasons how it had balanced and weighed the competing factors and told the Applicant why it had decided not to accept the report authors' shared opinion in favour of his release. It took account of a certain type of offending behaviour course being more likely to be available in the community rather than in custody. The panel stated and applied the right legal test. It was correctly focused on risk throughout. The rationale of the decision was clear. It was a conclusion that the panel was entitled to reach, on its own evaluation of all the written and oral evidence presented to it. The legal test of irrationality is a very strict one. This case does not meet it.

## Decision

22. The complaint of irrationality is not made out on the papers before me.
23. Accordingly, this application is dismissed.

Anthony Bate  
24 September 2019

