

[2019] PBRA 78

## Application for Reconsideration by Ullah

### Application

1. This is an application by Ullah (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 5 November 2019 not to direct his release or recommend open conditions.
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.

### Background

3. On the 16 May 2008, the Applicant was sentenced for three offences of robbery and an offence of attempted robbery to imprisonment for public protection (IPP) with a minimum period to serve of 5 years and 274 days. This minimum period expired on 15 February 2014.
4. On the 18 October 2017, the Applicant was released on licence. On the 2 February 2018, he committed offences of dangerous driving and driving over the prescribed limit for drugs and on the 6 May 2018, he committed an offence of harassment (by sending a text) against his then partner.
5. Following an unexplained delay, on the 7 January 2019, the Applicant was sentenced to 10 months imprisonment in respect of the driving offences. On the same day his licence was revoked, and he was returned to prison. On the 31 July 2018 he was fined for the offence of harassment.

### Request for Reconsideration

6. The application for reconsideration was received on the 24 November 2019. The grounds for saying that the decision was irrational were substantially that *"The decision was irrational given that all witnesses were supportive of his release and also the Panel did not place sufficient weight on the fact that the Applicant when released last time into the community, he had complied fully with his period in designated accommodation and that he attended all appointments offered to him."*



7. The Secretary of State referred the Applicant's case to the Board on the 13 July 2019 to decide whether to direct release or if that was not appropriate, to recommend a transfer to open conditions.

## The Relevant Law

8. 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."*

9. 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. It follows that irrationality is difficult to establish.

10. It is not unknown for a panel to decline to follow the recommendations of the professional witnesses. The panel is not obliged to adopt their conclusions or views. Its duty is to consider the evidence and decide for itself whether it is satisfied that it is no longer necessary for the protection of the public for the Applicant to remain confined.

11. However, it is incumbent on a panel to explain clearly the reasons for departing from the recommendations of the professionals and its recorded reasons should be sufficient to justify its conclusions. In this regard, 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 prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship."* (**Oyston [2000] PLR 45**)

## Discussion

12. The Panel members were able to listen to, observe and question the witnesses before deciding what weight to put on the evidence placed before them.



13. The Panel accepted the recall had taken place around 12 months after the driving offences but concluded that the new offences exposed a continuing deficiency in the Applicant's thinking skills and that the offences constituted an extension of an entrenched pattern of offending which in the past had been the cause of harm or damage.
14. The Panel took the view that the Applicant's behaviour in prison immediately following recall was "*poor, manipulative and instrumental in getting your own way*".
15. The Panel set out its principal anxieties in respect of the Offender Manager's evidence.
  - (a) First, the Panel said it disagreed with the Offender Manager that the Applicant would not benefit from a programme designed to address skills and strategies. The reason for this was the speed with which the Applicant committed offences on licence and took drugs.
  - (b) Second, the Panel noted the Offender Manager had not been able to make contact with the Applicant's prospective employer to confirm the prospect of employment.
  - (c) Third, the Panel noted that neither the Offender Supervisor nor the Offender Manager had considered the benefits to the Applicant of a progressive regime in custody.
16. The Panel's opinion was it had identified deficits in the Applicant's case, and further treatment was required to address those deficits.
17. At the hearing, the Offender Manager, the Supervisor (who did not give evidence) and the stand in Offender Supervisor all supported the Applicant's re-release on licence.
18. I therefore have to examine the reasons given in the Decision Letter for rejecting the views, arrived at independently, of those professionals that the Applicant's risk could be safely managed in the community.
19. My distillation of the written evidence of the Offender Manager is this:
  - (a) The offence leading to recall occurred in the early days of the release, and that prior to recall the Applicant demonstrated his ability to lead a law-abiding life, in particular, he maintained his employment, engaged well in supervision and did not come to the attention of the police apart from the offending which led to his recall.



(b) Following his delayed recall to prison the Applicant behaved badly in his first prison between his admission and about the 15 March 2019. Thereafter the Applicant settled back into prison regime, engaged well and remained focused in terms of moving on.

(c) The bad behaviour could be explained by the shock of an unexpected recall so long after the offending.

(d) There is no further offending work for him to complete in custody.

(e) There are no concerns in respect of his motivation and ability to comply with his licence conditions next time.

(f) There are a number of identified protective factors for him on the outside.

20. The Offender Supervisor and the stand in Offender Supervisor appeared to have supported at least in general terms the analysis of the Offender Manager and the recommendations of all three professionals were the same. All the professional witnesses placed weight on the length of time between the February offending and recall (11 months) and the time the Applicant has been at his present prison (9 months).

21. Returning to the Decision Letter, there are areas where it is not completely easy to understand the Panel's decision making process.

22. On page 3, it is said *"There is offence based work, treatment and opportunities for consolidation work already undertaken, available to you in the closed prison state, assuming you choose to engage"*.

23. It would have been helpful if the Panel had identified the formal work it had in mind. This is in part because the written evidence of the professional witnesses provides scant information that such work is either available or necessary and because on page 7 of the letter, it is stated

*"There is outstanding work to be completed regarding thinking skills, relationships, attitudes and beliefs and consequential thinking. The panel assesses this work as being core risk reduction that must be successfully completed ahead of any release on licence or progression to open prison conditions."* and

*"The panel is of the opinion that a formal treatment programme is probably not required, while being in a location that will serve to refresh and consolidate the skills you have gained previously, such as Progression Unit or other similar location assessed as being appropriate to address the issues raised by the Panel."*

24. It is extremely difficult to tell from the letter whether any of this work is likely to be available or not, particularly bearing in mind none of this work was recommended by the professionals. The lack of specificity about the proposed work is simply emphasised in paragraph 9 of the letter, where what is sought for the next oral hearing is

*"An updated Offender Manager Report providing up to date assessment of your risks and how any work you may have undertaken since this review has impacted on the risk of harm you pose."*

25. The Panel also gave this indication in paragraph 8

*"The panel invites the Secretary of State to ensure that your next review is undertaken early, once you have finished the work, rather than waiting the 18 months to 2 years that would usually be the case once a review is concluded without a progressive move or release being put in place. It is likely that your case would be ready for review at an Oral Hearing in a little over 12 months."*

26. It is unclear why the Panel chose this timescale when the availability and the nature of the work proposed was so uncertain. The unhappy impression gained from these passages is that the Panel's principal recommendation was that the Applicant should spend about a year longer in prison and that, as a secondary proposal, hopefully, during that time he would do some offending based work.

27. Additionally, there are certain areas where it is not clear whether the Panel actually accepted the evidence placed before it, or if the Panel did accept the evidence, what weight it put on that evidence.

28. On page 4 of the Letter, the Panel said

*"You were recalled because of non-compliance, poor behaviour and the commission of the new offence."*

29. The burden of the evidence from the professional witnesses was that, apart from the offences and the associated use of cannabis on the 2 February 2018, the Applicant had been largely compliant and well behaved on licence.

30. The Decision Letter fails to explain the basis for the findings of non-compliance and poor behaviour whilst on licence.

31. Also, on page 4, it is recorded that the Applicant had given evidence that after the new offences he had changed his life, had taken paid employment and did not think he would be recalled. It is unclear whether the Panel accepted this account.



32. At page 6 of the Decision Letter, the Panel recorded

*"It is reported that you did not attend appointments under the influence of substances, but the Offender Manager stated that she would not have been surprised if you had used drugs more than once."*

33. It is not easy to see how this passage could form a fair evidential basis for finding the Applicant had used drugs on more than one occasion. Nevertheless, the Panel thought the passage significant enough to include it in the Letter and included it without indicating what weight, if any, it put on the remark.

34. Whilst at his present prison, the Applicant may have been involved in two potentially adverse events.

35. First, he has received an adjudication for having "hooch" in his cell. In the dossier, it is said he was sharing a cell; in the Decision Letter, it is said he was in a single cell accommodation. However, it was acknowledged that the Applicant was appealing the adjudication, but it is unclear whether the Panel relied on the adjudication.

36. Again, it is recorded that a security entry for the 7 September 2019 indicated that Applicant had pulled a "shank" on another prisoner. The Offender Manager's evidence that this information was unreliable is set out extensively but without any finding.

37. Lastly, the Panel said that neither Offender Supervisor nor the Offender Manager had given any consideration to the Applicant accessing a Progressive Regime in custody. However, the Panel did not record what the two professionals said in their oral evidence about this when challenged.

38. As I have observed, the passage of time since the recall offending and the Applicant's behaviour during that time was a significant factor in the analysis undertaken individually by the three professional witnesses. It is extremely difficult to find any passage in the Decision Letter that deals with this factor. On page 4, the Panel said *"The recall took place around 12 months after the commission of the driving offences that led to a conviction."* This appears to be the only reference and it attracts no further comment.

39. This is not an easy case and I accept the problem may be one of presentation rather than substance. However, although the Panel conscientiously and extensively and no doubt accurately, set out and analysed the Applicant's conduct before licence and his offending on licence, the Decision Letter is almost silent on the matters set



out in paragraphs 19 and 36 of this reconsideration. What is recorded is in my view insufficient to justify the Panel's rejection of the recommendations of the three professional witnesses.

40. The overriding impression is that, although the Panel formed its own view of the risk of serious harm posed by the Applicant, the Panel failed to address or engage with the individual recommendations of the professional witnesses. In taking that course, the Panel failed in its duty to explain clearly the reasons for departing from those recommendations and ensuring that its reasons were sufficient to justify its conclusions.

41. In those circumstances, this application for reconsideration must be granted and there must be a fresh hearing before a different panel.

## Decision

42. For the reasons I have given, I do consider that the decision was irrational and accordingly the application for reconsideration is granted.

43. The next panel should not see the Decision Letter dated 1 November 2019.

44. The next panel should see the Reconsideration Decision dated 11 November 2019.

I make the following Directions which may be varied in due course by the new Panel Chair.

- (i) An updated report by the Offender Supervisor in respect of the Applicant's continuing conduct, compliance and motivation, together with any revised recommendation in respect of release or progression to open prison conditions is to be provided by the 20 January 2020.
- (ii) An updated report by the Offender Manager with any revised assessment of risk, resettlement and risk management plans, and recommendation respect of release or transfer to open prison conditions is to be provided by the 20 January 2020.
- (iii) The case should be heard by a fresh panel by way of an Oral Hearing to be listed on the first available date after the 24 February 2020. The hearing should have a three-member panel and time estimate of three hours.

**James Orrell**  
**11 December 2019**