

[2020] PBRA 122

Application for Reconsideration by Chapman

Application

1. This is an application by Chapman (the Applicant) for reconsideration of a decision of an oral hearing dated 7 August 2020 not to direct release.
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 7 August 2020;
 - The dossier, which now contains 426 numbered pages, including the Oral Hearing Decision Letter; and
 - Reconsideration Representations on the Applicant's behalf dated August 2020 (received 20 August 2020) from his solicitors.

Background

4. The Applicant is 45 years old at the time of writing. On 8 January 2016 he received a sentence which (after appeal) was an extended sentence totalling 11 years and nine months, consisting of seven years and nine months custody and four years extended licence. This followed his plea of guilty to one count of attempted robbery and one of robbery, both of which involved the use of an imitation firearm, to possession of which he also pleaded guilty.
5. The Applicant's parole eligibility date was 24 February 2020. His conditional release date is in September 2022. His sentence expiry date is in September 2026.

Request for Reconsideration

6. The application for reconsideration is dated August 2020 and was received on 20 August 2020.
7. The grounds for seeking a reconsideration are as follows:
 - (a) The Oral Hearing Panel (OHP) considered employment to be a key protective factor for the Applicant, yet the fact that he had secured employment on

release “does not encourage them to afford him the opportunity to undertake the position.”

- (b) The OHP identified that the COVID-19 pandemic and subsequent lockdown has hampered opportunities for prisoners to gain work experience outside the prison. The Applicant had, however, made the necessary referrals and secured himself a position, “so it is questioned why the Panel would not direct his release to commence his secured employment with no indication as to when community work experience will become available.”
- (c) “The Panel indicated that prior to his next review, [the Applicant] should have made every effort to secure and maintain employment that he can undertake in the community, and to respond positively to overnight temporary releases when they recommence. It can reasonably be submitted that as [the Applicant] has already secured employment, the sole reason as to why he has not been able to maintain that position is due to the No Direction for Release decision and the additional restriction of the prison lockdown.”
- (d) “Directing that [the Applicant] undertake overnight temporary releases] prior to his next review should be considered unrealistic in light of current circumstances ... As [the Applicant] successfully completed numerous [temporary releases] prior to lockdown and did not evidence any concerning or risk-related behaviour, arguably, this demonstrates that he can mirror his exemplary custodial behaviour in the community. The [temporary releases] that he completed should, in the light of the current environment, be considered sufficient to demonstrate his compliance in the community.”
- (e) “The Panel considered the Risk Management Plan to be comprehensive and robust, but that given [the Applicant’s] history, it considered that there was insufficient evidence to confirm that it can safely manage his risks in the community. [The Applicant’s legal representative] believe[s] that this is in reference to [the Applicant’s] previous release into the community and the commission of a further offence at that time. However, it should be noted that this occurred a substantial period of time ago, and that [the Applicant] has shown a significant maturing in terms of his intention to live a pro-social life in the community since then.”
- (f) “There have been no concerns of [the Applicant’s] custodial behaviour, no evidence of violence or use of illicit substances, therefore we query as to why [he] continues to be assessed as a high risk of serious harm.”
- (g) “There is no evidence to suggest that [the Applicant] poses a risk of either imminent or future harm.”
- (h) That the decision reached by the Panel is “irrational and unjustified.”

Current parole review

8. The Secretary of State referred the Applicant’s case for consideration of release. This was his first review on this sentence. It should be noted that the Applicant had



progressed from Category A to Category D but had been in open conditions for only 8 months at the time of the hearing, much of this during the pandemic lockdown, with the consequential restrictions.

9. The oral hearing took place on 3 August 2020, by video conference due to the COVID-19 lockdown. There were two members of the OHP, including a psychologist member. The panel considered a dossier then containing 419 pages, and heard evidence from the Applicant's Prison Offender Manager, his Community Offender Manager and the Applicant. The Applicant was represented throughout by his current legal representative. There were no representations from or on behalf of the Secretary of State.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 7 August 2020 the test for release.

11. 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."

12. 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.

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

The reply on behalf of the Secretary of State

14. The Secretary of State has not replied to or made any representations in respect of the application.

Discussion

15. The application does not in fact raise any issues of irrationality as defined above, either by way of individual complaints or looking at the case as a whole. There is no suggestion that the OHP took into account irrelevant material, failed to take into account relevant material, or misunderstood the evidence, or that the OHP's conclusion was one to which no reasonable panel could have come on the evidence.



16. The only possible exception is the assertion that there is no evidence that the Applicant poses a risk of imminent and future harm. The Applicant's previous offending history is part of the evidence on which the OHP was entitled to place such weight as in the circumstances it thought fit.
17. The application makes it plain that the Applicant disagrees with the decision of the OHP, but that is not a basis upon which reconsideration can be directed. The use of expressions such as "*it is questioned why*", "*it can reasonably be submitted*", "*arguably this demonstrates*" and "*we [the Applicant's legal representative and the Applicant] query as to why*", expressions which are well-judged in the context of the case, may indicate that the focus of the application is, in reality, on disagreement and disappointment rather than irrationality. There is no suggestion of procedural unfairness.
18. If it had been appropriate to consider the rationality of the decision in the light of the application, I would have mentioned some factors which the OHP was entitled to and did take into account, and which are not highlighted in the application, for example:
- (a) Neither the Prison Offender Manager nor the Community Offender Manager (the OMs) supported release. It is perfectly open to an OHP to override the recommendations of the witnesses, but the OHP must at the very least take them into account.
 - (b) The offences for which the Applicant is currently serving his sentence were committed very shortly after his release on licence (apparently in error) from a very long sentence for very serious offences. At that time, it is accepted, the Applicant genuinely intended to remain crime free, but when things did not work out as he hoped they would he returned, within a very few months, to extremely professional and well-planned serious crime.
 - (c) Part of the concern of the OMs was that the Applicant's plans for employment in the community had been very changeable.
 - (d) The Applicant had been offered employment in the community while in open conditions, and had refused because he would not be able to continue that employment after release and it was not his planned line of work. The OMs considered that he ought to demonstrate a commitment to an ordinary working life before he could be released.

Decision

19. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

Patrick Thomas
11 September 2020



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