

[2020] PBRA 155

## Application for Reconsideration by Powell

### Application

1. This is an application by Powell (the Applicant) for the reconsideration of a decision of an oral hearing dated 14 August 2020 not to direct release but to recommend progression to 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.
3. I have considered the application on the papers. These are the dossier amounting to 431 pages, the decision letter, the Applicant's own "grounds of appeal", the submissions made on his behalf by his legal representative in support of the application for reconsideration and a document entitled "Client's Case Management Documents", which runs to 89 pages including a further copy of the decision letter but reveals nothing additional to support the grounds of the application.

### Background

4. On 5 March 2007, the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection for offences of robbery (involving gratuitous violence), possession of an imitation firearm with intent and attempted robbery. The minimum term the Applicant had to serve before he could make an application to the Parole Board was four years, less time spent on remand; this expired on 30 June 2010.
5. The offences were committed to finance the Applicant's habitual misuse of illegal drugs.
6. On 20 March 2015, the Applicant was released on licence, but was recalled for offences of supplying Class A drugs.
7. On 22 December 2017, the Applicant was again released on licence, but was recalled for offences of harassment against his partner and commercial burglaries in which property to the value of £10,000 was stolen.



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## Request for Reconsideration

8. The application for reconsideration is dated 7 September 2020.
9. The Applicant's own grounds, which are carefully and clearly drafted, raise two issues. The first is that the Covid-19 pandemic ("the pandemic") has had an adverse impact on the facilities offered by open prison conditions establishments. This situation will continue indefinitely and the prisons in the Applicant's current location are particularly badly affected. The second issue is that the Applicant's Prison Offender Manager and his Community Offender Manager supported release.
10. The Applicant's legal representative has filed submissions but has not filed individual grounds and these have to be extracted from the narrative of the submissions.
11. The application is based on irrationality and procedural unfairness. There is, however, no basis for the allegation of procedural unfairness.
12. The grounds for seeking a reconsideration are as follows:
  - (a) The panel found the Applicant's ability to manage himself in a prosocial manner and to apply the lessons he had learnt from his offending behaviour work had not been adequately tested.

It is submitted the panel was wrong to rely on this factor because it had been brought about by the impact of the pandemic rather than any default or failure on the part of the Applicant.

- (b) The panel found there was insufficient evidence of a reduction in the Applicant's risk so that it would be manageable in the community.

Likewise, it is submitted the panel was wrong to rely on this factor for precisely the same reason given in (a) above.

- (c) *"We strongly assert that whilst a Risk Management Plan must be thoroughly reviewed when considering release, it should not prevent a prisoner's release, particularly when their level of risk no longer warrants confinement and is manageable in the community"*.
  - (d) It is submitted that *"just as the pandemic is influencing the services that are available in the community, it is also restricting what is available in open conditions"*.

(e) The easing of restrictions is making services available earlier in the community than in open prisons. In those circumstances, the services included in the proposed risk management plan are likely to be available sooner than those provided by open prison.

(f) The Applicant should not be denied release for reasons outside his control.

### **Current parole review**

13. The Secretary of State referred the Applicant's case to the Board on 7 June 2019.
14. The panel met on 1 May 2020 and 5 August 2020. It heard from the Applicant (who was legally represented), his Prison Offender Manager and Community Offender Manager and a programme facilitator.
15. The first hearing was conducted by telephone link but the panel quickly formed the view that a face-to-face hearing was necessary and the second hearing was conducted by way of a video conference room due to the restrictions imposed by the pandemic.

### **The Relevant Law**

16. The panel correctly sets out in its decision letter dated 14 August 2020 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

### *Parole Board Rules 2019*

17. Under Rule 28(1) of the Parole Board Rules 2019 the only kind 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)).
18. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

### *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 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.

### *Procedural unfairness*

21. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.
22. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:
- (a) express procedures laid down by law were not followed in the making of the relevant decision;
  - (b) they were not given a fair hearing;
  - (c) they were not properly informed of the case against them;
  - (d) they were prevented from putting their case properly; and/or
  - (e) the panel was not impartial.

The overriding objective is to ensure that the Applicant's case was dealt with justly.

### **The reply on behalf of the Secretary of State**

23. The Secretary of State has not made any representations in respect of this case.

### **Discussion**

24. The principle underpinning grounds (a) and (b) is set out in ground (e) namely *"The Applicant should not be denied release for reasons outside his control"*.
25. The legal representations do not provide any authority for this proposition. In my view, it is misconceived.
26. At the risk of being simplistic, one can imagine a case of an application for release by a dangerous prisoner. Professional opinions are unanimous that, without completing a piece of offending behaviour work, the Applicant's risk will remain unmanageable in the community. The Applicant accepts this and asks for the case to be dealt with on the papers, on the basis he will do the work before the next Parole Board review. As it turns out, unforeseen circumstances, completely outside his control, prevent him from doing the work. At the next review, the Applicant's predicament deserves considerable sympathy; nevertheless, he remains a prisoner whose risk cannot be managed in the community.
27. The representations in respect of grounds (a) (b) and (e) give the impression that the panel's task was to compare two different disposals, release and open conditions, and decide which was preferable. Indeed, at page four the author says, *"The Panel is under the impression that progression to open conditions would provide [the Applicant] with a suitable alternative to release"*. A close reading of the decision letter does not support that view.
28. The task of the panel was to adopt a two-stage approach. The first stage was to apply the statutory test for release, namely *"the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."*– 28(6)(b) Crime (Sentences) Act 1997; or to paraphrase the judgement of **Saini J** in **R (Wells) v Parole Board [2019] EWHC 2710** *"as a post tariff prisoner, [the Applicant's] continued detention depends on whether he poses a risk of committing offences that may occasion serious harm. That is, offences of serious violence like his index offence. The question being: is there a risk to life and limb from which the public needs protection by way of his continued detention"*.
29. Thus, the representations miss the starting point which is to ask whether the panel could have come to its decision not to direct release on the evidence before it. The decision to release is the only decision that can be reconsidered.
30. I have read the decision letter with considerable care and have come to the conclusion the panel was fully entitled to reach that decision and it has given adequate reasons for it. Those reasons are set out clearly and succinctly in section eight of the letter.

31. Ground (c) is not easy to follow. I think it is saying the panel's review of the risk management plan should not prevent release. But the risk management plan is an external factor designed, in conjunction with other external and internal factors, to ensure the prisoner's risk is manageable in the community. If, for whatever reason, the panel finds the risk management plan is unable to protect the public, a critical protective factor is removed from the case. The only question is was there sufficient evidence for the panel to come to the conclusion it did. In my view, there was sufficient evidence.
32. Ground (d) states a self-evident proposition which is then developed in Ground (e). Again, this submission is not so much that the panel was wrong not to direct release, but that its decision to recommend progression to open conditions was wrong. Such a decision is not subject to the reconsideration process.
33. The representations are, at their centre, no more than an expression of disagreement with the panel's decision and do not begin to approach the high test of irrationality as explained by Lord Diplock.
34. The representations also seek to rely on article 5 of the European Convention on Human Rights (ECHR). However, the author of the representations does not specify how article 5 has been breached. The ECtHR has held that the requirements of article 5 (4) extend only to the need for a court to have the power to direct release. The article does not require the Board to have the power to direct that a prisoner be transferred to open conditions nor to set the times between parole reviews. In those circumstances, to cite article 5 without indicating the alleged breach is bound to be a sterile exercise.

## Decision

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

**James Orrell**  
**23 October 2020**