

[2020] PBRA 166

Application for Reconsideration by Tyrer

Application

1. This is an application by Tyrer (the Applicant) for reconsideration of a decision made following an Oral Hearing dated the 7 October 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 dossier consisting of 344 pages, the oral decision letter, an email from the Applicant's legal representative setting out the grounds for her client's application, a decision letter not disclosed to the Applicant, but disclosed to his legal representative.

Background

4. The Applicant was sentenced on 27 November 2006 to a period of Imprisonment for Public Protection with a minimum term of 13 years and 9 days. The Applicant's tariff expired on 16 December 2019. He was 26 years old at the time of sentencing and is now aged 40. The offences which led to the sentence were attempted murder; possession of a firearm with intent to endanger life; grievous bodily harm contrary to section 18; and possession of a class A drug.
5. The oral hearing was the Applicant's second review.

Request for Reconsideration

6. The application for Reconsideration is contained in an email dated 28th of October 2020. The application was not made on the published form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well grounded and focused. The document explains how to look for evidence to sustain the complaints and reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made.
7. The grounds for seeking a reconsideration are that the decision of the panel was irrational for the following reasons:



- a. Because both the Offender Manager and Offender Supervisor supported release.
- b. That the panel, having concluded that the risk management plan was not sufficiently robust, should have given consideration to adjourning the hearing to enable a more robust plan to be developed.
- c. That the panel wrongly cited controlling behaviour as being evidenced by a discovery that the Applicant had been travelling to places other than his place of work from open conditions.
- d. That insufficient regard had been given to the period of time that has elapsed since he had been removed from open conditions.
- e. That evidence given by the Applicant relating to travelling elsewhere than work and the consequences of this decision had been misunderstood.

Current parole review

8. The Applicant's case was referred to the Parole Board by the Secretary of State pursuant to **section 28 (6) (a) of the Crime (Sentences) Act 1997** to consider whether or not it would be appropriate to direct release.
9. The Applicant's case was considered by a 3 member panel of the Parole Board on 18 September 2020. The Applicant was represented by a legal representative and consented to the hearing being conducted by video.

The Relevant Law

10. The panel correctly sets out in its decision letter 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

11. 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)).
12. 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**. I did not therefore consider this aspect of the reconsideration application.

Irrationality

13. 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."

14. 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.
15. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

Procedural unfairness

16. 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.
17. Procedural unfairness was not argued in this case.

The reply on behalf of the Secretary of State

18. The Secretary of State confirmed by email on 6 November 2020 that he was not submitting any representations.

Discussion

19. I have dealt with each of the matters raised by the Applicant's representative individually.
20. **That the decision of the panel was irrational because both the Offender Manager and Offender Supervisor supported release**
 - a. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that, as was observed by the Divisional Court in **DSD**, they have the expertise to do it.
 - b. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons

should be sufficient to justify its conclusions, per **R (Wells) v Parole Board 2019 EWHC 2710**.

- c. The panel set out in their letter the basis upon which they reached their decision. The panel clearly took a different view to the Offender Manager as to the management of the Applicant's risks. The reason for that contrary view is clearly set out in the decision letter.
- d. They noted that the Offender Manager had only recently taken the case. They noted that the risk management plan was based upon living with a partner. This partner had not been informed about the recent problems relating to open conditions. The panel were concerned about the impact of these disclosures. The panel determined that failure to be open and disclose issues to the partner coupled with the failure to be open with the prison about travelling beyond a place of work raised concerns about openness and honesty with professionals.
- e. The panel were concerned about a lack of clarity about working arrangements in the community and about taking a caring role with a relative.
- f. The panel clearly concluded that the confidence that the Offender Manager had in managing risk was misplaced in the light of the lack of openness demonstrated by the evidence they received.
- g. The panel also considered the release recommendation of the Offender Supervisor. The Offender Supervisor took the view that the conduct which led to the transfer of the Applicant from open conditions to closed, was not a matter which impacted on risk. The panel disagreed, the panel explained that it was an issue relating to a lack of honesty and therefore affected the effectiveness of managing the Applicant on licence.
- h. I find the panel clearly disagreed with the assessments of the two professionals in this case. However, the panel explained the basis of their disagreement. The panel are entitled and obliged to make their own independent assessment of risk. Their reason for taking a differing view were clearly set out in the decision letter.

21. That the panel, having concluded that the risk management plan was not sufficiently robust, should have given consideration to adjourning the hearing to enable a more robust plan to be developed.

- a. A panel of the Parole Board is obliged to make its decision on the basis of the evidence presented. The drafting of risk management plans are matters for the professionals.
- b. In this case the panel clearly indicated that the major concerns were the openness and honesty of the Applicant. The panel noted that they were concerned about the readiness of the Applicant to be managed in the community. It follows therefore that an adjournment would not have met this concern. The panel clearly determined that the plan was not sufficiently robust because of the lack of openness and honesty of the Applicant. The essence of managing risk being candidness and honesty by those on licence.

22. That the panel cited controlling behaviour as being evidenced by a discovery that the Applicant had been travelling to places other than his place of work from open conditions.

- a. The use of the term 'controlling behaviour' is traditionally associated in the criminal justice context, with behaviour towards partners (or possibly other vulnerable individuals). The use of this term in the context of this decision

letter was unexplained. The lack of honesty which led to removal from the open prison was appropriately characterised as pushing boundaries. The use of the term controlling behaviour should have been explained, however, I do not conclude that the absence of an explanation was determinative of the decision. Neither did it add or detract from the finding that the Applicant had been pushing boundaries and therefore escalating his risk.

23. That insufficient regard had been given to the period of time that has elapsed since he had been removed from open conditions.

- a. The panel appropriately acknowledged that the Applicant was super enhanced and that he had no adjudications which were appropriate considerations in considering his risk. The length of time since the return to closed conditions would not, in my view, be a relevant factor in assessing future risk.

24. That evidence given by the Applicant relating to travelling elsewhere than work and the consequences of this decision had been misunderstood

- a. The panel concluded that the Applicant was taking calculated risks, pushing boundaries and not being open and honest with professionals. This determination is reasonably supported by the uncontested evidence in this matter and I therefore reject the assertion that the panel misunderstood the evidence.

25. Having considered this application I conclude that there is no evidence that the decision of the panel was irrational. The panel reached a differing conclusion to that of the Offender Manager and the Offender Supervisor, however their reasons for differing in their assessment are clearly set out in the decision letter. I find no irrationality in this case.

26. As indicated, I do find that the use of the term controlling behaviour could not be helpfully applied to findings in this letter, but I did not find that this lack of explanation materially affects the rationality of the decision.

Decision

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

**HH Stephen Dawson
9 November 2020**