

[2021] PBRA 161

## Application for Reconsideration by Lishman

### Application

1. This is an application by Lishman (the Applicant) for reconsideration of a decision of a Panel of the Parole Board dated 25 October 2021 following an oral hearing on 14 October 2021. The hearing was conducted remotely via video-link.
2. The Panel made no direction for release but recommended that he was suitable to remain in open conditions where he is currently located.
3. 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.
4. I have considered the application on the papers. These are the dossier of 412 pages (that includes the decision letter) and the application for reconsideration.

### Background

5. The Applicant was aged 37 at the time of sentencing and is now aged 47 years old. He was sentenced to life imprisonment on 24 January 2011 for sexual offences. The tariff was set at 10 years and 78 days (with allowance for time on remand) and expired on 12 April 2021.
6. The Applicant has remained in custody since being sentenced.

### Request for Reconsideration

7. The application for reconsideration is dated 8 November 2021.
8. It is said that the decision not to direct release was an irrational one. The grounds set out, in some detail, the background to the case and rehearse the arguments in favour of release.
9. Although the grounds are broken down, in essence it is said that the fact that all witnesses were recommending release, the Applicant has spent a large number of days in the community (on release from the open prison), his risk had reduced since sentence and there was a comprehensive release plan combined to mean that the decision is an irrational one.



10. It is also said that there is a failure to give sufficient reasons as to why the recommendations were not accepted. This would fall in the category of procedural impropriety rather than irrationality.

### Current parole review

11. The Applicant's case was referred to the Parole Board in July 2020. An oral hearing was directed in November 2020.

12. The case was listed to be heard on 4 May 2021 but was adjourned due to the absence of the probation officer.

13. The oral hearing was conducted remotely on 14 October 2021. The Panel heard evidence from the Applicant, as well as from the prison probation officer, the community probation officer and from a psychologist.

### The Relevant Law

14. 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 suitability to remain in open conditions.

#### *Parole Board Rules 2019*

15. 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)).

#### *Irrationality*

16. 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."*

17. 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.

18.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 duty to give reasons*

19.The decision as to the assessment of risk is one for the Parole Board, who are not bound by the views of the professionals.

20.However, where the Panel makes a decision contrary to the recommendations of the professionals, it is incumbent on it to give clear reasons for this, and sufficiently justify its conclusion (**R (Wells) v the Parole Board [2019] EWHC 2710 (Admin)**).

21.In considering an application for reconsideration, I should remember that the question is to do with the liberty of the subject. In those circumstances, I should adopt an anxious scrutiny of the Panel's decision.

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

22.The Secretary of State has stated that he does not wish to make any representations in response to this application.

### **Discussion**

23.Starting with the question of the rationality of the decision, it must be remembered that this is a high threshold.

24.The Panel acknowledged that the case was not a straightforward decision. However, it concluded that the release test was not met.

25.The Panel set out the arguments in favour of release but then goes on to give reasons for its conclusion not to do so.

26.It seems to me that the decision of the Panel was one open to it. Whilst the Applicant had spent a considerable period of time in open conditions and in the community on temporary releases, he had only had two periods of overnight leave.

27.As the Panel recognised, in many cases the extensive day releases would be sufficient testing. Given the index offences, the Panel were entitled to conclude that further overnight testing was required. It may be that other Panels would have decided the case differently, but that does not mean that the decision reached was irrational.

28.In relation to the reasons given, the Panel have set out why it is that they concluded that the proposed plan could not yet be said to be sufficient to manage the Applicant's risk as the professionals had concluded.

29.I consider that the decision is sufficient to inform the Applicant of why the Panel reached the decision that it did. In those circumstances, the reasons given were sufficient.

## Conclusion

30. It does not seem to me that the decision letter was flawed. A previous Panel had concluded that the Applicant needed testing in open conditions. Given the history of offending and the length of time in custody, that was an unsurprising conclusion.
31. Since then, although the Applicant has had a number of releases, there have only been two periods of overnight leave which is often considered to be one of the crucial reasons for a period of time in custody.
32. This is in large part due to the Covid-19 pandemic and is out of the Applicant's control. However, this does not change the test that the Panel has to adopt. Against that, the decision was one that was within the range of possible decisions.
33. Further, the Panel has set out, in a concise and straightforward manner, the reasons for the decision. These are sufficient for the Applicant to understand why he was unsuccessful in his application and contain no error of law.

## Decision

34. 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.

**Daniel Bunting**  
**16 November 2021**