

[2021] PBRA 164

## Application for Reconsideration by Leist

### Application

1. This is an application by Leist (the Applicant) for reconsideration of a provisional decision by the Parole Board under Rule 25(1) of the Parole Board Rules 2019 (the 2019 Rules) that the Applicant was unsuitable for release (the Decision). The letter by which the Decision was communicated is dated 15 October 2021 (the Decision Letter).
2. I have considered the application on the papers comprising:
  - a) A dossier of 752 numbered pages;
  - b) The Decision Letter; and
  - c) Written submissions on behalf of the Applicant dated 2 November 2021 in which reconsideration is requested (the Applicant's Submissions).

### Background

3. In January 2010, the Applicant received an indeterminate sentence of imprisonment for public protection for sexual assault on a male child under 13. The minimum tariff was set as 2 years, less time spent on remand, which expired in April 2011. There were also convictions in January 2010 for several assaults by the Applicant on his partner and for possession of extreme pornographic material, for which he received determinate sentences of imprisonment totalling four years.
4. The Applicant was aged 24 when he received the sentence and is now aged 35.

### Current parole review

5. The Decision was made on the Secretary of State's referral of the Applicant's case to the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release.
6. The Decision was made by a three-member panel of the Board that considered the Applicant's case at oral hearings, conducted by remote telephone and video links, on 5 August 2020, 14 January 2021 and 23 and 24 September 2021 (the Panel). The Panel comprised of an Independent Member of the Board, a Judicial Member and a Psychologist Member. The oral hearing was conducted remotely.

### Application and response



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7. The Applicant's submissions assert that the Decision is marred by irrationality and procedural unfairness.
8. By an email dated 12 November 2021, the Public Protection Casework Section notified the Board that the Secretary of State offered no representations in response to the Applicant's reconsideration application.

## The Relevant Law

9. Rule 28(1) of the 2019 Rules 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.

### *Irrationality*

10. 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."*

11. 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.
12. 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. 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*

13. 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.

## Consideration

14. The Applicant asserts that the Panel failed to properly consider or give sufficient weight to the evidence, including the evidence of the professionals who were unanimous in their recommendation for release.
15. It is important that a panel should explain clearly a decision that is contrary to the opinions and recommendations of professional witnesses. That is especially so in the case of unanimity among professional witnesses: **R (Wells) v Parole Board 2019 EWHC 2710**. However, the Parole Board is not obliged to adopt the opinions and

recommendations of professional witnesses and it is a panel's responsibility to make its own risk assessment and to evaluate the likely effectiveness of any risk management plan proposed on the totality of the evidence, which it may be expected to perform with the benefit of its expertise in the realm of risk assessment; see **DSD**, for example.

16. In the Applicant's case, the recommendation of all professionals, in both written and oral evidence was for the Applicant to be released to the community. However, the Panel set out in its own concerns in the conclusion section of the Decision Letter.

17. The Applicant challenges the rationality of those concerns, including the Panel's consideration that the Applicant lacked victim empathy and genuine remorse. The Applicant submits that that view was not supported by any of the evidence heard orally or contained within the dossier. The Panel did refer to an example being the Applicant's minimisation, in the Panel's view, of his substance misuse. However, the example is not obviously related to victim empathy and remorse, and several professional report writers have stated the opinion that the Applicant has come to demonstrate genuine or good remorse for his offending against the victims of the index offences and considerable empathy for them.

18. The Applicant moreover asserts that the Panel's concerns that he has '*pressed, on a number of occasions, for the opportunity personally to express his regrets through the restorative Justice System*' is incorrect. The Applicant asserts that it has never been stated that he has '*pressed*' for the opportunity to do this. The basis for the Panel's concern appears to be the record in the Decision Letter that the oral evidence of the Applicant's Community Offender Manager was that the Applicant several times had suggested a restorative approach to his former partner, which does not appear to correspond to a finding that the Applicant had pressed for that, and seems at odds with the adjacent record that the Community Offender Manager's oral evidence included that the Applicant appeared able to work in an empathetic way and that the Community Offender Manager had "*as much faith as can with any prisoner*" that the Applicant would never seek out his victim. The statement in the Decision Letter that the Panel saw, in the Applicant's evidence, no real indication that his expression of remorse and a determination not to minimise his conduct was done other than formally for the purpose of the proceedings is with respect difficult to understand.

19. The following comments in the Decision Letter are similarly lacking in clarity or reasoning:

*'In coming to its conclusions the Panel took careful note of [the Applicant's] general attitudes throughout the hearing. In this regard, a video link hearing is less satisfactory than a face-to-face hearing but it formed the clear impression that [his] apparent co-operation and confidence in the Parole process was foremost only when [he] judged that proceedings were moving in [his] favour and that a concerning attitude developed when matters were more probing.'*

20. The Applicant asserts that the Panel placed excessive weight on the misuse of substances, especially in light of the fact that the Applicant has been open and honest with professionals for over 12 months and has worked to address his substance problem. Moreover, it is asserted that professionals agreed that substance

misuse had been used as a maladaptive coping strategy and did not increase risk, which is supported by the materials I have considered. The Applicant's *'long and successful period'* of covert use of substances was identified by the Panel as a manifestation of a past history of controlling and entitled behaviour. However, it is recognised in the Decision Letter that the Applicant's substance misuse does not directly relate to his offending (*'not directly constituting offence paralleling behaviour'*) and no obvious credit is given to the Applicant for his recent disclosure of substance misuse.

21. The Applicant asserts that the Panel gave insufficient weight to evidence that he is unlikely to be able to access adequate support in open conditions for those with personality disorders. However, whether or not the weighting of such evidence was insufficient, that consideration could not be material to the assessment of whether it remains necessary for the protection of the public that the Applicant remained confined in prison (which includes open prison) and is therefore irrelevant to the consideration of the application for reconsideration of the provisional decision not to release to Applicant into the community.

22. The Applicant also asserts that the Panel's approach in the hearing was unfair in its exploration of the Applicant's suitability for open prison or release which, it is asserted, was *'weighted to suggest that Open and Release are equal options, not that release should be considered first and foremost and open if release not suitable.'* However, the exploration of a witness's assessment of a prisoner's suitability for either of those options can often assist in the evaluation of witnesses' assessment of the other option, and it is for the Panel to address those options in the correct sequence, if the terms of the referral require that. The Decision Letter reveals that the Panel correctly addressed the assessment of whether it remains necessary for the protection of the public that the Applicant remained confined in prison before considering his suitability for open prison, which it only considered after concluding that his confinement remained necessary.

23. The Decision Letter reveals that the Panel placed significant weight on concerns regarding the Applicant's the ability and willingness to comply with the intentions and requirements of the proposed Licence Conditions if he was released. The Panel noted the Applicant's expressed determination to be open and honest and co-operate with professionals but that that was accompanied by claims of lack of support from his previous Community Offender Manager, a criticism which seemed to the Panel to coincide with her change of recommendation and contradicted the view of the Community Offender Manager that there were no such concerns. The Panel remarked that it considered it significant that the Applicant spoke of taking advice only if he knew it would benefit him whereas it was considered to be crucial that there is confidence that he would promptly disclose the formation of any intimate relationship and not decide for himself when he wished to do so. The Panel also expressed a lack of confidence that the Applicant would approach his Community Offender Manager when he encountered issues or difficulties while on licence in the community whereas he had stated that he would approach the Probation Service *'4th in line.'*

24. The Decision Letter also reveals that the Panel placed significant weight on concerns regarding the Applicant's relationship with his father, who had given evidence during the hearing. The Panel considered the Applicant's father to minimise the Applicant's

offending, despite what it considered must have been extensive knowledge of the Applicant's general behaviour prior and leading up to the index offences. The Panel noted with concern that the Applicant's father had taken a leading role in enabling the Applicant to maintain his substance misuse habit through paying drug debts incurred by the Applicant in prison in a calculated operation involving his employees, rather than co-operating with the relevant authorities. The Panel also noted with concern that the Applicant clearly indicated an intention to continue to rely on his father in preference to professionals and that he appeared to see no reason why he should not accept his father's involvement, and that the Applicant's father was influential over other family members who would be less likely to report concerns to the authorities without his say so.

25. The Applicant has not directly challenged those latter aspects of the Panel's reasoning.

26. I have identified shortcomings in the Panel's consideration that the Applicant lacked victim empathy and genuine remorse, and in the Panel's expression of concerns regarding the Applicant's 'general attitudes' throughout the hearing.

27. However, overall, the reasons stated within the Decision Letter are of adequate clarity and cogency and are supported by reference to evidence such that the Decision cannot properly be described as irrational or procedurally unfair.

## Decision

28. The Decision is not marred by procedural unfairness and reconsideration is not directed.

**Timothy Lawrence**  
**23 November 2021**