

[2021] PBRA 175

Application for Reconsideration by Pemberton

Application

1. This is an application by Pemberton (the Applicant) for reconsideration of a decision of an oral hearing dated the 18 October 2021 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 789 pages, the decision letter, legal representations on behalf of the Applicant, dated the 8 November 2021 and the 26 November 2021 and representations on behalf of the Secretary of State dated the 17 November 2021.

Background

4. On the 11 March 2016, the Applicant was sentenced to an extended determinate sentence comprising 4 years imprisonment and a 5-year licence extension, following his conviction for assault occasioning actual bodily harm and threats to kill. The Applicant also received a concurrent 12 month sentence for child cruelty. An indefinite restraining order was imposed to protect his wife, girlfriend, children and other family members.
5. The Applicant was released on his conditional release date of the 5 January 2018 and was recalled to custody on the 9 February 2018. The Secretary of State referred his case to the Parole Board to consider whether or not to direct his re-release. The Applicant was 33 when sentenced and is now aged 39.

Request for Reconsideration

6. The application for reconsideration is dated the 8 November 2021.
7. The grounds for seeking a reconsideration are based on irrationality and are as follows:
 - a) The panel made no finding of fact about the circumstances of the recall or the instructions given to the Applicant regarding developing intimate relationships, and it did not provide an explanation as it was required to do.



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- b) Even if the evidence of the community offender manager and the police about the circumstances of the recall is accepted, the Applicant still was not in breach of his licence conditions.
- c) In the circumstances, it was irrational for the panel to find that the recall was appropriate.
- d) The panel failed to provide proper reasons to refuse release and why they departed from the release recommendations of the psychologist witnesses.
- e) The panel failed to record the contradictory evidence of the community offender manager and the prison offender manager.
- f) Several of the panel's assertions were not supported by the evidence, for example, how the release plan was inadequate, why the Applicant had not developed skills to manage himself upon release and that he posed a high risk of imminent harm.

Current parole review

- 8. The Secretary of State had referred the case to the Parole Board to consider release. There had been a number of deferrals but the oral hearing was the first review since the Applicant's recall.
- 9. The oral hearing took place on the 15 October 2021. The panel consisted of two independent members and a psychiatrist member. It was conducted by way of video link and evidence was taken from the Applicant's previous community offender manager, his prison offender manager, the Clinical Lead for the Bridge Project, a prison psychologist, an independent psychologist and his current community offender manager.

The Relevant Law

- 10. The panel correctly sets out in its decision letter the test for release.

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)).

Irrationality

- 12. [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."

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

Other

15. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: *"there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."* See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide *"objectively verifiable evidence"* of what is asserted to be the true picture.
16. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: *"It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship."*

The reply on behalf of the Secretary of State

17. The reply made on behalf of the Secretary of State is dated the 17 November 2021 and indicates that the decision letter does not mention further evidence before the panel to the effect that the managers were not supporting release but would consider supporting a move by the Applicant to open conditions under the prison recategorization process.



Discussion

18. On the 3 January 2014, the Applicant tied up his wife and subjected her to a form of waterboarding. He then put her in the bath and pushed her under the water in the presence of his child.
19. The Applicant assaulted his older child, aged 10, over a prolonged period.
20. Those brief facts indicate the Applicant is a danger to a woman with whom he forms a close relationship and is a danger to children.
21. In 2017, the Parole Board declined to direct the Applicant's release saying that he had a latent tendency to behave in a violent and controlling manner in relationships, which might be heightened by PTSD symptoms. Both the judge at sentencing and the psychiatrist who had prepared a report for the Crown Court rejected PTSD as an explanation for his behaviour.
22. The Applicant was released on his conditional release date in 2018. It follows he was not released because the Parole Board considered his risk manageable in the community.
23. The Applicant was recalled on the 9 February 2018. The Secretary of State relied on two grounds for the recall, a breach of condition 5 [i] (to be of good behaviour) and a breach of condition 5 [viii] (developing personal relationships, whether intimate or not, with anyone resident in a house containing children under the age of 18).
24. The reason for the recall is very slightly confusing because both Probation and the panel seems to have proceeded on the basis of an alleged breach of condition 5 [xvi] (duty to report a developing intimate relationship) which was not a condition relied upon by the Secretary of State. It was for that reason that I asked if the solicitor for the Applicant wished to make any further submissions in writing.
25. The Applicant had formed a relationship to some degree with a woman. There was a dispute as to whether this had been a developing intimate relationship.
26. The panel heard evidence, principally around the issue whether the Applicant had been correctly informed by the community offender manager of the circumstances in which he would be obliged to inform her of a developing relationship with a woman.
27. The Applicant's solicitor submitted that the Applicant had been given the wrong information and that as there was no evidence the relationship was sexual, the recall had not been appropriate.
28. In a very careful decision letter, the panel came to the conclusion it could make no finding of fact about how condition 5 [xvi] had been explained to the Applicant.
29. That of course was not an end of the matter. The panel considered the evidence it found to have been established and held that the recall had been appropriate.



30. It appears that the Applicant had asserted;
- a) He had met the woman on a well-known internet dating site with the intention of seeking a one night stand.
 - b) He met the woman twice on one day, at a cafe and at the designated accommodation where he was living.
 - c) No sexual contact had taken place between them.
31. The panel considered that, as the Applicant had intended to develop some form of intimate relationship and, given the seriousness of the index offences and the potential for further serious harm, the Probation Service had been right to be cautious and the recall had been appropriate.
32. That part of the decision causes me some difficulty. If one asks the question what did the Applicant do or what did he fail to do that breached his licence conditions, it is difficult to find an answer. As I understand the position, there was no prohibition on seeking contacts on the Internet nor any prohibition on forming an intimate relationship. As to failing to inform the community offender manager, the panel had expressly refrained from making any findings about what the Applicant had been told to do.
33. It seems to me the decision letter is deficient in that it does not explain which licence condition had been breached and how it had been breached.
34. However, that is not a reason for directing a rehearing for two reasons: first, even if the panel had found the recall unjustified, it was still under a duty to consider whether the Applicant met the test for release and, secondly, a panel's decision on recall is not a matter the reconsideration panel can consider as it is not a decision coming within rule 28 [i] - see paragraph 11 of this decision.
35. Turning to the main issue in this application, there had been a difference of opinion between the professional witnesses. The two psychologists did not consider the Applicant's risk to be imminent, largely because it was likely to arise only in a personal, intimate relationship and the Applicant's evidence had been that he was not in an intimate relationship and did not intend to enter one, if he were to be released.
36. The psychologists agreed that the Applicant needed to do further work in respect of his violence before his risk was manageable, but that the work could be done in the community.
37. The prison offender manager and the community offender manager disagreed. The prison offender manager said the Applicant had not done any training course addressing the use of violence ("*the identified work*") and, therefore, his risk had not reduced since recall. Without completing that identified work, the Applicant continued to present a high risk of serious harm in the community. The risk would be imminent. The robust risk management plan could be circumvented and in those circumstances was not capable of managing the Applicant's risk.

38. The community offender manager's opinion was the Applicant should remain in closed conditions to complete the identified work. Because of the speed of the Applicant's recall, his risk could become imminent.
39. There seemed to be tacit agreement between all four professional witnesses that, if the Applicant entered an intimate or emotional relationship, his risk could become imminent. The recommendations of the psychologists appear to have been predicated on the fact the identified work would have been completed and would be effective before the Applicant embarked on a new relationship.
40. The panel preferred the approach taken by the prison offender manager and the community offender manager.
41. The panel accepted a number of positives, including the Applicant's good custodial conduct, his improved insight and his acceptance that his background had trained him to become a violent person.
42. The panel made two important findings. The first was that the risk management plan was not capable of managing the Applicant's risk in the community. This was because if the Applicant entered into a new relationship (before completing the identified work), there was no evidence he had developed sufficient skills to deal with the situation differently than he had done in the past. This finding clearly accepted the prison offender manager's analysis and the evidence of the psychologists did not really disagree with the proposition.
43. The second finding developed in this way:
- a) Without doing the identified work, the Applicant did not have the skills to manage his work risk effectively in the community.
 - b) He might nevertheless be safe in the community if he did not enter into a new relationship.
 - c) The speed following his release with which he sought a companion on a dating site suggested that, notwithstanding his good intentions, he could not be trusted not to enter into a relationship before completing the necessary work.
 - d) In those circumstances, it was not safe to release the Applicant into the community without having first done the identified work.
44. These two findings were made in the context of the very real seriousness of the index offences and the obvious need to proceed cautiously, bearing in mind the protection of the public is the Parole Board's primary concern.
45. I have asked myself three questions, were those findings supported by the evidence; did the decision letter adequately explain the basis for the findings; would those findings, alone, justify the refusal to direct release. In my opinion, the answer to all three questions is yes.
46. In these circumstances, the panel's main decision cannot be stigmatised as irrational.

47. Ground 7 (e) complains the decision letter did not deal with differences between the evidence of the two probation officers. The decision letter, taken as a whole, is comprehensive and balanced and in my view comes within the ambit of the decision in **Oyston [2000] PLR 45**.

48. Ground 7[(f) sets out three findings of the panel which, it is alleged, are not supported by the evidence. I disagree; the findings are based on the evidence of the prisoner offender manager as summarised in the letter.

49. I pay tribute to the care and clarity with which the legal submissions have been made but I regret to have reached the conclusion the panel was entitled to come to their decision and they expressed perfectly adequately the reasons why they came to that decision.

Decision

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

James Orrell
05 December 2021