

[2021] PBRA 34

Application for Reconsideration by LEWIS

Application

1. This is an application by Lewis (the Applicant) for reconsideration of a decision of the Panel following an oral hearing on 28 January 2021 not to direct his release on licence.
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. This application has been allocated to me as one of the members of the Board who are authorised to make decisions on reconsideration applications. I have considered the application on the papers.
4. The documents provided to me were:
 - (a) The dossier considered by the Panel, now numbered to 358 pages, since it also contains the decision letter ("DL") dated 11 February 2021;
 - (b) The application for reconsideration, dated 2 March 2021 from legal representatives on behalf of the Applicant; and
 - (c) Confirmation dated 11 March 2021 that the Secretary of State has no representations to make.

Background

5. The Applicant is now 46 years of age. On 26 April 2007, when aged 32, he received a sentence of imprisonment for public protection for an offence of arson being reckless as to the endangerment of life with a minimum tariff of 3½ years less time spent in custody on remand. At the same time, he received a determinate sentence of imprisonment of two months for criminal damage ("the index offences").
6. The Tariff Expiry Date was 2 August 2010.
7. On 27 January 2007 the Applicant attended at the home of his then partner and threw a television through a downstairs window. He returned later and, after issuing threats, threw a homemade petrol bomb through the living room window at a time when the victim and her young son were in the house.



8. The Applicant has a criminal record comprising convictions for over 80 offences, a number of which involve violence towards women. These include fracturing the cheekbone of a woman with whom he had had a lengthy relationship and fracturing the jaw and cheekbone of his father's girlfriend during a family argument. There are also convictions for criminal damage involving another former partner.
9. The Applicant completed several accredited and non-accredited offending behaviour programmes in custody, focusing on substance misuse and Intimate Partner Violence and he was released on licence in January 2016.
10. He was recalled in February 2018 due to concerns about his behaviours in a relationship with another partner (AT).
11. A Panel of the Parole Board considered his case on 2 August 2018 ("the 2018 Panel") and declined to order his release. In so doing, the Panel found:

"On all the evidence available to it, the panel has found that the recall was appropriate. This is because there was credible evidence that [the Applicant] were placing [the Applicant's partner] at risk of serious harm through [the Applicant's] unreasonable and aggressive behaviour. The panel made a finding in [the Applicant's] case that, on the balance of probability, [the Applicant's] behaviour towards [the victim], over a period of maybe a year, amounted to domestic violence."

Request for Reconsideration

12. The application for reconsideration is dated 2 March 2021.
13. The grounds for seeking a reconsideration are as follows:

(I) Irrationality

14. The Applicant submits that the Panel's decision is irrational in that:
 - (a) In preferring the evidence of the Prison Psychologist ("PP") it failed to properly apply the test for release.
 - (b) The decision not to release on the basis of a Risk Management Plan ("RMP") supported by the Community Offender Manager ("COM") and the Prison Offender Manager ("POM") was fundamentally flawed.
 - (c) The Panel failed to afford adequate weight to the offending behaviour work which the Applicant had completed.
 - (d) The Panel accepted the view of PP that the Applicant should complete a specific course addressing the use of violence and sex offending prior to release.
 - (e) The Panel rejected the evidence of the COM, POM and the Independent Psychologist ("IP") when not directing release.
 - (f) The Panel failed to give sufficient weight to the Applicant's custodial conduct.



- (g) The Panel were arbitrary and irrational in concluding that the Applicant would quickly form a relationship upon release.

(II) Procedural Unfairness

15. The Applicant submits that he did not receive a fair hearing and that the Panel was not impartial.

The Applicant's submissions appear to include:

- (a) The Panel should have revisited the findings of the 2018 Panel in relation to the Applicant's treatment of AT in the light of the decision not to prosecute.
- (b) The Panel failed to consider the evidence which led to the Applicant's recall impartially because, apparently, the same Board member sat on both panels.
- (c) The Applicant points out that the DL refers to the "2019 Panel" by mistake for the "2018 Panel" and suggests that, by recording that the findings in relation to domestic violence and the appropriateness of recall were not challenged, the Panel impliedly criticises the Applicant's current solicitors and casts doubt on their entitlement to challenge the findings of fact of the 2018 Panel.
- (d) That by describing the IP as "Solicitor Commissioned Psychologist", the Panel demonstrated inherent bias since this suggests that they viewed his evidence and independence as compromised and his findings as less valid than the PP.

Current parole review

16. The Applicant's case was referred to the Parole Board by the Secretary of State in March 2019 for it to consider whether or not it would be appropriate to direct his release and, if not, whether he was suitable to progress to open conditions.

17. The Panel consisting of three members (one of whom is a Psychologist) considered the case remotely on 2 June 2020 (by telephone) and on 28 January 2021 (by video link). On 2 June 2020 the dossier was paginated to 256 pages and the (then) COM, the POM and the Applicant gave evidence. The application was for release.

18. By 28 January 2021 the dossier numbered 342 pages. The Panel heard further evidence from the POM, the Applicant, both Psychologists and a new COM. Both COMs, the POM and the IP supported release which was opposed by the PP.

19. The same solicitor represented the Applicant on both occasions and confirmed that the Applicant was content to proceed with a remote hearing on both occasions.

20. In making its final decision the Panel considered all the oral evidence provided and took account of the documentary evidence provided in the dossier.

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21. The Panel correctly sets out in the DL dated 11 February 2021 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

22. 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)).

23. 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

24. 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."

25. 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.

26. 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

27. 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.

28. 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.

29. 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

30. The Secretary of State had no representations to make in response to this application for reconsideration.

Discussion

31. I find that the Panel had an in-depth knowledge of this case derived from a considerable dossier of written evidence together with that obtained in two hearings during which it heard from the Applicant on each occasion.

32. The Applicant has been legally represented throughout and the Panel provided a comprehensive DL extending to 15 pages.

33. Where there is a conflict of opinion, it was plainly a matter for the Panel to determine which opinion they preferred, provided the reasons given are soundly based on evidence, as well as rational and reasonable. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of the RMP proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant.

GROUND (I) - IRRATIONALITY

34. To a considerable extent the matters relied on can be approached in the generality since, in essence, they amount to further submissions that the Panel should have arrived at a different decision and directed release on the basis of the RMP and should have preferred the views of the COMs, POM and IP to that of the PP.

35. The Panel made clear findings to support their decision.

36. The POM accepted that there was core risk reduction work outstanding and that the course addressing the use of violence and sex offending remained a treatment need for the Applicant.

37. The previous COM agreed with the Assessment for suitability to undertake certain training programmes that the Applicant had outstanding treatment needs and that



the course addressing the use of violence and sex offending should be completed although the Covid-19 restrictions currently prevented this.

38. The current COM in a report dated to October 2020 supported the recommendation for the course addressing the use of violence and sex offending and did not support release. However, in his most recent report, he supported release even though he accepted this course was an outstanding treatment need.
39. The Panel carefully set out the relevant evidence and their reasons for preferring the views and recommendations of the PP.
40. The Panel was well aware of the contents of the RMP and judged that it could not manage the Applicant's risk in the community as there was still core risk reduction work to be completed.
41. The Panel noted and took account of the interventions undertaken by the Applicant prior to his release on licence and the quality of his custodial behaviour.
42. The Panel noted that the Applicant's risk of further offending within a relationship was High, that his risk of violent reoffending was also High when in a relationship and made a finding (DL p.13) that the Applicant's risk on release was imminent if in a relationship.
43. I find there was ample evidence before the Panel for it to reject the Solicitor's submission that the Applicant's intention not to enter into a relationship upon release was plausible and its finding on this point is, in my view, neither arbitrary nor irrational.
44. In short, where a Panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel. I find that, in this case, there are no such reasons.

Ground (II) PROCEDURAL UNFAIRNESS

45. The Panel noted the finding of fact made by the 2018 Panel in relation to domestic violence and accepted that the recall was justified. It also noted, as a matter of fact, that the findings were not challenged on behalf of the Applicant although the solicitor for the Applicant did, it appears, point out that such findings did not have to be made to the criminal standard of proof. The Solicitor also (Application p.7) reminded the Panel of the need for caution in deciding what weight should be attached to these findings.
46. There was no formal application to re-open the findings of the 2018 Panel on the grounds that there had been a change of circumstances (which would, in any event, have been unlikely to be granted) and the Panel allowed the Applicant another opportunity to give his version of events (DL p.7).
47. I do not propose to speculate as to the reasons why the Applicant was not prosecuted but I am satisfied that the Panel was entitled to rely on the findings of the 2018 Panel



which had heard the relevant evidence, properly directed itself as to the standard of proof and set out its findings in a clear fashion.

48. The Panel was not asked to formally revisit those findings and heard submissions on behalf of the Applicant as to the weight to be attached to them which was then a matter solely for the Panel.
49. The Applicant does not spell out why (if it was indeed the case) the presence of the same member of the Parole Board on both the 2018 and the current Panel leads to the conclusion that the latter, which was composed of three members, failed or refused to impartially consider the evidence. Without more, I find the submission untenable and lacking in merit.
50. I am of the same view with regard to the suggestion that the Panel, by simply recording the fact that the 2018 Panel's findings of fact were not challenged before it, are impliedly criticising the Applicant's current solicitors or casting doubt on their ability to challenge those findings. There are, in my view, no grounds to support such a submission and I reject it.
51. The Applicant seeks to suggest that by describing the IP as the "Solicitor Commissioned Psychologist" the Panel was demonstrating inherent bias. This is a bold submission.
52. While it might have been better not to have used that form of words, as far as I can see, the term is used on only one occasion (DL p.2) while later in the DL (p.5) he is described as providing an "independent" assessment. He is also described in the Adjournment notice of June 2020 as the "independent psychologist" as he is by the Panel Chair at dossier pp. 326 and 329.
53. I am satisfied that the Chair and the Panel as a whole will have been well aware of his independent status, that they gave careful consideration to his written and oral evidence and explained their reasons for not following his recommendation.
54. This submission is without merit.
55. Finally, there is, I find, nothing in the point that in the DL the 2018 Panel is referred to as the "2019 Panel". This is obviously a typographical error which is unfortunately repeated. All concerned will have understood that the Panel being referred to sat in 2018 and not 2019 and will have been in no way misled as to the material under consideration.
56. I find that the submission that the Panel was not impartial is without foundation.

Decision

57. 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.

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