

[2021] PBRA 90

Application for Reconsideration by Rudling

Application

1. This is an application by Rudling (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 19 May 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 Decision Letter dated 19 May 2021;
 - Legal Representations dated 9 June 2021; and
 - The Dossier, numbered to page 368, of which the last document is the Decision Letter.

Background

4. The Applicant is now 28 years old. In October 2013, when he was 21, he received a sentence of 12 years' imprisonment, consisting of a custodial term of 7 years and an extension period of 5 years, for an offence of causing grievous bodily harm with intent. He was released on licence on 10 October 2018 and his licence was revoked on 29 May 2019. He had been arrested for and convicted of shoplifting, then arrested for possession of Class A drugs with intent to supply. He is awaiting trial for that offence, but it is not expected that that matter will be dealt with by the courts before 2022. He had also been arrested for assault on a male he knew, allegedly over a drugs debt, and he was accused of an attempted robbery with a firearm; neither of these two matters has been proceeded with. He had been the victim of an alleged aggravated burglary. He was not recalled until 1 July 2019, having been out of contact with his Community Offender Manager (COM) for over a month.

Request for Reconsideration

5. The application for reconsideration is dated 9 June 2021.
6. The grounds for seeking a reconsideration are as follows:



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- a) Irrationality: the decision not to release is based on a disproportionate assessment. The panel adverted to concerns raised by the COM, who potentially had access to more active information about his case following Multi-agency public protection arrangements (MAPPA) consultations and the sharing of intelligence regarding him and another man.
 - b) Irrationality: the panel considered that external controls could not be relied upon to manage the Applicant's risks in the community. In coming to this conclusion, which is disputed, the panel may have relied on allegations about his behaviour which were not substantiated.
 - c) Irrationality: the panel decided it could not evidence that the Applicant had reduced and addressed his internal risk factors and could neither evidence that external controls could be relied on to manage his residual risk. This is contrary to clear evidence that he had done so from his Prison Offender Manager (POM) and his behaviour while on licence.
7. The submission is that no rational panel could have come to the conclusion not to release and to depart from the POM's evidence that in her opinion the Applicant could be released.
8. There is no complaint of procedural unfairness.

Current parole review

9. The Secretary of State referred the Applicant's case to the Parole Board for consideration of release. The referral itself does not appear to be in the dossier.
10. The Oral Hearing Panel (OHP) conducted the hearing by video-link on 11 May 2021. The panel consisted of one judicial and two independent members. It considered the dossier and heard oral evidence from the COM, the POM and the Applicant. The Applicant was represented throughout by a solicitor, who made closing submissions. The Secretary of State was not represented and made no submissions. Following the hearing the panel was provided with three-character references from prison officers.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 19 May 2021 the test for release.

Parole Board Rules 2019

12. 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

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.

The reply on behalf of the Secretary of State

16. The Secretary of State has indicated that he does not intend to make any representations in regard to this application.

Discussion

17. Grounds (b) and (c), as detailed above, are, firstly, a complaint that the OHP paid attention to allegations that were not pursued by the police. This is recorded as being the thrust of the Applicant's representative's submissions at the hearing. Secondly, they are a complaint that the OHP preferred the recommendation of the COM to that of the POM. As to that, panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses, even if, as is not the case here, they are unanimous. It is the panels' 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.

18. The matters complained of in Grounds (b) and (c) formed only a part of the balanced assessment by the panel of the risk presented by the Applicant in the community and the adequacy of the Risk Management Plan to manage that risk. The panel took account of the Applicant's long history of violent offending, what appeared to be an enduring high-risk situation between him and a named individual, his conduct that

led to him being removed from two places where he had been directed to live, his deliberate failure to comply with recall, and the fact that he still had a serious allegation awaiting trial, which would be a destabilising factor. All of these were matters properly taken into consideration, and the fact that the Applicant disagrees with the conclusion reached by the panel does not make its decision irrational.

19. The matter in Ground (a) is put forward as irrationality, but in reality it is a complaint that the panel acted unfairly by taking account of evidence with which the Applicant had no opportunity to deal, or which perhaps amounted to mere speculation about what lay behind the COM's opinion that the Applicant's risk was not manageable in the community. That is a complaint of procedural unfairness.
20. 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.
21. 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.
22. The overriding objective is to ensure that the Applicant's case was dealt with justly.
23. In my judgement, if the panel did what is complained of, then it is at least arguable that the Applicant was not given a fair hearing. If, on the basis of evidence which was not presented to the Applicant for him to deal with, or which derived from speculation by the panel, the panel preferred the COM's assessment of the manageability of the Applicant's risk in the community to that of the POM, then it may be appropriate to direct reconsideration.
24. However, this does not, from the material before me, appear to be the case. In the course of its summary of the COM's evidence the panel referred to the police intelligence about the ongoing grievance between the Applicant and the named person, and to a recent MAPPa review of the case which stated that the conflict was "ongoing". The COM confirmed there was insufficient evidence for the Applicant to be charged with all of the allegations relating to violence and aggression when he was in the community, but said she remained concerned by the volume of police and prison intelligence relating to him being aggressive and threatening at times. She accepted there was no evidence to corroborate allegations made by the Applicant's ex-partner. She had initially supported release but had changed her mind since attending MAPPa meetings about ongoing concerns. She also considered

the information about poor compliance in the accommodation provided, and the fact that the Applicant was still under investigation for the drugs offence.

25. It therefore seems that the material which is the subject of Ground (a) was fully ventilated at the hearing, and the opportunity given to, and on my reading of the Decision Letter taken by, the Applicant's representative to test the value of the evidence by questioning and to address the panel about it.

26. A panel of the Parole Board is entitled to take into account hearsay evidence as long as it is clear about what it is and the necessity to be careful about it. In this case the panel did that, as its summary of the evidence of the COM shows. The legal representations in support of this application pick out a short passage in the Decision Letter without giving the context I have set out in the preceding paragraphs. Taking the Decision Letter as a whole there is nothing in any complaint of procedural unfairness.

27. The panel's conclusion was one it was entitled to come to on the evidence.

Decision

28. 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.

Patrick Thomas
9 July 2021