

[2022] PBRA 58

Application for Reconsideration by Armstrong

Application

1. This is an Application (the Application) by Armstrong (the Applicant) for reconsideration of a decision by a Panel of the Parole Board dated 12 April 2022 not to direct his release. The decision was made following the oral hearing of the Applicant's extended sentence early release review conducted on 14 March 2022.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on the basis that the decision is (a) irrational or (b) procedurally unfair.
3. I have considered the Application on the papers. These comprise: the Application for Reconsideration with Representations; the Decision Letter; an email from the Public Protection Casework Section dated 26 April 2022; and the Case Dossier running to 486 pages.

Background

4. On 28 April 2017, the Applicant received an extended sentence comprising a term of imprisonment for 7 years 6 months and an extended licence period of 3 years 6 months for the manslaughter of his male partner. He pleaded not guilty but was convicted by a jury after trial.
5. The offence was committed late in the evening of 6 September 2016. A neighbour had heard a scuffle from within the couple's flat and just after midnight the Applicant was seen running in the street asking for an ambulance to be called. When paramedics attended, they found the victim covered in bruises. He was taken to hospital but died later from a suspected brain tumour.
6. The trial judge described the Applicant as deeply controlling and manipulative within the relationship. He concluded that "*What caused him to die was because in the course of the fight you caused him to fall over and hit his head that led shortly afterwards to his death.*" The Applicant was unsuccessful on his appeal against the conviction. Prior to the parole hearing, he continued to maintain that he had heard the victim collapse in another room. He refined that account when giving evidence to the panel, admitting that his partner had suffered a seizure brought on by a subdural haematoma which must have been caused by him. He confirmed that he accepted responsibility for the death.



7. The Applicant was 44 at the time of the index offence and had previous convictions over a period of 13 years for drunk, disorderly and anti-social behaviour but none for violence to another person. Both the Applicant and his partner were alcohol dependant and there was an extensive history of domestic abuse between them.

Request for Reconsideration

8. The Application for Reconsideration is dated 20 April 2022 and contains detailed representations by the Applicant's Solicitors.

9. It is submitted on the Applicant's behalf that the Decision is irrational in concluding that the untreated risk of intimate partner violence was too high to be safely managed in the community when:

a) Risk was not considered to be imminent;

b) Risk was confined to relationships and the Applicant was not currently in one;

c) The robust risk management plan in place would enable any increase in risk to be identified at an early stage so that steps could be taken to prevent it from escalating to a critical level; and

d) It was irrational and potentially discriminating to expect someone to complete risk reduction work to address risk in same sex relationships where the Prison Service does not offer such programmes.

10. It is further submitted that the Decision was procedurally unfair because the Panel:

a) Declined to grant the three month adjournment sought by the Applicant's Solicitors to allow, *inter alia* (i) further overnight release on temporary licence to demonstrate risk reduction in the absence of any other means (ii) time for consolidation following the completed one to one work (iii) time to allow the risk management plan to be fortified and finalised and (iv) time to allow further information to be obtained from the Offender Personality Disorder (OPD) Service; and

b) Did not consider adjourning to allow a "Psychological" (presumably intended to refer to "Programme") Needs Assessment (PNA) to be completed to identify whether further risk reduction work was needed.

12. It has been confirmed on behalf of the Secretary of State that he does not wish to make any representations in response to the Application.

Current Parole Review

13. The Applicant's case was referred to the Parole Board by the Secretary of State to decide whether to direct his release.

14. At the hearing, the Panel considered a dossier running to 486 pages. It included an Intervention Report by the prison psychologist with whom the Applicant had engaged in one to one sessions, and a Psychological Risk Assessment (PRA) by another prison psychologist as directed when the Panel had earlier adjourned the case. There were reports by the Prison Offender Manager (POM) and Community Offender Manager



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(COM). Also included was information about the Mulberry Project to which it was intended the Applicant be referred under the risk management plan.

15. Oral evidence was given by the POM, by the COM, by the respective authors of the intervention Report and of the PRA, by a representative of the Mulberry Project, and by the Applicant himself. The case was then adjourned to enable the COM to inquire and notify the panel whether the Applicant had been screened into the Offender Personality Disorder (OPD) Pathway. That information was not provided. In the meantime, the POM notified the Board that the Applicant had refused to take a Mandatory Drug Test and that an adjudication had been scheduled.
16. The Panel Chair issued Directions on 28 March 2022, expressly stating in the Notice that the panel could not issue a decision until the outstanding information had been provided. Brief reports from the COM and the POM by 4 April 2022 were directed accordingly and a further direction made that any submissions by the Applicant's Legal Representative to be provided by 11 April 2022.
17. A report was provided by the POM dated 4 April 2022 in which she confirmed that the Applicant had pleaded guilty to disobeying a lawful order and received a four week suspension of privileges and partial stoppage of earnings. He was not removed from open conditions but was suspended from access to ROTLs for a period of four weeks.
18. No report was provided by the COM. The Decision states that she had confirmed that he had been referred but that no assessment had yet been conducted. There is no documentary evidence of the COM's statement or of the referral.
19. Further Written Representations dated 11 April 2022 were submitted by the Applicant's Legal Representative. It was argued that the admitted lapse into substance misuse, namely Subutex, was to cope with shoulder pain and the pressure of the forthcoming hearing, and that he had referred himself to the Wellbeing Team. This re-engagement was confirmed in the POM's report.
20. The COM had recommended release. The risk management plan proposed by her provided for a period in Probation Approved Premises. This was to be followed by a move to abstinent based accommodation for people recovering from alcohol/drug addiction. The POM recommended release on the same basis.
21. The author of the PRA did not support release on the basis that the Applicant needed to undertake more work to address intimate partner violence and there were unanswered questions about problematic behaviour and traits associated with personality disorder. She said she would like to see further overnight ROTLs and a risk management plan that included support through the OPD Pathway, further sessions with a psychologist, polygraph testing and evidence of having established a relationship with his COM in view of the importance of disclosing intimate relationships. The COM confirmed that such work would be immediately started on release. They would all be covered by appropriate licence conditions.
22. It was common ground that there were no formal programmes identified as suitable and available for the Applicant to undertake in custody, including open conditions.
23. The Panel concluded that the Applicant's untreated risk of intimate partner violence was too high to be safely managed in the community under any risk management



plan and that outstanding core risk reduction work on relationships and intimate partner violence needed to be completed in custody.

The Relevant Law

24. The Decision Letter correctly sets out the test for release.

Parole Board Rules 2019

25. 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)).

Procedural unfairness

26. The issue to be decided under this ground would be whether there is evidence that the correct process was not followed either in the application of the Parole Board Rules or in the fair conduct of the hearing.

Irrationality

27. 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."*

28. This test had been earlier 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 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 uses the same word as is used in judicial review proceedings demonstrates that the same test is to be applied.

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

30. The importance of giving adequate reasons in Parole Board decisions has been made clear in two High Court cases. In **Wells [2019] EWHC 2710 (Admin)** it was suggested that, rather than ask 'was the decision being considered irrational', the better approach is to test the decision maker's ultimate conclusions against all the evidence received and ask whether the conclusions reached can be safely justified on the basis of that evidence, while giving due deference to the panel's experience and expertise.

31. Panels of the Board are wholly independent and are not obliged to adopt the opinions or recommendations of professional witnesses. A panel's duty is to make its own risk



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assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence and decide what evidence it accepts and what evidence it rejects. Once that stage has been reached, following the guidance provided by cases such as **Wells** and also **Stokes [2020] EWHC 1885 (Admin)**, a panel should explain in its reasons whether or not it is going to follow or depart from the recommendations of professional witnesses.

32. It follows that, in reaching a decision about irrationality on this Application, I am required to decide first, whether I am satisfied that the conclusions reached by the Panel were justified by the evidence and second, whether I am satisfied that the conclusions are adequately and sufficiently explained.

33. In considering the amount of detail needed to be included in a decision letter, there has been guidance from the High Court, 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 require elaborate or impeccable standards of draftsmanship."*

Discussion

34. The Applicant submits that the decision was irrational on the basis set out in paragraph 9 above.

35. Applying the strict test set out established case law it is difficult to conclude on the basis of the evidence before the Panel that its decision was irrational. A Panel should take into account the recommendations of the professional witnesses but is entitled to reach its own conclusions on the evidence before it. The decision document considered all the evidence and was logically argued. Imminence of risk and what it encompassed was carefully evaluated.

36. The Decision provides a detailed analysis of the Applicant's offending behaviour, a review of his risk factors and an assessment of current risk after consideration of the material available to the Panel by way of reports and oral evidence at the Hearing. The Panel expressly took account of the opinions expressed by the professional witnesses, including any revision of the opinions expressed in the written reports.

37. The Applicant's submission of procedural unfairness is as set out in Paragraph 10 above.

38. It was agreed by all the professional witnesses that there remained core risk reduction work to be undertaken. However, none could be identified as available to the Applicant in custody, including the open prison regime to which he had been transferred. He had completed one to one work in that environment but there had been insufficient time to enable this to be consolidated. Consolidation was identified as an important factor in assessing the Applicant's risk.

39. As part of its reasoning when declining to direct the Applicant's release, the Panel relied on the fact that the risk management plan was too fragmented and the fact that the Applicant had not been screened into the OPD Pathway. The need for outstanding core risk reduction work was stated as a reason for declining release, but there was



no evidence of identifying what form such work would take. Nor was there evidence of consolidation following the already completed one to work, refinement of the Risk Management Plan or further information from the OPD Service. The latter had been the subject of earlier directions by the Panel Chair which had not been complied with. A Programme Needs Assessment could have been directed during the adjournment period and assessed by the Panel as a measure of risk.

40. The information before the Panel was inadequate to enable a fair decision to be made. An adjournment would have rectified this and incidentally would also have provided an opportunity for further ROTLs.
41. In these circumstances, with a previous Direction unfulfilled and important assessments outstanding, the Panel ought to have adjourned the case. This would have provided the further evidence needed to allow the Panel to fairly conclude the review.

Decision

42. Based on the evidence which was before the Panel and applying the test set out in case law, I do not find that the decision not to direct the Applicant's release was irrational. However, the failure to adjourn for the purposes sought by the Applicant deprived him and the Panel of the opportunity to explore all relevant avenues of enquiry.
43. The Panel failed to follow a fair procedure and thereby restricted its ability to make a judgment on all the facts which ought to have been before it on the issue of current risk and its management in the community.
44. The Application for Reconsideration is accordingly granted, and I make the following further directions.

**HH Judge Graham
White
7 May 2022**

