

[2022] PBRA 61

Application for Reconsideration by Magrath

Application

1. This is an application by Magrath (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 16 April 2022 not to direct his 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:
 - a) The Decision Letter dated the 16 April 2022;
 - b) A request for reconsideration in the form of written representations from the Applicant's legal representative dated the 28 April 2022;
 - c) Personal representations from the Applicant; and
 - d) The dossier, number to page 470, of which the last document is the Decision Letter. The panel considered a dossier which ran to 457 pages. Page 458 of the dossier is a brief letter offering employment on release to the Applicant. It is not clear from the panel's Decision Letter as to whether it had sight of this document.
4. The application was not made on the published form CPD 2, which contains guidance notes to help prospective Applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints and reminds Applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made, and I am satisfied that the written legal representations provide the Applicant's explanation as to the proposed grounds for reconsideration. I have read the Applicant's personal representations with care to assist in my understanding of his application.

Background

5. The Applicant is now 23 years old. On 3 January 2015, when he was 16 years old, he received an extended sentence comprising of 10 years and 4 months detention and a 5-year extended licence period. The sentence followed the Applicant's conviction for offences of manslaughter, conspiracy to commit grievous bodily harm and conspiracy to commit robbery (the Index Offences).



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6. The Applicant was convicted along with two co-defendants. The sentencing Judge detailed a background of drug dealing and drug use. The victim of the manslaughter offence and another male attended a property and were ambushed. The victim was fatally stabbed, and the other male received stab wounds to his shoulder and both thighs. The Applicant was convicted for the offences of manslaughter and conspiracy to commit grievous bodily harm on a '*joint enterprise*' basis. At the time of his offending, he had been a part of a criminal gang, although the Applicant has disputed this. The sentencing Judge said that the Applicant represented a very significant danger and therefore passed an extended sentence of detention.
7. The Applicant became eligible to be considered for release by the Parole Board on 15 October 2021. His case was referred to the Parole Board by the Secretary of State on 6 January 2021 and this was the first review of his case. On 12 April 2021, the Applicant was moved to an open prison, this was a decision made by others and was not a decision open to the Parole Board.
8. On 1 June 2021, the Applicant's case was considered on the papers by a single member of the Parole Board and an oral hearing was directed. The oral hearing took place on 4 April 2022. An earlier hearing on 30 November 2021 had been adjourned by the panel. On 4 April 2022, the panel heard evidence from the Applicant's probation officer in the community, the officer responsible for his case in custody and a psychologist employed by the prison service. The Applicant also gave evidence to the panel.
9. If not released by the panel, the Applicant would otherwise be released automatically in March 2025 at the conditional release date of his sentence, unless released following a further review by the Parole Board. In its Decision Letter, the panel noted the support for release from the witnesses at the oral hearing, however, it disagreed with the recommendations made and did not direct his release.

Request for Reconsideration

10. The Applicant's grounds for reconsideration are that the panel's decision was irrational, in that:
 - a) The panel failed to explore points within the hearing and there were inaccuracies in the decision letter;
 - b) Excessive weight was given to the cannabis related incident in December 2021;
 - c) Some of the points made in the decision letter contradict the evidence; and
 - d) The panel made an inaccurate assessment of risk and the listed risk factors were also inaccurate.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 16 April 2022 the test for release.
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)).

13. In **R (on the application of 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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

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.

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."*

17. 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.

The Reply on behalf of the Secretary of State

18. The Secretary of State confirmed by way of email dated the 10 May 2022 that he did not wish to make any representations in response to the application.

Discussion

19. In its Decision Letter, the panel places weight on the Applicant's positive drug test result for cannabis in February 2022, at a time when he knew his case was being considered by the Parole Board. Any reading of the Decision Letter establishes that the panel's assessment of the case was influenced by the Applicant's drug test result and the potential implications this may have on his level of risk. I have set out from paragraph 25 (below) the relevant paragraphs in the panel's Decision Letter.
20. In summary, the Applicant seeks to persuade me that the panel placed too much weight on the drug test result in reaching its decision not to direct his release. It is submitted that the panel's finding that risk would be unmanageable in the community is at odds with its decision to adjourn the first oral hearing for the Applicant to undertake further periods of testing in the community (although I should point out that the adjournment was made for a number of reasons). It is also submitted that the panel's finding that there was outstanding core risk reduction work to be completed was an irrational conclusion given the fact that the Applicant is in an open prison and that no evidence was heard indicating outstanding sentence plan objectives.
21. The importance of giving adequate reasons in decisions of the Parole Board has been made clear in the cases of **Wells [2019] EWHC 2710 (Admin)** and **Stokes [2020] EWHC 1885 (Admin)**, both of which contain helpful guidance which I am bound to follow on the correct approach to deciding whether a decision made by a panel in the face of evidence from professional and other expert witnesses can be regarded as irrational.
22. It is suggested in Wells that rather than ask "*was the decision being considered irrational?*" the better approach is to test the ultimate conclusions reached by a panel against all the evidence it has considered 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.
23. Panels of the Board are wholly independent and are not obliged to adopt opinions and recommendations of professional witnesses. It is the responsibility of a panel, whose members will have acquired considerable experience in the assessment of risk, to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence presented to it and to decide what evidence it can be able to accept and what evidence it cannot accept.
24. Having reached conclusions upon the evidence it is clear that a panel is then required to explain its reasons, especially if they are going to depart from the recommendations made by experienced professionals. A panel can rationally depart from expert evidence, but a rational explanation for doing so must be given and it must ensure as best it can that its stated reasons are sufficient to justify its conclusions. It follows that I must decide whether on a reading of the panel's decision, I am satisfied that the conclusions it reached are justified by the evidence it considered, and secondly whether I am satisfied that those conclusions are adequately and sufficiently explained or whether there are any unexplained evidential gaps or leaps in reasoning which fail to justify the conclusion that is reached.

25. In section two of the Decision Letter, 'Analysis of Change (The Present)', the panel stated:

'2.1. [the Applicant's] progress through custody is well documented, assessed and commented upon in the Dossier; the panel does not consider it as being necessary to repeat all of that information here. The panel has noted and considered all of the information within the Dossier as part of its risk assessment and decision-making process.'

26. The panel then went on to detail the oral evidence it had received from the witnesses. In assessing that evidence, it had this to say:

'2.7. The panel were clear at the previous hearing that it agreed with the previous Psychologist, that a placement in an designated accommodation. was essential to support and monitor [the Applicant] upon any release that it may direct. There is a history of [the Applicant] absconding from his parents' address, and he has described his mother as being "overbearing" and saying that he cannot live with her. [the official supervising his case in custody] stated this was because [the Applicant] did not like his mother's boundaries at the time – and that he rebelled against that; [the Applicant] does want his own independent accommodation in the future. [the official supervising his case in custody] supports [the Applicant] in his application for release and indicated this release should be to his mother's address in Essex.'

'2.8. [the prison psychologist] has indicated that [the Applicant] should undertake a programme with the drug misuse team, rather than individual sets of In Cell work, [the official supervising his case in prison] agreed that such work would be beneficial, but that he could do that work in the community. The panel disagrees with [the official supervising his case in prison], it notes that [the Applicant] knew he was in his Parole window, he has been in custody for many years and knows the pitfalls, and he has undertaken a significant amount of treatment, and yet he used cannabis; the panel assesses that in smoking the cannabis in February, [the Applicant] took a calculated risk that he would not get caught, he did not disclose his use of cannabis to any one, until the failed test meant that he had to speak about it.'

'2.9. Whilst the smoking of cannabis, in and of itself, may not be a direct risk issue, it is the case that in obtaining the drug, [the Applicant] places himself in the company of negative others and their lifestyle – that element is a core indicator of risk and the potential for an increase in risk and its imminence for [the Applicant].'

'2.14. The panel assesses that [the Applicant's] account [of the Index Offences] lacks credibility, it is also evidence of not fully understanding the triggers to his offending, the panel assesses that [the Applicant] deliberately put himself in the way of being involved in serious offending and that he was not a "sheep" as he describes, but an active participant in criminality that he had sought out.'

'2.16. [the Applicant] stated that he "made a mistake" when he smoked the cannabis, and that he wants to learn from that mistake. The panel assesses that his decision to join in with the drug taking is either evidence of a concerning lack of consequential thinking and failure to generate alternatives in a situation, or a piece of risk-taking behaviour in the hope that he would not get

found out; either way, the panel questions if [the Applicant] has internalised and consolidated the learning he should have taken from [a thinking skills accredited course], and his work with the substance misuse teams over the years. In giving his evidence, [the Applicant] said that he should have told his POM and COM, rather than wait for the drug test results, he stated "I just tried to move past it". [the Applicant] identifies his risk factors as being drugs, negative peers, and red-flag situations/people. The panel agrees with him and is of the opinion that all of those factors were active when he chose to partake of cannabis in February 2022.'

'2.27. The panel was told that [the Applicant] has not sought to associate with previous or negative peers and associates; the panel assesses that these assertions are called into question when considering [the Applicant's] behaviour when he first arrived in open prison conditions, and then when he used cannabis shortly before his oral hearing.'

27. In its assessment of risk, the panel stated:

'3.3. The panel assesses that the risks posed are currently unmanageable and imminent were release to be directed, as [the Applicant] has outstanding treatment and consolidation needs. It is also the assessment of the panel that further testing of [the Applicant] is necessary ahead of any release.'

'3.5. The panel assesses that there is outstanding work to be completed regarding thinking skills, consequential thinking, attitudes and beliefs, impulsivity, structured and accredited drug and alcohol programme, consolidation of his previous learning and a need to develop skills in being open and honest with those supervising him. The panel assesses that this work must be completed in custody ahead of release, so as to ensure public protection and risk management.'

'3.6. The panel also notes that were release to be directed as a result of the current review, [the Applicant] would be given a new COM, it is established that a good trusting working relationship with his COM, would be a factor in risk management and the effectiveness of supervision. [the Applicant] must be afforded the opportunity to become accustomed with his new COM.'

28. In its conclusion the panel stated:

'4.2. There is limited evidence of the presence of internalised skills and strategies or changes to [the Applicant's] attitudes to support an assessment that risk is reduced in his case, nor is there sufficient evidence that the work/treatment that he has completed has been internalised and consolidated by him. The panel assesses that there is outstanding core risk reduction work which requires completion, and until this is done, the risks [the Applicant] poses are unmanageable and imminent were he to be in the community on licence at this stage in his sentence.'

'4.3. On the basis of the above, and the other assessments and information recorded in this decision letter, the panel determines that it is necessary for [the Applicant] to be detained in custody in order to protect the public.'

29. The Decision Letter sets out in some detail the oral evidence of each of the witnesses. There was support for the Applicant's release on licence and a risk management plan had been produced.
30. In my view, the panel should have provided a more detailed explanation as to why it disagreed with the recommendations being made in this case. Its decision at paragraph 2.1 not to document the Applicant's custodial progress did not help in the understanding of its assessment of his case. For example, little is said about the panel's assessment of the Applicant's progress via temporary release in the community while at the open prison and whether this offered any mitigation in terms of likely future risk.
31. The panel placed weight on the cannabis incident, although within reports in the dossier it is suggested that this may have been an isolated incident or, at best, the Applicant was not '*on the radar*' in terms of the prison's drug culture. It is difficult to establish from the Decision Letter whether the panel considered this to be an isolated incident of drug misuse in its assessment and its determination of the weight to be given to the risk of drug misuse and its relevance to other risk factors.
32. Paragraph 3.5 of the Decision Letter sets out the outstanding treatment needs determined by the panel; however, it is difficult to understand why this conclusion was reached save that the panel was concerned by the cannabis test result. If, as suggested by the Applicant and within reports in the dossier, the cannabis matter was an isolated incident, it is difficult to understand why the panel was not minded to agree with the written and oral evidence in this case.
33. As I have outlined, panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their 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. 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.
34. I have no doubt that the panel applied itself to its responsibilities in this case. For the reasons I have given, the issue is that it did not, in my view, sufficiently explain its reasoning for reaching a different view to the recommendations of the professional witnesses. Therefore, the application succeeds on this point.
35. Given my finding above, I do not propose to deal with the remaining grounds outlined in the Applicant's submissions in any detail as it is unnecessary.

Decision

36. Accordingly, applying the test as defined in case law, I conclude that the decision was irrational. The application for reconsideration is therefore granted.

Robert McKeon
12 May 2022