

[2023] PBRA 145**Application for Reconsideration by Grimmer-Dunne****Application**

1. This is an application by Grimmer-Dunne (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 6 July 2023. The decision of the panel was not to direct release.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, and/or (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are the dossier consisting of 224 pages; the application for reconsideration submitted by the Applicant's legal representative; and the response by the Secretary of State (the Respondent).

Background

4. On 2 May 2014, the Applicant was sentenced to an extended determinate sentence of imprisonment consisting of a custodial period of seven years and an extension period of three years in relation to offences of wounding with intent and false imprisonment.
5. The Applicant with others attended the home of a man unknown to the Applicant. They subjected the victim to sustained violence over at least an hour, during which he was punched, kicked, burnt, stabbed, and internally searched for drugs.
6. The Applicant was noted to have an extensive history of criminal offending and a substantial number of offences, including assault and robbery offences, prior to the commission of the index offence.

Request for Reconsideration

7. The application for reconsideration is dated the 18 July 2023.
8. The grounds for seeking a reconsideration are set out below. I have individualised the issues set out in the Applicant's narrative into single grounds.

Current parole review

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9. The Applicant had been released on licence on two earlier occasions. He had been recalled following releases. The current panel were therefore considering release following recall. The Applicant's first recall had occurred two days after release in circumstances where the Applicant had failed to return to designated premises as required.
10. The Applicant was released again by a Parole Board panel in February 2022 after he failed to return to the designated premises where he was staying and had tested positive for illicit drugs. He was also suspected of not taking prescribed medication. He was recalled in March 2022 and returned to prison in April 2022.

Oral Hearing

11. The review was conducted by an independent Chair of the Parole Board. Oral evidence was given by the Prison Offender Manager (**POM**), and a Community Offender Manager (**COM**). The Applicant was represented by a solicitor.
12. A dossier consisting of 205 pages was considered.

The Relevant Law

13. The panel correctly sets out in its decision letter dated 6 July 2023 the test for release.

Parole Board Rules 2019 (as amended)

14. Pursuant to 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

15. 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."

16. 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.



17.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

18.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.

19.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.

20.The overriding objective is to ensure that the Applicant's case was dealt with justly.

21.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.*"

22.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.*"

The reply on behalf of the Respondent

23.The Respondent offered no representations.

Reconsideration grounds and discussion

Ground 1

24.Information given by the Offender Management Unit (**OMU**) was incorrect as the recorded prison entries relating to misbehaviour do not mirror a risk of violence to the public in the community.



25. The Applicant indicates that the opinion of the prison unit responsible for managing offenders was incorrect, and that behaviour by the Applicant in prison did not necessarily mirror the Applicant's behaviour when in the community.

Discussion

26. The role of the Parole Board panel is to receive evidence from the parties and to assess its weight and credibility. A panel is not obliged to follow the views of any particular witnesses. In this case the panel indicated in the decision that the Applicant's use of violence, as evidenced by his criminal record and index offence, was "*entrenched*" (decision paragraph 4.1). The panel also noted that since his return to prison there had been evidence of threats to harm other prisoners and a great deal of instability (decision paragraph 4.3). It is apparent that the panel based their final decision on the totality of evidence in this case and that the decision demonstrated no substantial reliance on any view of the prison authorities. I reject the submission that the panel acted irrationally under this ground.

Ground 2

27. There was no consideration by the panel of mental health issues.

Discussion

28. The panel in this case had a full opportunity to consider mental health issues. There was a report from the prison mental health services on the dossier. There was also a report dated 3 July 2023 made by the prison and pointing out to the panel the concerns of the prison about the Applicant's deteriorating mental health.

29. I am satisfied that the panel had the Applicant's mental health in mind when considering their decision, however it is clearly the case that the panel's duty was to consider any such issues within the context of the risk to the public.

Ground 3

30. The decision mentions personality disorder, and the Applicant had never had a personality disorder assessment or test.

Discussion

31. In formulating the risk factors associated with the Applicant, the panel makes mentions of personality disorder. It is also noted in the dossier that the probation service had completed a psychological formulation and that the Applicant '*screened in*' to the Offender Personality Disorder Pathway (p149 of the dossier). Whilst there appears not to have been any substantial personality assessment by a psychologist, it is often the case that an assessment can be made by probation officers, based upon historical behaviour. The assessment will often reveal traits of a personality disorder which may require addressing within the supervision process. In my determination the absence of a more detailed personality assessment does not amount to irrationality within the meaning set out above.



Ground 4

32. An incident of the 29 April 2023 involving a suspicion of assault and threats to another prisoner was misunderstood by the panel in that the Applicant's role in this incident was as a 'look out' outside the cell where the violence was said to have occurred, rather than an actual perpetrator of violence.
33. Also, the prison management department said the Applicant had a prison adjudication for weapons and threats to kill, referring to the same incident (29 April 2023), which he did not.

Discussion

34. It appears from the panel decision (paragraph 2.20) that the panel accepted that the incident (29 April 2023) was a joint enterprise involving the Applicant and other prisoners. It is well established that violent conduct by a group, will result in joint responsibility for the outcome regardless of the role taken by any individual. The detailed findings of the adjudicating prison governor are not recorded. However, the panel and the prison were justified in citing this incident as one which involved violence towards another prisoner by the Applicant and others acting jointly. I do not therefore find that the panel's conclusion was irrational.

Ground 5

35. The Applicant indicates that he had never received any sentence plan targets or a Programme Needs Assessment (PNA).

Discussion

36. This complaint can be taken shortly, a Parole Board panel is an adjudicating body. The Board are not involved in sentence planning or organisation. This is not a matter amenable to reconsideration.

Ground 6

37. The Applicant noted that there had been no allegation of violence perpetrated by the Applicant whilst he had been on licence.

Discussion

38. Within paragraph 4.2 the panel specifically note within the concluding remarks that there was no evidence that the Applicant used violence whilst on licence for the two months preceding his recall to prison. However, the panel set out in some detail the background to their decision which involved an assessment of historical behaviour and current progress in prison.

Ground 7

39. The panel at paragraph 4.3 refer to the Applicants concerning behaviour relating to self-harming.



40. The Applicant submits that self-harming does not present a risk to the public and that therefore it should not be an issue that impacts upon the test for release.

Discussion

41. The panel indicate at paragraph 4.3 *"Since his return to custody, [the Applicant's] behaviour has been unstable. He has used violence and threats towards other prisoners and staff and has also self-harmed, inflicting serious injuries. Whilst he has received treatment and care, including constant supervision, his self-harm appears to be escalating."*

42. In my determination the panel reference self-harming as evidence of instability which could lead to a risk to others. It is clear that behaviour which results in threats to self-harm using a knife or other instrument in public might well elevate risk, particularly to emergency services and to members of the public who may seek to intervene.

43. I determine that the panel were not irrational in concluding that self-harming behaviours, associated with instability, could raise the risk of serious harm to the public.

Ground 8

44. The panel were not fair in their assessment of the facts.

Discussion

45. I have considered the decision of the panel. The panel fairly balanced the positive factors that they found in relation to the Applicant, against those matters of concern. They noted that the risk management plan was similar to that proposed on the last occasion and that despite the safeguards within that plan, the Applicant's behaviour had deteriorated after a very short period. The panel concluded that the risk of serious harm was therefore imminent. I am not persuaded that the panel acted unfairly towards the Applicant.

Decision

46. In all the circumstances therefore, I conclude that the decision in this case was not irrational in the legal sense set out above and that the decision was not procedurally unfair. I refuse the application for reconsideration.

HH S Dawson
15 August 2023

