

[2020] PBRA 136

Application for Reconsideration by Bartley

Application

1. This is an application by Bartley (the Applicant) for reconsideration of a decision by a two-member panel, consisting of an independent member and a judicial member, not to direct his release, following a hearing on 13 August 2020.
2. I have considered this application on the papers. These consist of the dossier, the provisional decision of the panel also dated 13 August 2020, the application for reconsideration dated 2 September 2020 made by the Applicant himself and the response of the Secretary of State, by e-mail, dated 17 September 2020.

Background

3. On 4 March 2016, the Applicant received an extended determinate sentence totalling 10 years 7 months, consisting of a custodial period of 7 years and 7 months and an Extended Licence Period of 3 years for an offence of robbery and concurrent terms of 30 months, 18 months and 30 months respectively for two offences of committing an indictable offence while in possession of a firearm and one of attempted robbery. His Conditional Release Date is 25 January 2023.
4. The Applicant was aged 36 at the time of the conviction and was aged 40 at the time of this review.

Request for Reconsideration

5. The handwritten application for reconsideration, submitted by the Applicant, consists of a six page document. It is not necessary to reproduce the application in full, but all sections have been considered and aspects relevant to the issues of irrationality or procedural unfairness are dealt with below.

Irrationality

- (a) The application for reconsideration listed a number of factual matters where it is claimed that the Panel failed to reach the correct decision, having failed properly to consider matters such as dismissal of prison disciplinary procedures or deduction of adverse entries from the prison reporting and security system. The Applicant further submitted that the Panel ought to have considered the health dangers to him, as a "*most at risk*" prisoner, of the current prison measures relating to pandemic risks.



The specific aspects highlighted are:

- (i) That the Panel was concerned as to the Applicant's alleged bullying behaviour, which he denied, and an entry relating to alleged bullying which had been redacted after a formal complaint from him.
- (ii) Claims relating to possession of a mobile phone had been dismissed.
- (iii) In one specific incident, the Applicant had been accused of assault on a prison officer but the charge had been dismissed "*when in front of the Governor it was proven that I did not physically touch the officer.*"
- (iv) That the Panel failed to take into account that, during an adjudication relating to a fight with a relative, it had been accepted that the Applicant had been involved in the fight as "*an act of self-defence.*"
- (v) The Panel failed to take into account positive National Offender Management Information System (NOMIS) entries and the fact that the Applicant had been employed as a young persons' representative was not reported to the Panel.
- (vi) That the Applicant had completed all his sentence planning objectives and had lowered his risk where he no longer presented a threat to the public.
- (vii) That no social distancing measures were in operation in the prison.

Procedural Unfairness

- (b) The Applicant makes no specific complaint of procedural unfairness but, in so far as his submissions as to irrationality might be considered a complaint as to procedural unfairness, that issue has also been considered by the Reconsideration Assessment Panel (RAP).

The Reply on behalf of the Secretary of State

6. The Secretary of State offered no representations in response to the application.

Current Parole Review

7. The Secretary of State referred the Applicant's case to the Parole Board to consider whether it was appropriate to direct release. At the oral hearing, conducted remotely by telephone link due to Covid-19 restrictions, the Applicant, who gave evidence in person, was represented by a Legal Representative and evidence was given by his Prison Offender Manager (POM) and his Community Offender Manager (COM).
8. The Panel recorded that neither the POM nor COM supported release although they had considered that the Applicant would benefit from a transfer to open conditions,



a matter which was not for it to consider. The POM had known the Applicant for only a short time and had not, at that stage, been even able to speak to him. He was concerned, however, at the number of negative behaviour entries and the number of security entries on his record and the recent adjudication for assault. On numerous occasions, the Applicant was said to have been abusive and threatening to officers and other inmates and reference was made to an altercation with a female officer in which the Applicant was said to have attempted to seize a box of wipes and a "tug of war" had ensued. The COM, who had known the Applicant much better and claimed to have a good relationship with him expressed the view that, when pressure got too much for him, he made bad decisions. The Panel, whilst acknowledging the Applicant's acceptance that the Applicant was capable of being helpful and assisting officers in difficult situations, recorded the Applicant's admission that he had punched a relative in response to a derogatory comment about the Applicant's partner, leading to a fight between them, his acceptance that he had been wrong to grab the box of wipes and acceptance that, 12 months earlier, he had been found in possession of a mobile phone and had done so because he had given priority to maintaining contact with his partner over compliance with prison rules.

9. The Panel outlined the Applicant's serious criminal record, including lengthy previous custodial sentences for varied offences including robbery, attempted robbery and rape, recorded that the index offences involved threats to shoot a post office employee and, on the same day, a bank robbery involving the use of a toy gun hidden inside a sock. It undertook a balanced examination of evidence, noting recent completion of a training course addressing decision making and better ways of thinking and specifically acknowledging that the Applicant had the capability of being compliant and pleasant. It found, however, that he had a high sense of entitlement and, if emotionally aroused, the Applicant's response in custody had been violent. It concluded that, in the community, there would, inevitably, be situations where he would become emotionally aroused at being unable to get what he wanted and that he would pose an unacceptably high risk of committing further violence. Accordingly, no direction for release was made.

The Relevant Law

9. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis that the decision is (a) irrational and/or that it is (b) procedurally unfair. This is an eligible case.
10. 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".

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 uses the same word as is used in judicial review demonstrates that the same test should be applied. This test for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.

11. Procedural unfairness under the Parole Board Rules relates to the making of the decision by the Parole Board and an assessment is required as to whether the procedure followed by the Panel was unfair.

Discussion

Irrationality

12. In my judgment, the decision to refuse release cannot be said, in any way, to meet the test of irrationality. The Panel, having clearly considered, with care, the documents in the dossier and the oral evidence gave a clear and reasoned decision:
 - (a) It made findings of fact, as to relevant matters, which it was clearly entitled to do. It made a detailed assessment of the Applicant's current risk finding that there remained an unacceptably high risk of the commission of further violent offences and placed emphasis on the need for development of sufficient internal controls to manage his risks.
 - (b) The RAP notes that the submissions highlight a number of specific factual issues where it is claimed the Panel failed fully to acknowledge formal disciplinary dismissals or mitigatory aspects of decisions and failed to give weight to matters favourable to him, including that he had completed all his sentence planning objectives and attained a trusted position within the prison. The purpose of reconsideration is not a re-examination of evidence and I am satisfied that the Panel's findings followed a proper evaluation of evidence.
 - (c) The RAP notes the submissions in relation to the Applicant being a "*high risk prisoner*" in circumstances where, it is claimed, no social distancing procedures were in force in the prison. Issues as to the practical health arrangements within the prison are not a matter for the Panel unless they be identified as relevant to risk as to behaviour and to potential behaviour on release. No such relevance as to risk is identified.

Procedural Unfairness



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13. I have considered the application with great care. The Applicant was legally represented, it is recorded that submissions made on his behalf were considered and I can find nothing to suggest that the conduct of the proceedings was procedurally unfair.

Decision

14. For the reasons I have given, I do not consider that the decision was irrational or procedural unfair and, accordingly, the application for reconsideration is refused.

Edward Slinger
26 September 2020