

[2020] PBRA 189

## Application for Reconsideration by GASKIN

### Application

1. This is an application by Gaskin (the Applicant) for reconsideration of a decision of a single-member MCA panel dated 7 October 2020 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 the decision letter, the dossier and the application for reconsideration.

### Background

4. The Applicant received an extended sentence consisting of a custodial period of ten years followed by an extended licence period of five years on 14 April 2014 following conviction after trial for conspiracy to cause grievous bodily harm with intent. He also received a consecutive sentence of one year for contempt of court. His parole eligibility date is 30 December 2020, conditional release date is in April 2024 and sentence expiry date is in October 2029. The Applicant was 41 years old at the time of sentencing and is now 48 years old. This is his first parole review.
5. On 7 October 2020, a single member MCA panel considered his case on the papers and made no direction for release. The decision was issued on 10 October 2020. Following the issue of a negative MCA decision, a prisoner may apply for consideration at a full oral hearing within 28 days. This period expired on 7 November 2020 with no such application being made.
6. After this time, the decision remains provisional for a further 21 days, within which an application for reconsideration can be made. The deadline for application in this case was therefore 28 November 2020.

### Request for Reconsideration

7. The application for reconsideration is dated 26 November 2020 and has been submitted by solicitors acting for the Applicant.
8. The grounds for seeking a reconsideration are as follows:

- a. Reference to a murder charge that the Applicant faced is 'unfair and prejudicial' as he was acquitted of murder; the panel gave insufficient weight to his assertion that he was not violent towards his victim;
  - b. The panel's conclusion that the Applicant has refused to engage in offending behaviour work is both irrational and unfair in the face of evidence that he is, in fact, unsuitable for such work;
  - c. The panel has erred in suggesting that the Applicant cannot satisfy the test for release as he has not demonstrated a reduction in risk through the completion of offending behaviour work;
  - d. The panel failed to acknowledge the impact of the Applicant's physical health on his risk; and
  - e. It was both procedurally unfair and irrational for the panel not to direct a full risk management and release plan.
9. The grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

### **Current Parole Review**

10. The Applicant's case was referred to the Parole Board by the Secretary of State in February 2020 to consider whether or not it would be appropriate to direct his release.
11. A single-member MCA panel considered his case on 7 October 2020 and made no direction for release. The dossier considered by the panel contained no legal or personal representations.

### **The Relevant Law**

12. The panel correctly sets out the test for release in its decision letter dated 7 October 2020.

#### *Parole Board Rules 2019*

13. 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)). This is an eligible decision.
14. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.


#### *Irrationality*

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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.

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

#### **The reply on behalf of the Secretary of State**

20. The Secretary of State confirmed that he would not be submitting any representations in response to this application.

#### **Discussion**

21. I shall deal with each of the grounds in turn.

##### *a. Reference to murder charge*

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22. It is first submitted that reference to the murder charge is unfair and prejudicial. The decision letter does not make reference to any murder charge. This ground is entirely unfounded and must fail.

23. It is also submitted that the panel gave insufficient weight to his assertion that he was not violent towards his victim. While the Applicant's assertion may be true in relation to the victim, the panel's conclusion draws reference to subsequent instances of violence and fighting in custody. Its weighing up of the evidence is entirely rational in this regard. This ground therefore fails.

*b. Offending behaviour work*

24. Next, it is submitted that the panel's reliance on his "refusal" to undertake offending behaviour work is both irrational and unfair (as it is unsupported by evidence).

25. In support of this, reference is drawn to paragraphs 7.3 and 7.4 of the July 2020 psychological report. This notes as follows:

*'[The Applicant] would not easily cope with or benefit from a mainstream violence reduction group work... Current treatment options therefore are deemed to be limited.'*

26. At paragraph 7.6 it goes on to say:

*'...it is recommended that [the Applicant] be referred to complete 1-1 work to help address his criminogenic needs.'*

27. Overall, at paragraph 7.2 the psychological report concludes that the Applicant's risk "cannot at present time be managed outside of closed conditions."

28. A report from the Applicant's custody probation officer (12 June 2020) notes that the Applicant "refuses to engage in [offending behaviour programmes] stating that his mental health would not permit" and "he has made it clear that he will not engage [with offending behaviour programmes] and is prepared to await his [conditional release date]".

29. It is therefore unsustainable to suggest there is no evidence for the Applicant refusing to undertake offending behaviour work. In any event, the decision does not make any mention of the Applicant's refusal or otherwise. Its conclusion correctly notes that "[s]ince being sentenced, [the Applicant] has not undertaken any offence related work in order to reduce [his] risk of serious harm". This is a fact. It is not irrational for the panel to rely upon it. This ground therefore fails.

*c. Test for release*

30. It is next submitted that the panel has erred in suggesting that the Applicant cannot satisfy the test for release as he has not demonstrated a reduction in risk through the completion of offending behaviour work.

31.The decision letter notes that *"Although [the completion of offence focussed work] is not a pre-requisite for release, it means you are unable to show any reduction in the risk that you present"*.

32.It cannot be said that the panel has suggested the completion of offending behaviour work is a necessary condition for release. It also goes on to note various allegations of assault since the Applicant has been sentenced and agrees with the views of all reporting professionals that some form of risk reduction work is necessary. The panel's conclusion not to direct release cannot be said to be irrational. This ground therefore fails.

#### *d. The Applicant's health*

33.It is next submitted that the panel failed to acknowledge the impact of the Applicant's physical health on his risk.

34.The custody probation officer's report (12 June 2020) notes that *"[the Applicant] now walks with a walking aid and it is on this basis that violent behaviour could be less possible for [him]."*

35.The same report does not, however, conclude that the Applicant meets the test for release.

36.The decision letter is not the vehicle by which every piece of evidence is recited. With a 199-page dossier it would become unwieldy and unnecessarily lengthy if it was. The overwhelming weight of evidence supports the conclusion that the Applicant did not meet the test for release and there are no suggestions that the impact of the Applicant's health on his propensity for violent behaviour would tip the balance in his favour. There is no basis on which to suggest the matter of the Applicant's health would have had any bearing on the panel's decision or that it was irrational or procedurally unfair not to say so explicitly. This ground therefore fails.

#### *e. Risk management plan*

37.Finally, it is submitted that it was procedurally unfair for the panel not to direct a full risk management and release plan as, without one, the panel could not satisfy itself that the Applicant's risk could be managed in the community.

38.The decision notes that *"The panel gave consideration to adjourning for [a completed risk management plan] to be produced, but in the light of the lack of offence-related work, and [the Applicant's] lack of engagement overall, did not consider it necessary to do so"*.

39.It is clear therefore that the panel thought about directing a plan but decided that it would make no difference to its decision. In support of this, it went on to note that the success of any plan would depend on the Applicant's motivation to comply with it and gave cogent reasons as to why there was insufficient evidence that the Applicant would, in fact, comply.

40.No risk management plan can be effective if a prisoner disregards its conditions. As such, the panel’s decision not to direct a risk management plan is both considered and well-reasoned. It cannot be said to be irrational or procedurally unfair. This ground therefore fails.

## **Decision**

41.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.

**Stefan Fafinski**  
**15 December 2020**