

[2020] PBRA 199

Application for Reconsideration by Mackmurdie**Application**

1. This is an application by Mackmurdie (the Applicant) for reconsideration of a decision of the Panel following an oral hearing on 17 September 2020 not to direct his release on licence.
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. This application has been allocated to me as one of the members of the Board who are authorised to make decisions on reconsideration applications. I have considered the application on the papers.
4. The documents provided to me were:
 - (a) The dossier considered by the panel, now numbered to 302 pages since it also contains:
 - (i) The Panel's adjournment notice dated 21 September 2020;
 - (ii) A Stakeholder Response Form (SHRF) dated 2 October 2020 issued by the Applicant's legal representative; and
 - (iii) The decision letter dated 5 November 2020.
 - (b) The application for reconsideration, dated 13 November 2020 from the legal representative on behalf of the Applicant.
 - (c) Confirmation dated 26 November 2020 that the Secretary of State has no representations to make.
 - (d) Copies of two email threads relating to developments between the date of the adjournment notice and the decision letter.

Background

5. The Applicant is now 28 years of age. On 12 June 2015 he received an extended sentence of imprisonment of 11 years comprising a custodial period of 9 years and an extended licence of 2 years for an offence of s.18 grievous bodily harm



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committed in April 2014 (when he was aged 22) and to which he pleaded guilty ("the index offence").

6. On the same occasion he was sentenced to concurrent terms of imprisonment for witness intimidation and theft linked to the index offence as well as three offences arising out of an incident of violence in July 2013.
7. The parole eligibility date is recorded as 7 April 2020, the conditional release date as 8 April 2023 and the sentence expiry date as 7 April 2025.
8. In relation to the index offence, the Applicant, with others, aggressively approached the victim, who was known to them, in the street and threatened him in relation to a dispute about a bicycle. He used a discarded chair, fashioned into a stick, to attack the victim and repeatedly hit him whilst he was on the ground, inflicting serious injuries including to his head and knee which required surgery.
9. He then stole the victim's phone, contacted him in his hospital bed and intimidated him, threatening to kill him if he did not drop the charges.
10. At the time of the index offence, the Applicant was (according to the decision letter) subject to a deferred sentence in relation to matters of affray, possession of an offensive weapon and criminal damage to which he had also pleaded guilty.
11. The Applicant's criminal record from the age of 15 revealed a pattern of violent offending and non-compliance with court orders.
12. The Applicant has completed programme work in custody to address his risk and no further such interventions are recommended.

Request for Reconsideration

13. The application for reconsideration is dated 13 November 2020.
14. The grounds for seeking a reconsideration are as follows:
15. The Applicant complains that the parole process was procedurally unfair.
16. More specifically that the Panel did not receive important evidence from the Community Offender Manager ("COM") despite the hearing being adjourned and further extensions being granted in order for that information to be provided; and it is submitted that, if the information had been shared as directed, the Panel may not have reached the same conclusion.
17. It is also argued that the information which was provided did not justify the Panel's finding that a designated accommodation placement was not available.
18. It is submitted that the information that was provided by the COM did not meet the direction made on 21 September 2020 and that the Panel's decision was made in the absence of the risk management plan directed and without the information necessary to make an informed assessment of risk.



19. The Applicant also complains that the COM did not provide critical information about the occupiers (family members) of two addresses advanced by him as alternatives to designated accommodation.
20. Following my request for clarification the Applicant's solicitors confirmed in an email that it was also submitted that the Panel's decision was irrational, arguing that "*the matter was adjourned as the Panel stated they could not make an independent risk assessment without a written risk management plan even though one was verbally provided at the hearing. Despite adjournments and directions, we were still not provided with a risk management plan. We can only assume therefore that neither were the panel.*"
21. The email is dated 3 December 2020 and helpfully had attached to it a copy of an email from the COM of 1 October 2020.

Current parole review

22. The case was referred to the Parole Board in April 2019 when the Applicant was 27 years of age for it to consider whether it was appropriate to direct the Applicant's release.
23. The matter came before a Panel consisting of two experienced members of the Board for an oral hearing which, due to the Covid-19 restrictions, was conducted by video link on 17 September 2020.
24. Neither the COM nor the Prison Offender Manager ("POM") supported release, recommending instead a move to open conditions, a disposal which, given the nature of the sentence to which the Applicant is subject, the Panel was not asked, nor had the power, to consider.
25. The Applicant sought a direction for release and the Panel considered the dossier and heard oral evidence from the POM, the COM and the Applicant.
26. The Panel issued an adjournment decision on 21 September 2020 giving the primary reason as "Risk Management Plan: Incomplete/Unsatisfactory", and went on to amplify its reasons as follows:
"The panel was unable to complete the review because a confirmed risk management plan was not provided. Whilst oral evidence was provided about a proposed plan, the panel requires a confirmation in writing. The panel will complete its risk assessment when it considers the plan. This review will be concluded on the papers."
27. A direction was made for the filing of an "[Offender Manager] Report" by 1 October 2020 to contain the following information:
"A risk management plan with confirmed accommodation proposals and recommended licence conditions. The date that [designated accommodation] place will be available."
28. There then followed some weeks of email exchanges and the issuing of a SHRF on behalf of the Applicant before, on 5 November 2020, the Panel issued its decision refusing to direct the Applicant's release.



29. As what happened during the period between the issue of the adjournment notice and the decision letter forms the gravamen of the Applicant's case, I will examine this in detail in the "Discussion" section of my decision.

The Relevant Law

30. The panel correctly sets out in its decision letter dated 5 November 2020 the test for release.

Parole Board Rules 2019

31. 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)).

Irrationality

32. 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."

33. 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.
34. 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

35. 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.
36. 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.

Other

37. In the cases of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

The reply on behalf of the Secretary of State

38. The Secretary of State had no representations to make in response to this application for reconsideration.

Discussion

39. The adjournment notice was sent to the relevant parties under cover of an email dated 23 September 2020 by the Parole Board Case Manager ("CM") who confirmed: *"The panel will conclude the case on the papers following receipt of the directed report."*
40. On 1 October 2020 at 16:09 the COM sent the following email to all parties: *"An update risk management plan for [the Applicant] has been completed and countersigned. However, one of the proposed [designated accommodations] listed on the [risk management plan] have indicated that there is now no confirmed reopening date for their [designated accommodation] (because of COVID-19) whilst I am still awaiting a response (from email correspondences made on 25/09/2020 and 30/09/2020 respectively) regarding a reopening date and/or confirmed waiting time(s) for bed spaces at the other proposed [designated accommodation]. I have since been advised by management to liaise with [designated accommodations in region A] (in the following instance) regarding available bed spaces. However, I'm minded that any update from a [designated accommodation in region A] won't be verified until after the 01/10/2020 set by the Parole Board."*
41. It would appear from this email that a risk management plan ("RMP") had been prepared as directed and countersigned which included two proposed designated



accommodation placements and the COM was awaiting a response as to the availability of one of the designated accommodation locations and was also pursuing alternative placements in another location.

42. The Applicant's solicitors responded swiftly on the morning of 2 October 2020, acknowledging that the RMP was incomplete as regards a designated accommodation placement and agreeing to a short adjournment so that the Panel could have the necessary information before making its full risk assessment.
43. They were informed that a SHRF had to be issued which they did the same day, the Secretary of State raised no objections and the Panel Chair, equally promptly, directed that *"the deadline for the addendum report from the COM, including a risk management plan, is extended to 14/10/2020."*
44. The Parole Board CM distributed the completed SHRF by email on 5 October 2020 confirming *"The COM report deadline is extended to 14/10/2020."*
45. On 13 October 2020 the COM did not file an RMP but instead sent an email containing *"updated information on [designated accommodation] availability for [the Applicant] for the purposes of the Parole Board and [the Applicant's] legal team"*.
46. In summary, it was stated that:
 - i) The designated accommodation at one region was working at reduced capacity with a high number of referrals with the waiting time for a bed being in the region of 10-14 weeks but the earlier the referral was made the better; and
 - ii) The COM had made a referral via the Central Unit to three possible designated accommodations in another region (where the Applicant's risk would be better monitored prior to move-on) and he was to receive feedback within 10 working days of 9/10/20. One of the designated accommodations would have a minimum waiting time of three months but no information was provided about the position of the other two.
47. Accordingly, it was clear that at this point a number of possible placements in designated accommodation were being pursued.
48. This email was seen by the Panel Chair who responded to the CM: *"It seems that we probably need to wait another two weeks for things to be clarified. Could you please follow up if an update is not received from the COM by 02/11/2020?"*
49. On 20 October 2020 the CM therefore emailed the COM as follows: *"The panel has been sent your below email [that of 13/10/20] and they expect further update from you by COP 02/11/2020."*
50. The last communication from the COM is an email of 2 November 2020, the substance of which is: *"The checks I have received back have indicted the two proposed addresses are not known and neither addresses raised any disenable concerns."*



51. This email was forwarded to the Panel Chair by the CM the same day and relates to the addresses of the two family members proposed as alternatives to a placement in designated accommodation.
52. The panel issued its decision letter on 5 November 2020 having concluded the review on the papers. The Panel noted *"During the adjournment, the panel received emails from your offender manager regarding the attempts that were being made to find you [designated accommodation]."*
53. The Panel found as to the alternative addresses that *"it does not have any information about the nature of your relationships with the occupants of the addresses."*
54. As to the designated accommodation it found: *"Whilst referrals for an approved place have been made, a place is not available."*
55. Finally, the Panel *"considered that the risk management plan was not robust enough in view of your risks."*

Findings

56. The Panel considered the dossier, heard oral evidence and found that it could not complete the review because it did not have a confirmed, complete RMP which included the date when a bed at designated accommodation would be available and it therefore proposed to finalise the matter once it had this.
57. A RMP is, of course, central to issues of risk and its management and it is to be noted that the POM is recorded in the decision letter as being unable to comment on whether she thought that the Applicant's risks would be manageable in the community as she had not seen the RMP.
58. Although the COM says in his email of 1 October 2020 that an updated RMP had been prepared and countersigned, this was never sent to the Board. Nevertheless, following receipt of the 2 November 2020 email from the COM, the Panel decided to conclude the review on the papers on the basis of such further information as was available.
59. However, I find that the Panel was not in a position to complete its risk assessment nor should it have done so in the absence of this document and the information which it had adjourned in order to obtain.
60. It was also not in a position to find that the RMP was not robust enough to manage risk since it had found that the evidence concerning a RMP which it had available to it at the hearing was incomplete/unsatisfactory and, for that reason, it had directed the COM to file a completed one.
61. In addition, it was not, in my view, open to the Panel to find that a designated accommodation place was not available as the evidence contained in the emails from the COM did not point to such a conclusion or justify such a finding. Indeed, the email from the COM of 13 October 2020 kept open a number of possibilities



about which he was awaiting information. Quite properly, the Panel Chair allowed further time *"for things to be clarified"*. However, the very brief email from the COM of 2 November 2020 dealt solely with the family addresses and said nothing about progress or otherwise with a bed at designated accommodation.

62. The Panel would, of course, be particularly conscious of its obligation to conclude the review speedily and it could not allow further adjournments for an indefinite period while its directions were not being properly fulfilled.
63. Nevertheless, I find that, given that the Panel had made a specific requirement which had not been complied with, fairness required that, rather than proceed to conclude the review, the Panel should, at least, have given the Applicant, through his solicitor, the opportunity to make representations on the state of the evidence and as to how the Panel should now proceed.
64. Further, the Panel should have considered seeking clarification of the designated accommodation position through further specific directions with a tight timetable and/or reconvening the adjourned hearing in order that it might have the benefit of a complete RMP (as originally directed), the view of the POM on the RMP and so as to allow the Applicant (as per **Osborn**) to properly put his case and participate fully in the decision-making process at a resumed oral hearing. This would also have allowed the Panel, which felt that it did not have enough information about the Applicant's relationship with his family members, to fill this gap in its knowledge in relation to a possible licence address about which the COM was expressing no *"disenable [sic] concerns"*.
65. In short, I find that the Panel appears to have lost sight of the reasons why it adjourned the review in September 2020 and of the appropriate procedural options open to it and, also, that it was not in a position, either fairly or evidentially, to make the findings it did in relation to the inadequacy of an RMP which it had not received as directed nor as to the non-availability, as at 5 November 2020, of designated accommodation for the Applicant.

Decision

66. Accordingly, I do consider, applying the test as defined in case law, the decision of 5 November 2020 to be irrational and procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

Peter H.F. Jones
22 December 2020

