

[2020] PBRA 52

## Application for Reconsideration by Droogan

### Application

1. This is an application by Droogan (the Applicant) for reconsideration of a Parole Board Decision dated 11 March 2020 in which the Panel concluded that it was necessary for the protection of the public that the Applicant should remain in custody. The Panel did not direct his release nor recommend a move to open conditions.
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 of 11 March 2020, the application for reconsideration of 23 March 2020 and the dossier.

### Background

4. On 20 December 2011, the Applicant received a sentence of Imprisonment for Public Protection and the Judge fixed a minimum term of four years 56 days after taking account of time spent on remand; the sentence expiry date was 14 February 2016.
5. The index offence was a Section 18 wounding with intent to do grievous bodily harm, which was described by the sentencing judge as a wholly unprovoked and sustained attack.
6. At the time of the offence, the Applicant was subject to an Extended Sentence for Public Protection having been convicted of a Section 47 Assault involving the use of a knife for which the Applicant received a three-year sentence with a two-year licence.
7. At the time of the index offence, the Applicant had relapsed into undisclosed drug misuse, and accrued drug debts with him carrying a weapon for his own protection.
8. The Applicant was first released on licence in July 2016 and he was recalled on 23 September 2016 after becoming involved in a fight at his Designated Accommodation. The Applicant was suspected of misusing prescribed medication and a weapon was found under his mattress.



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9. The Applicant was then released for second time on 4 June 2018, but he was recalled on 4 June 2019. On the previous day, he had attended a coordinated approach to help him resettle in the community but presented as being under the influence of an unknown substance. When he was drug tested, the result was positive. The panel was told that the Applicant accepts the recall was appropriate and the panel agreed with that conclusion.
10. The Panel noted that the Applicant was assessed as posing a high risk of causing serious harm to the public, to children and known adults, victims of his offending and previous partners if he was to be released in the community. A probation service assessment report indicated the Applicant has a high risk of general offending and a medium risk of committing further offences of violence. The panel concluded having heard the evidence and having seen the Applicant give evidence that these were realistic assessments of risk in his case.
11. The Panel noted that *"there was general support from the professional witnesses for [the Applicant's] release on licence"*, but that in the light of the evidence, the panel *"was left with the impression of [the Applicant's] limited appreciation of [his] risks in relationships and how [he] manages [his] emotions"*. It also concluded that *"the evidence would appear to confirm [the Applicant's] solicitor's submission that [the Applicant] will struggle with [using illegal] drugs for the rest of [his] life."*
12. In the circumstances, the Panel concluded that it was necessary for the protection of the public that the Applicant remained in prison and it did not direct the Applicant's release.
13. There was no support from the professionals to move the Applicant to open conditions. The Panel did not recommend that the Applicant should move to open conditions.

## Request for Reconsideration

14. The application for reconsideration is dated 23 March 2020.
15. The grounds for seeking a reconsideration are as follows:
  - (a) The decision was irrational as the Panel ought to have undertaken, but failed to undertake, further inquiries into the circumstances of the allegations of violence, specifically to the allegation of being violent to a partner repeatedly referred to in the decision letter.
  - (b) There was procedural unfairness in relation to the allegation of the risk of serious harm and being violent to a partner and its failure to follow the Parole Board's Guidance on Allegations; and that
  - (c) There was procedural unfairness in relation to the balancing of evidence relating to the Applicant's progress since recall and the recommendations of the professionals as opposed to the allegations of being violent to a partner.



## The Relevant Law

16. The Panel correctly sets out in its decision letter dated 11 March 2020 the test for release and a move to open conditions.

### *Parole Board Rules 2019*

17. 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*

18. 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."*

19. 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 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.

20. 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*

21. 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.

22. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:



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- (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.

23. 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 uncontested 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.

24. 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.*"

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

25. The Secretary of State has not made any submissions in response.

### Discussion

26. A critical issue in determining this challenge is to ascertain the reasoning of the Panel in the decision under challenge bearing in mind that the Board is the specified decision maker.

27. The Panel in this case had the advantage of hearing the evidence, including that of the Applicant. Its task was to focus on the risk then posed by the Applicant if he were to be released.

28. The panel made the crucial findings that the Applicant's proposals for release were on licence were broadly what had been put forward to the last panel prior to the Applicant's release. This release had been the subject of the recall now



accepted by the Applicant as correct, and after a year during which the Applicant had significantly breached those plans, the panel did not have sufficient evidence that these breaches would not occur again if the Applicant was now released.

29. The panel explained that further work had to be done to reduce the risk posed by the Applicant before he could be safely released.
30. This reasoning was open to the Panel as the designated factfinders and it was not obliged to make findings on every disputed issue. Its major task was to determine whether it was necessary for the protection of the public that he remained in prison. The Panel had the advantage of seeing and hearing the Applicant's evidence. That is what the Panel did with the benefit of an analysis of the evidence, including the evidence of the Applicant, which it considered relevant, such as the sensible admission by the Applicant's Solicitor that the Applicant will struggle with drugs for the rest of his life. Above all, the Panel was entitled to draw its own conclusions on the risk posed by the Applicant, which is what it did, and it was not required to consider every issue.
31. It is necessary to stress as explained in paragraph 24 above, and as was explained by Lord Bingham, the Panel had to explain the considerations which influenced its decision and that was done in this case. This is what the Panel did by predicting how the Applicant would behave if released, taking account of his use of illegal drugs and prescription medication and his attitudes which emerged from his oral evidence.
32. The case for reconsideration on grounds of irrationality falls well short of the high threshold for challenging the decision of the Panel on this ground.
33. The challenge to the Panel's decision based on procedural unfairness cannot succeed as it carried out a careful review of the evidence attaching importance to its conclusions on the risks posed by the Applicant on release. The Panel bore in mind the Applicant's limited appreciation of the risks he poses in the light of the statement by the Applicant's Solicitors that the Applicant "*will struggle with drugs for the rest of [his] life*".
34. The Panel was not obliged to consider every issue as long as it reached a conclusion based on findings open to it as the designated fact finder. That is what the Panel did.

## Decision

35. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair or flawed. Accordingly, the application for reconsideration is refused.



**Stephen Silber**  
**23 April 2020**

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