

[2020] PBRA 63

Application for Reconsideration by Livsey

Application

1. This is an Application by Livsey (the Applicant) for the reconsideration of a decision by a four member Panel, including two psychology specialist members, not to direct his release, following an oral hearing on 24 February 2020.
2. I have considered this application on the papers. These consist of the dossier, the provisional decision of the Panel dated 26 February 2020, the application for reconsideration dated 8 April 2020, further particulars of the application in response to directions dated 17 April 2020 from the Reconsideration Assessment Panel and responses from the Secretary of State (by e-mails dated 21 April 2020).

Background

3. On 19 September 2013, the Applicant received an extended determinate sentence totalling ten years, consisting of a custodial period of six years and an Extension Period of four years for offences of aggravated burglary, criminal damage and possession of a prohibited weapon. His sentence expiry date is 9 June 2023.
4. He was automatically released, on licence, on 9 June 2017, but recalled on 2 July 2019 for alleged breaches of his licence which required him to be of good behaviour and not to behave in such a way which undermined the licence period. The alleged breaches involved threats to an ex-partner, to his Landlord and to Probation, damage to property and return to alcohol use, accompanied by a refusal to work with Probation to seek support and to consider alternative plans, in all, rendering him unmanageable in the community.

Request for Reconsideration

5. The application for reconsideration, submitted by the Applicant's Legal Representative consists of a five 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 seven specific aspects of the Panel's reasons where it was submitted that insufficient weight was given to factual elements of the evidence, evidence as to risk reduction, or positive factors of the evidence as to work carried out, and the availability of risk reduction programmes in the community. The specific aspects highlighted are:



- (i) Issues as to personality traits;
- (ii) Risk of serious harm within the context of intimate partner relationships;
- (iii) Concerns as to mental wellbeing;
- (iv) Lack of understanding of triggers to offending behaviour and risk factors;
- (v) Deflection of blame for index offence and domestic behaviours;
- (vi) Lack of full understanding of offending behaviour on his victim; and
- (vii) That emotional wellbeing could deteriorate rapidly and difficulty in identifying warning signs.

Procedural Unfairness

- (b) That the Panel *"were somewhat hostile within their questioning of [the Applicant] and the witnesses. As such the hearing appears to have taken place in something of an oppressive environment."*
- (c) That the hearing took place over around six hours *"which is somewhat unusual and extremely intensive."*
- (d) That *"all of these factors will have undoubtedly had a significant impact upon our client's ability to give full and detailed evidence."*
- (e) In response to the Reconsideration Panel's invitation for a supplemental submission, the Applicant's Solicitors lodged an e-mail submission, dated 27 April 2020, in the following terms:

"The OS [Offender Supervisor] has advised that she supports [the Applicant's] application for reconsideration and that in respect of her evidence, she felt that the panel were officious in their manner of questioning. She also indicated that the body language and facial expressions of one of the panel members were negative when she was giving her evidence and she found this uncomfortable and off-putting. ... to the extent that she fed this back to her manager and consideration was given as to whether to submit a formal complaint to the Board.

In terms of the breaks allowed in the hearing she states that the lunch break was in fact a 10 minute break at the direction of the panel, which then turned into a longer break to allow the panel time to eat lunch ... The witnesses were not advised that the break had been extended and so this left no time for them to access refreshments.

The OS points out that she is an experienced officer, has attended numerous hearings, and has been challenged on her evidence by previous panels, however she felt that this panel were more aggressive in their approach than any panel she had encountered previously.

[The Applicant] states that he felt the panel were combative in their responses to some of evidence, and that particularly when the OM and OS were giving evidence of positive examples of conduct or progress, the panel



counteracted these examples with negative inferences and he felt that this affected his evidence”.

6. The Secretary of State offered no representations in response to the application or to the Reconsideration Assessment Panel’s directions.

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 re-release. At the oral hearing, the Applicant, who gave evidence in person, was represented by a representative from his Solicitors and evidence was given by his Offender Supervisor, Offender Manager and a Prison Psychologist.
8. The Panel recorded that, despite disagreements with aspects of evidence as to his behaviour during release on licence and the circumstances of his recall, the Applicant accepted that his recall was necessary. It further recorded that the initial recommendations of all professionals, Prison Psychologist, Offender Supervisor and Offender Manager was for re-release. The Panel, however, identified specific limitations on the basis of those recommendations and outlined that, during their evidence, the Offender Manager referred to wavering in relation to her recommendation, the Offender Supervisor accepted that her assessment of imminence of serious harm was specifically dependant on conditions relating to avoidance of alcohol and difficult situations and to a maintenance of mental health stability, and that the Prison Psychologist acknowledged limitations on her assessment and diagnosis.
9. The Panel undertook a detailed examination of evidence, specifically acknowledging that the Applicant had provided open and honest engagement during the oral hearing, had evidenced a period of improved mental health stability and an improvement in his understanding of the views of others. It concluded, however, following consideration of each of the aspects identified separately in the headings listed in the application for reconsideration, that the risk management plan could not be considered robust and effective and that the risk of serious harm was not manageable in the community. Accordingly, no direction for release would be made.

The Relevant Law

10. 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.
11. 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.

12. 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

13. Irrationality:

In my judgment, the decision to approve the recall and to refuse release cannot be said, in any way, to meet the test of irrationality. The Panel, which included two expert psychology members, having clearly considered, with care, the documents in the dossier and the oral evidence gave a clear and reasoned decision:

- (a) In approving the recall, it made findings of fact as to relevant matters, which it was clearly entitled to do and, noting that the Applicant had accepted that his recall was necessary, adopted the correct test for that recall.
- (b) In dealing with release, it placed emphasis on specific factors such as lack of insight, inability to identify risk factors and failure to complete core risk reduction work making the management of the risks of serious harm unmanageable in the community. It set out the need for specific further necessary work and continued cooperation with mental health as well as further assessment and treatment to be undertaken.
- (c) The Reconsideration Assessment Panel notes that the submissions as to particular issues relate to suggestions of failure to attach appropriate weight, to reasons being "*somewhat contradictory*", to evidence "*tending to suggest*" and to evidence being "*somewhat disregarded*". The purpose of reconsideration is not a re-examination of evidence and I am satisfied that each of the separate listed findings followed a proper evaluation of evidence.

14. Procedural Unfairness:

I have considered both the original application and the supplementary submissions with great care. I have further considered the guidance of the Parole Board as to the conduct of oral hearings which, in general terms, requires the panel to treat witnesses with respect and emphasises the need for witnesses, particularly the prisoner, to be at ease on the basis that the crucial consideration is the need to hear all material evidence from witnesses who are comfortable enough to give it.



This requirement remains subject to the fact that the proceedings do not take place under the constraints of formal procedures and that they necessarily contain elements of both adversarial and inquisitorial practices to enable the panel, acting, in effect, as an independent arbiter, to reach conclusions as to risk, a role made more difficult when, as is now customarily the case, the Secretary of State is unrepresented.

In this case:

- (a) Treatment of witnesses. The Panel had clearly taken and considered a substantial amount of evidence. In proceedings where the reasoning of professional witnesses, in particular, is in question, it is clearly the duty of the panel to scrutinise effectively, a process which is necessary, albeit that others may consider it over-robust. It is suggested that the Panel was hostile and the atmosphere oppressive but there is no suggestion that the Legal Representative, at the hearing, raised any concerns as to the nature or form of the questioning or that the evidence of the Applicant, who was commended by the Panel as being open and honest, was affected. No formal complaint has been lodged by any of the professional witnesses.
- (b) Complaint as to the length of the proceedings and that insufficient time was given during the lunch break. In general terms, it is good practice, where there is a substantial volume of evidence to be considered, for there to be breaks in the proceedings and, particularly, for there to be a realistic lunch break. In this case, the Applicant was professionally represented and, in neither the original nor the supplementary submissions, is it suggested that any issue was raised as to the need for specific breaks or as to the length of the lunch break.

In my judgment, taken at their highest, the complaints, in so far as relevant to the fairness of the proceedings and the decision, are vague and lacking in detail and I find that the conduct of these proceedings cannot be said to have been procedurally unfair.

Decision

15. 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
4 May 2020

