

[2020] PBRA 94

Application for Reconsideration by Port

Application

1. This is an application by Port (the Applicant) for the reconsideration of a decision of an Oral Hearing Panel of the Parole Board (OHP) dated the 15 June 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. This is an eligible case.
3. I have considered the application on the papers. These are the application for reconsideration prepared by the Applicant's solicitors, supporting documents, the dossier and the Decision Letter.

Background

4. The Applicant is now 41 years of age. He has a significant offending history which has included the use of violence and the carrying of weapons. He is serving a sentence of Imprisonment for Public Protection imposed on 26 March 2007 following his plea of guilty to a single offence of wounding with intent to cause grievous bodily harm (the index offence) which took place in November 2006. The minimum term of imprisonment imposed by the judge was three and a half years. The tariff expiry date was 26 September 2010. The Applicant was released on 15 August 2012 and recalled to prison on 15 May 2019.
5. The background to the index offence was that the Applicant had borne a grudge against the victim for over three years. Both the Applicant and the victim attended a family funeral in 2006. The Applicant approached the victim from behind and attacked him with a knife.
6. The OHP noted that a feature of the Applicant's violent offending was that it had been committed against those known to him and had frequently involved the taking of revenge or the settling of a grudge. The OHP identified the Applicant's risk factors, that is to say the things that make it more likely that he would re-offend, as including vengeful thinking, grudge holding and anger management.
7. The Applicant was released from prison by the Parole Board on 15 August 2012. He made progress in the community but also relapsed into drug use. He was arrested in 2014 and in 2018 but no further action was taken against him on



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either occasion. A third more serious incident occurred in May 2019 which led to his recall some seven years after his release. While not leading to any criminal proceedings against the Applicant it was necessarily carefully examined by the OHP. The OHP was unable to make a finding of fact about that incident but it did find that the facts demonstrated some of the Applicant's risk factors, in particular, poor thinking skills, grievance thinking and rumination as well as demonstrating an apparent willingness to carry and use weapons.

8. During the oral hearing the OHP explored with the Applicant his current feelings towards both the victim of the index offence and the alleged victim in the recall incident.
9. Before the oral hearing could take place the COVID-19 outbreak happened, and the prison service ceased all face to face hearings. As there was likely to be a substantial delay before face to face parole hearings could recommence, the Parole Board issued guidance as to how members should address the situation. Panel chairs were requested to review any outstanding cases that had been directed to an oral hearing to consider whether an alternative method of disposal could be adopted. The alternatives included a hearing by telephone or by video link but in either case only if such a hearing could be fair.
10. As far as the Applicant's case was concerned, it was directed on 11 May 2020 that it could fairly and effectively be conducted by telephone. Neither the Applicant nor the Secretary of State raised any objection neither then nor at any stage thereafter.

Request for Reconsideration

11. The application for reconsideration is set out in an email dated 29 June 2020. I am bound to say (respectfully) that it has not been entirely easy to follow some of what is being submitted on behalf of the Applicant. The grounds for seeking a reconsideration appear to be as follows:
 - (a) The OHP gave insufficient weight to the fact that the Applicant had been in the community and offence free for 7 years prior to his recall;
 - (b) Because there had been no criminal proceedings brought as a result of the recall incident there had been no examination of the credibility of the alleged victim;
 - (c) The possibility of a move to open conditions was not fully explored by the OHP; and
 - (d) The panel chair was at times difficult to hear over the telephone link, with the result that there was a breakdown in understanding and communication such that a fair risk assessment could not be made.

The Relevant Law

Parole Board Rules 2019

12. 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)).
13. 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

14. 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."

15. 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.
16. 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

17. 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.
18. 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.

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

Other

20. The test to be applied when considering the question of a transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)**, **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:

- (a) the progress of the prisoner in addressing and reducing their risk;
- (b) the likeliness of the prisoner to comply with conditions of temporary release
- (c) the likeliness of the prisoner absconding; and
- (d) the benefit the prisoner is likely to derive from open conditions.

The reply on behalf of the Secretary of State

21. No representations have been made on behalf of the Secretary of State in response to this application.

Discussion

22. Before dealing with each of the grounds put forward on behalf of the Applicant, I note that the decision of the OHP was contrary to the recommendations of the professional witnesses. The decision in the case of **R (ex parte Wells) v The Parole Board** contained helpful guidance on deciding whether a decision made by a panel in the face of evidence from professional witnesses can be regarded as irrational. It is a decision I am obliged to follow.
23. It is suggested in **Wells** that rather than ask the simple question "*was the decision being considered irrational*", a better approach is to test a panel's ultimate conclusions against the evidence before it and ask whether the conclusions reached by a panel can be safely justified on the basis of that evidence, while giving due deference to the panel's experience and expertise.
24. Panels of the Board are not obliged to adopt the evidence, opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessment and to evaluate the likely effectiveness of any risk management plan proposed.
25. If a panel is going to depart from the recommendations of an experienced professional, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions.

26. With this guidance in mind I turn to consider the grounds, as I understand them to be, put forward on the Applicant's behalf:

(a) *The OHP gave insufficient weight to the fact that the Applicant had been in the community for 7 years.*

(i) Taking as its starting point an earlier review in 2012 which resulted in the Applicant's release, the OHP stressed several positive aspects of the Applicant's efforts to make progress while in the community. Necessarily, it referred to the two matters in 2014 and 2018 which led to his arrest but did not result in any criminal proceedings, and also to his struggle with drugs. It moved on to consider in considerable detail the evidence it heard regarding the incident that led to the Applicant's recall.

(ii) In my judgment, the OHP properly and fairly gave due weight to the fact that the Applicant had been in the community for a long time and had made some progress. Notwithstanding, they reached the conclusion that the recall incident was particularly significant, amounting in their view to conduct, which in a number of important respects paralleled, or mirrored, the index offence. This was a conclusion that the OHP were entitled to reach on the evidence they heard. Having reached the conclusion that the circumstances that led to the recall were relevant, the OHP went on to decide that at the very least, they showed that the Applicant's risk factors of poor thinking skills, grievance thinking and rumination were again evident.

(b) *Because there had been no conviction of the Applicant following the recall incident there had been no examination of the credibility of the alleged victim.*

(i) Inevitably, in respect of this second ground, there will be some overlap with my response to the first ground. The OHP had before it a signed witness statement taken by the police from the alleged victim of the recall incident and had some information regarding that person's background and circumstances. It heard detailed evidence from the Applicant regarding the incident itself and considered in some detail his conduct thereafter. While expressing concerns about the credibility of the Applicant's account to them, the OHP did not make a finding of fact against the Applicant.

(ii) Having reached that point the OHP went on to find, as they were entitled to do, that it regarded the events that led to the recall important and relevant to the issue of future risk in that they demonstrated the presence of some of the Applicant's risk factors. In so doing the OHP followed Parole Board guidance on how to deal with allegations that have been made but which have not resulted in a criminal conviction. Panels faced with information regarding an allegation have to assess its relevance and weight and either choose to disregard it; or make a finding of fact; or make an assessment of the allegation and decide whether and how to take it into account as part

of their review. The Decision Letter in my judgment clearly and carefully explained how the circumstances surrounding the second recall impacted upon their final conclusions.

(c) *The possibility of a move to open conditions was not adequately explored.*

- (i) The OHP found that until the Applicant had undertaken further work to address his risk factors, the proposed risk management plan would not safely manage his risk in the community. It then went on specifically to consider whether it could nonetheless recommend a progression to open conditions.
- (ii) It explained carefully and in a balanced way why in its opinion it was not able to recommend such a progression. It follows that in my judgment, the issue of a progressive move to open conditions was obviously carefully considered.
- (iii) I am bound to make the observation that, in any event, the reconsideration mechanism does not apply to decisions to recommend or not to recommend a move to open conditions.

(d) *The conduct of the hearing by telephone link resulted in a breakdown in communication leading to an unfair result.*

- (i) The complaint here is that the OHP chair was "*difficult to hear at various points*" which led to what is described as a "*breakdown in communication*" which in turn resulted in "*an unfair result*".
- (ii) I have caused enquiries to be made of the panel chair who has responded by email. Unsurprisingly, the chair cannot now recall all the details of the hearing but has taken the trouble to listen to the recording made of the hearing. I note the panel chair's comments and in particular the following:
 - (a) *At the start of the proceedings the chair requested all attendees to draw attention immediately to any issue over sound quality. Later she invited immediate interruption if anyone could not hear.*
 - (b) *On a few occasions participants said they could not hear a specific question. The question was repeated until the chair was confident it had been heard.*
 - (c) *During the Applicant's evidence he said he could not hear a question from the chair which was repeated and he responded clearly.*
 - (d) *As soon as any concern about sound quality was raised, the hearing was paused by the chair, the issue was addressed and/or the question was repeated to ensure it was clearly heard. The chair has expressed complete confidence that any issues that were raised in this regard were addressed.*
 - (e) *No comment nor complaint was made by the Applicant's legal representative regarding sound quality during final submissions to the OHP.*
- (iii) Since the termination of face to face oral hearings in prisons as a result of the Covid-19 outbreak, I understand that to date over 1400

telephone hearings have been conducted nationwide. This and other measures have enabled what would otherwise have been unacceptable delays in prisoner's hearings to be avoided. Inevitably, difficulties will occur during a hearing conducted remotely. All participants are alive to this and each will and have played their part in overcoming them appropriately. One of the considerable advantages of the routine recording of oral hearings is that, as has been clearly demonstrated in this case, complaints can be effectively investigated.

(iv) The submission made on behalf of the Applicant is that during the hearing communication broke down and an unfair decision was the result. There is no evidence before me to support either suggestion.

(v) On the contrary, I am entirely satisfied that the Applicant's hearing was conducted with consummate care and fairness.

27. The Decision Letter in this case was in my judgment detailed, comprehensive, balanced and fair.

28. I have come to the clear conclusion that there are no grounds for interfering with any of the OHP's conclusions. It was a decision that was neither irrational nor procedurally unfair.

Decision

29. The application for reconsideration is therefore dismissed.

Michael Topolski QC
17 July 2020