

[2021] PBRA 124

Application for Reconsideration by Deadman

The Application

1. This is an application by Deadman (the Applicant) for reconsideration of a decision not to direct his release made by an oral hearing panel (the Panel) dated 26 July 2021, following a hearing on 19 July 2021 conducted via video link.
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 which comprised of the application for reconsideration, the grounds in support prepared by solicitors on behalf of the Applicant and the dossier consisting of 373 pages.

The Background

4. To provide some context for the decision that faced the Panel it is necessary to set out some of the relevant background in a little detail. The Applicant who is now 39 years of age was sentenced in January 2008, having pleaded guilty to an offence of robbery of a bookmaker's which was committed in October 2007 when he was 25 years old (the index offence). He was unarmed but threatened the owner of the shop with violence before making off with a substantial amount of cash. The offence was linked to the Applicant's misuse of drugs and alcohol, instability in his relationship and accrued drug debts. At the point of being sentenced the Applicant had two previous convictions for robbery, the second of which had been committed in November 2000 and involved a meat cleaver that was used to injure a shopkeeper. In respect of the index offence the judge imposed an indeterminate sentence of imprisonment for public protection and specified that the minimum term that the Applicant would have to serve before release could be considered was one of two years four months. The Tariff Expiry Date is recorded as being 25 December 2008.
5. The Applicant's progress through his sentence was described by the Panel as being "poor". His first period in open conditions resulted in him absconding in 2010. He was eventually convicted of escape from lawful custody and was given a determinate prison sentence. A subsequent period in open conditions ended after

he had used threatening behaviour. He was convicted in July 2017 of assault on a member of staff.

6. The Applicant did to his credit complete offending behaviour work and was moved to a Progression Unit from which he was de-selected after some poor behaviour which included participation in a rooftop protest. In January 2020 a Parole Board panel directed his release and he left prison at the beginning of March 2020 to take up a residential placement as part of his resettlement plan. This move coincided with the implementation of Covid – 19 restrictions and after initial engagement the restrictions began to impact upon his supervision and he began to test boundaries. Just 22 days after release the Applicant was arrested for burglary and assault on two emergency workers. Further allegations of significant rule breaking at his residential placement emerged which led to a decision being made to recall him to prison. He was at the time, and remained for several months, unlawfully at large until his arrest in September 2020. In November 2020 the Applicant was convicted of the two assaults upon the emergency workers and an offence of criminal damage which resulted in the imposition of a 10 month prison sentence.
7. The Panel recorded that following the Applicant's return to custody in late 2020 there was on his part a mixed response to compliance and supervision followed by a period of engagement and positive improvement which led to there being professional support for re-release into the community. The identification of the Applicant's risk factors have remained constant and included substance misuse; poor consequential thinking; a willingness to threaten and use violence; peer influence; criminal attitudes and lifestyle; relationships and a poor attitude to authority.

The Application: Grounds

8. There are three Grounds put forward which are set out in undated written submissions prepared by the Applicant's representatives. Inevitably there is some overlap and I will endeavour to avoid undue repetition. It is submitted:

(i) In Ground 1 that the Panel failed to take relevant matters into account.

(ii) In Ground 2 that the Panel took into account irrelevant matters.

(iii) In Ground 3 that the Panel failed to provide sufficient reasons to explain why the recommendations of the professional witnesses were not followed.

The Relevant Law

Parole Board Rules 2019

9. 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

10. 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."

11. 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.

12. The application of this test has been confirmed in previous decisions on applications for reconsideration under Rule 28. For example see **Preston [2019] PBRA 1**.

The reply on behalf of the Secretary of State

13. PPCS on behalf of the Secretary of State have indicated that they do not wish to make any representations in response to this application.

The Application: Discussion and Determination

14. Before dealing with the Grounds in some detail there is a matter that I should address. By way of a preamble the application draws my attention to the proposition that a mistake of fact can be a ground for seeking a reconsideration of a decision of the Parole Board. There is no doubt that that is the case. The submission appears to be that the decision not to release the Applicant arose because the Panel made material mistakes of fact when accepting some evidence and rejecting other evidence. That is not in my judgment the same thing as making a mistake of fact. I have approached this application on the basis that the real challenge made on behalf of the Applicant is that the Panel failed to take into account relevant matters (Ground 1), took into account matters that were irrelevant (Ground 2) and failed to provide adequate and /or sufficient reasons for their decision (Ground 3). In my judgment, mistakes of fact do not arise. Even if I am wrong about that then the position of the Applicant is nonetheless fully protected by my considering the detail of the challenge that is put forward in support of each ground.

Ground 1.

15. This Ground focuses upon the submission that the Panel failed to take certain relevant matters into account.

16. It is submitted that the Panel failed to consider the possibility that such offending behaviour work that the Applicant was required to do could have been done in the community. It is also submitted that the Panel failed to attach proper weight to the evidence that the Applicant's risk could be managed in the community.
17. The Panel noted and recorded the close link between the Applicant's offending and drug and alcohol misuse. It carefully examined his progress through his sentence. It balanced his custodial behaviour against his engagement and progression. The evidence from a professional witness was that a particularly important intervention could in fact be completed in the community as neither that programme nor any other (no doubt due to Covid restrictions) was being run at the prison where the Applicant was held.
18. In analysing the manageability of the Applicant's risk in the future, the Panel noted that the evidence was that he posed a high risk of serious harm in the community but that while he was able to remain abstinent from drugs that risk was lower, becoming imminent at the point of any relapse.
19. As for the submission that the Panel failed to consider the possibility of offending behaviour work being completed within proposed specialist accommodation where the Applicant could access psychologists for support, the Panel clearly heard and considered a good deal of evidence on that issue.
20. I find that there is no basis for the assertion that the panel failed to take relevant matters into account. Neither am I satisfied that the Panel failed to attach proper weight to the evidence that in the opinion of the professional witnesses the Applicant's risk could be managed in the community.

Ground 2.

21. This Ground focuses upon the submission that the Panel took irrelevant matters into account.
22. It is submitted that the Panel were not entitled to reach the conclusion that the Applicant's partner was a protective factor in his life in the light of evidence from a professional witness that in that witness' opinion his partner was a supportive factor.
23. Panels of the Board are wholly independent and are not obliged to adopt the opinions or recommendations of professional witnesses. A panel's duty is clear, and it is to make its own risk assessment and to evaluate the likely effectiveness of any risk management plan. That will require a panel to test and assess the evidence and decide what evidence they accept and what evidence they reject.

24. The Applicant's submission in support of this ground comes very close to suggesting that the Panel were simply not entitled to reach the conclusion they did reach on this aspect of the case. Indeed, it is submitted in terms that in reaching their conclusion the panel deviated from the evidence of the professional witness. In my judgment this submission fails to take into account the role and duties of a Parole Board panel as I have summarised them in paragraph 23 above.
25. In further support of this ground, the Panel is criticised for observing that the Applicant would need to be proactive in seeking employment and other accommodation when the time came for him to move on from his residential placement. The submission appears to be that there was no evidence that the Applicant would be unwilling to search himself for employment and accommodation. As I read the decision and the case as a whole, in light of the Applicant's history regarding compliance and co-operation it was in my judgment within the Panel's remit to express real doubts about the Applicant's ability and willingness to act proactively and effectively when in the community.
26. I am unable to accept that the Panel in reaching its decision can be demonstrated to have taken any irrelevant matters into account.
27. As for the complaint that inadequate and insufficient reasons were provided, this is also addressed in Ground 3, but for present purposes I find that the opposite is the case. The Panel provided a specific reason for the view it took of the potential influence of the Applicant's partner by reference to her conduct during the several months when the Applicant was unlawfully at large. In my judgment, that view was evidence based, sufficiently explained and one which the Panel was entitled to reach.

Ground 3.

28. This ground focuses on the submission that the Panel failed to adequately or sufficiently provide reasons for its decision not to follow the recommendations of the professional witnesses to release.
29. In setting out its conclusions the Panel began by observing that the index offence was consistent with the Applicant's criminal history. It went on to record, as I have already mentioned, that his progress through the sentence had been poor; furthermore that he failed in open conditions; that he escaped from custody and committed further offences; that his partner assisted him to avoid capture while unlawfully at large; that his releases into the community were short lived and that his recall was in all the circumstances appropriate.
30. The Panel heard and recorded the positive evidence from the Applicant himself about the work he had done during his sentence and the skills and benefits he had

gained from that work. Importantly, it heard from him on his relapse prevention work and his relationship with his family and his hopes for the future with his partner. He also addressed in his own evidence his issues with the accommodation where he had been placed explained why he decided to leave that accommodation in breach of his licence conditions and his current attitude towards drugs and drug use.

31. With all of that evidence in mind the Panel went on to examine and explain its conclusions regarding the manageability of the Applicant's risk in the community. It is submitted on the Applicant's behalf that the decision provides no clear nor sufficient reasons why his risk could not be managed in the community with the support of the risk management plan. I am unable to accept that submission on a reading of the decision as a whole. The decision notes that the Applicant's mental health did suffer at times in custody and that to his credit he has with help made progress in that regard. Against that, it is observed that as recently as June 2021 there had been negative incidents. The Panel indicated that it accepted the professionals' evidence that the Applicant had further work to do and had reached the conclusion that there was core risk reduction work to be done which in its judgment should be completed in prison prior to release. It went on to find (as I have already mentioned) that the Applicant's relationship with his family had not been wholly protective, largely because of the part played by his partner in assisting him to remain unlawfully at large.

32. The Panel addressed the risk management plan and while accepting its provision for increased oversight and support it noted that in its expert judgment there was a lack of evidence that the Applicant had developed sufficient or adequate strategies for avoiding the negative influence of others.

33. I do not accept that the Panel has failed to provide sufficient or adequate reasons for its decision not to release the Applicant.

Giving Reasons

34. The importance of giving adequate reasons in decisions made by the Parole Board has been made clear in two High Court cases both of which contain helpful guidance which I am bound to follow on the correct approach where a panel decides either to accept or reject evidence presented to it.

35. In **Wells [2019] EWHC 2710 (Admin)** it is suggested that rather than ask "*was the decision being considered irrational*" the better approach is to test the decision maker's ultimate conclusions against all the evidence received and ask whether the conclusions reached can be safely justified on the basis of that evidence while giving due deference to the panel's experience and expertise.

36. Once that stage has been reached, following the guidance provided by cases such as **Wells** and **Stokes [2020] EWHC 1885 (Admin)** a panel should explain its reasons whether or not they are going to follow or depart from the recommendations of professional witnesses.
37. The giving of reasons by a decision maker is "*One of the fundamentals of good administration*" (**Breen v Amalgamated Engineering Union [1971] 2 QB 175**). When reasons are provided, they may indicate that a decision maker has made an error or failed to take a relevant factor into account; hence their importance. As I understand the principles of public law engaged in deciding this application, an absence of reasons does not automatically give rise to an inference that the decision maker has no good reason for the decision. Neither can it be necessary for every factor to be dealt with explicitly for the reasoning to be legally adequate in public law.
38. The way in which a panel fulfils its duty to give reasons will inevitably vary depending upon the facts and circumstances revealed by the evidence in any particular case. For example, if a panel is intending to reject the unanimous evidence of professional witnesses then detailed reasons will be required. If on the other hand a panel is accepting the evidence of one, or more than one professional witness but at the same time not accepting the evidence of another or others, then again some reasons will be required.

Conclusions

39. The Panel in this case had in essence two questions to resolve. First, did the Applicant need to remain in prison to complete work aimed at reducing his risk or could that risk be safely managed in the community. In my judgment, the Panel in a thorough and fair minded decision set out and carefully weighed the evidence and decided against release.
40. I am not required to decide whether I or any other panel might have reached the same or a different conclusion. I am required to decide whether I am satisfied that the conclusion that was reached by the Panel was justified by the evidence and whether that conclusion and the reasons for reaching it were adequately and sufficiently explained.
41. I am satisfied first that the conclusion reached by the Panel was justified on the totality of the evidence, and secondly, that the decision itself satisfies the public law duty to provide evidence based reasons that in my judgment adequately and sufficiently explain the conclusion reached.

Decision

42. For all the reasons I have given and set out above I do not consider that the decision was irrational.

43. The application for reconsideration is refused.

Michael Topolski QC
19 August 2021