

[2021] PBRA 137

## Application for Reconsideration by Zahid

### Application

1. This is an application by solicitors acting on behalf of Zahid (the Applicant) for Reconsideration of a decision dated 24 of August 2021 which followed an oral hearing on 13 August 2021. The outcome of the decision was not to direct release.
2. Rule 28 (1) of the Parole Board Rules provides that applications for Reconsideration may be made in eligible cases either on the basis of (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 dossier consisting of 622 pages, the application for Reconsideration and the decision letter.

### Background

4. The Applicant is serving an indeterminate sentence for public protection which was imposed on 5 November 2009. His tariff expired on 13 August 2012.
5. The offences were four robberies. The robberies were committed against individuals at knifepoint and were pre-planned.
6. At the time of sentence, the Applicant was 27 years old. He is now aged 39.

### Applicant's representations

7. The application for Reconsideration is dated 13 September 2021.
8. The grounds for seeking Reconsideration are that the decision was irrational because:
  - a. *'On two previous occasions panels of the Board had assessed that all core risk reduction work had been completed yet now it was said that violence work amounted to core risk reduction work';*
  - b. The panel relied upon behavioural incidents relating to aggression which did not amount to a risk of serious harm; and
  - c. The last proven act of violence was over two years before the panel hearing.

### The Secretary of State's representations

9. The Secretary of State made no representations in response to the application.

## Current parole review

10. The Secretary of State made a referral on 16 July 2019 to the Parole Board to consider the Applicant's suitability for release. If it did not consider release appropriate, the Board were asked to consider suitability of a recommendation for a move to open conditions.
11. This was the Applicant's fifth parole review during this sentence.
12. In earlier Parole Board decisions there had been two recommendations for transfer to open conditions. The Applicant had been transferred on both occasions however on the first occasion he had failed to comply with the regime and had been returned to closed conditions. On the second occasion he had left the open prison without permission and was returned to a closed prison. The Applicant had also been transferred to a progressive regime at another prison, but had disengaged after a short time and was transferred away from that prison.
13. The Parole Board oral hearing panel indicated that the historical reports conveyed a strong sense that the Applicant felt aggrieved by the criminal justice system because of the nature of his sentence.
14. A prison psychological risk assessment had been commissioned in 2018 but the Applicant had declined to engage with it.
15. The Parole Board panel identified a number of issues of concern: a proven adjudication in January of 2019 in relation to assaulting a prison officer; an incident where the Applicant punched another prisoner in self-defence in June 2019; also recorded were alleged threats to harm a member of staff. Also recorded were incidents of being angry with staff about door locking (13 January 2019); anger towards a member of staff about a forthcoming meeting (7 October 2019); threats to harm a member of staff (8 January 2020); anger and threats regarding the leaving of a room following a prison procedure (23 June 2020).

## The relevant Law

16. The panel correctly sets out in its decision letter the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a move to open conditions.
17. Pursuant to 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)).
18. 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 a previous Reconsideration application in the case of **Barclay [2019] PBRA 6**.

## *Irrationality*

19. 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.'*

20. 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.

21. 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*

22. 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. Procedural unfairness appears not to be argued in this case. The application indicates (at paragraph 6) *'these submissions will argue that the decision is irrational'*. At paragraph 15 however the application indicates *'It is submitted that the decision is irrational and procedurally unfair'*. I found no separate arguments in relation to procedural impropriety, and I have therefore dealt with the application on the basis of irrationality.

23. 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."*

### **Discussion**

24. I deal with the grounds of this complaint as set out in paragraph 8 above.

8 (a) *'On two previous occasions panels of the Board had assessed that all core risk reduction work had been completed yet now it was said that violence work amounted to core risk reduction work'*.

25. Panels of the Parole Board are bound to approach each reference on the basis of the evidence which is presented at the hearing. Parole Board panels are not bound by decisions of their predecessors. It is invariably the case that each fresh referral will include updated and new information which will affect the assessment of risk. As indicated above, in this case there had been earlier recommendations relating to the transfer of the Applicant to open conditions.

26. In 2012 a panel recommended a transfer to an open prison. That decision implied that all 'core' behavioural work had been completed. It would be unusual for a transfer to open conditions to be recommended if there remained uncompleted behavioural work.
27. However, as indicated above, this Applicant was transferred back to a closed prison after concerns about his behaviour. Following a review, he transferred back to an open prison once again, but later absconded. As a result of this absconcion he was transferred back, once again, to a closed prison. He was then transferred, for a short period, to a prison with a progressive regime, however, after difficulties in the progressive regime prison, he was again transferred back to a closed prison.
28. Thus, despite a conclusion by an earlier panel, that all core work had been completed, it is clear that subsequent behaviour and events led the current panel to conclude that further basic work in terms of behaviour was required, in order to manage risk. The panel identified, in the decision letter, concerns about compliance and the Applicant's hostile and threatening behaviour.
29. In the light of the Applicant's difficulties following his transfer to open conditions and his behaviour thereafter, the panel were entitled to conclude that further work was required before the Applicant's behaviour could be safely managed in the community. The Applicant's difficulties and behaviour following transfer to the open prison were indicative of the need to reassess any decision about completed core work.
30. I therefore reject the contention that the current panel was in any way bound by the fact that earlier panels may have concluded, on the basis of the evidence before them at the time, that core work was complete. I am not persuaded therefore that the conclusion of the panel, that further work was required, could be considered to be irrational in the light of the history of this particular Applicant.
31. I deal with the other two points which are linked namely:
- 8(b) 'that the panel relied upon behavioural incidents relating to aggression which did not amount to a risk of serious harm'.*
- 8(c) 'That the last proven act of violence was over two years before the panel hearing'.*
32. My understanding of this ground is that the examples of behaviour during the preceding two years could not be defined as violence which amounted to serious harm. It is apparent from the dossier that the incidents which are reported to be negative behaviour by the Applicant do not amount individually or indeed collectively to acts which would be defined as causing serious psychological or physical harm. The negative behaviour is described within the dossier in terms of threats, and hostile and aggressive presentation.
33. A Parole Board panel in assessing risk is obliged to take account of a number of factors. Prison behaviour will be a factor considered by a panel. Behaviour within the prison environment is often assessed on the basis of whether there are indications of parallels with negative behaviour in the community or whether there are warning signs of possible behaviour in the community which might affect risk.

The panel identified, in the decision letter, that the Applicant's behaviour individually did not amount to serious harm. However, the panel's determination was that taking the Applicant's behaviour as a whole and in combination with the Applicant's index offence and previous offending, the reported incidents were a matter of concern in relation to risk. The panel identified that the Applicant's index offences involved threats of violence and intimidation in order to commit the offences of robbery. In essence the panel concluded that the Applicant's more recent hostile and negative behaviour could amount to warning signs or parallels to behaviour that might become more serious in the community.

34. I am satisfied that the panel were entitled to take account of the incidents recorded, in reaching an assessment as to risk in this case. I am also not persuaded that a panel would be obliged to be limited to assessing only incidents resulting in serious harm (physically or psychologically), in assessing risk. I am therefore not persuaded that this ground amounts to an example of irrationality.
35. I turn to a further point. In this case an independent psychologist gave evidence. The psychologist's opinion was that the Applicant's risk could be managed safely in the community. That evidence was at variance with the evidence of other professionals who had concluded that further risk related work would be required, and that the Applicant's risk could not at this stage be managed in the community.
36. Although not argued as a ground in this Reconsideration application, I have considered whether the panel adequately explained their rejection of the independent psychologist's conclusion. As noted in the decisions above, panels are obliged to explain their conclusions within the decision letter itself. This is of particular importance where there is a difference of view by professionals.
37. The panel, in the decision letter, identified the difference in recommendations and expressly addressed the reason why they rejected the view of the independent psychologist. The independent psychologist had concluded, in her recommendation, that the Applicant's violent offending was purely driven by substance misuse. The psychologist was satisfied, on the basis of the Applicant's prison conduct and reports, that his addiction to illicit drugs had been brought under control or eliminated. On that basis the independent psychologist had concluded that the Applicant's risk was no longer a concern because of the psychologist's opinion that there was a direct link between illicit drug misuse and violence.
38. The panel, having assessed the evidence, disagreed with this conclusion. The panel indicated that there were examples of hostile behaviour whilst in prison and at a time when the Applicant was unaffected by illicit drugs. For that reason, the panel concluded that the formulation of the independent psychologist was, in their assessment, flawed.
39. The panel also considered the Applicant's compliance and cooperation. The Applicant had, at times, refused to cooperate and communicate with the probation officer in the community. The Applicant had declined to engage with a prison psychological report which had been commissioned. There had also been instances of poor compliance in connection with the prison regime. For all these reasons the panel concluded that poor compliance may be a factor which would elevate risk in the community.

## Decision

40. Accordingly, applying the test in **DSD**, I am satisfied that this decision was not 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. The application for Reconsideration is refused.

**HH Stephen Dawson**

**27 September 2021**