

[2021] PBRA 159

Application for Reconsideration by Ansell

Application

1. This is an application by Ansell (the Applicant) for reconsideration of a decision of the Parole Board dated the 11 October 2021 made following an oral hearing held on 13 September 2021 which decided not to direct release and made a recommendation for 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 dossier, the decision letter dated 11 October 2021, the application for reconsideration dated 28 October 2021 from solicitors acting on behalf of the Applicant and the email response from the Secretary of State dated 3 November 2021.

Background

4. The Applicant is serving an indeterminate sentence for public protection (IPP) for 2 offences of threats to kill. He was sentenced on the same occasion to determinate sentences for battery, criminal damage, aggravated vehicle taking, driving while disqualified and driving with no insurance, and making off without paying. The index offending saw him, following the breakdown of his relationship with his partner, make threats to kill her and her young child. After she had called the police he took a vehicle, took petrol from a petrol station and following a chase by the police, damaged 3 police cars which had caused him to stop. His minimum tariff of 13 months (18 months less time served) expired on 24 June 2007. He was aged 22 at the time of his index offence and is now 38.
5. The Applicant was released from custody on 15 October 2010 and recalled on 16 November 2010 following an allegation of assault and harassment by an intimate partner. He was released for the second time on 9 February 2015 and recalled on 25 May 2015 following an allegation of unlawful imprisonment and assault by an intimate partner.

Request for Reconsideration

6. The application for reconsideration is dated 28 October 2021.



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7. The application was not made on the published form CPD 2 but was in the form of written submissions from the Applicant's legal representative.
8. The grounds for seeking a reconsideration are as follows:

That the decision was irrational on the basis that:

- (a) The panel failed to provide sufficient reasons why it departed from the conclusions of the witnesses;
- (b) The panel have placed insufficient weight on the overall risk management plan;
- (c) The panel have focused too heavily on the issue of autism and not explained how that relates to the specific issue of harm in this case; and
- (d) The panel should have made a finding in regard to his removal from open conditions and have not sought to evaluate the reasons for the removal in sufficient detail to understand how this impact on the decision not to release.

Current parole review

9. The case was referred to the Parole Board on 25 February 2020. The referral was for the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release. If after considering the case, the Board decided to direct the Applicant's release on licence, the referral invited the Board to make a recommendation in relation to any condition which it considered should be included in the licence. If the Board did not decide to direct release on licence, the referral invited the Board to make a recommendation whether the Applicant was ready to be moved to open conditions, commenting on the degree of risk involved if this recommendation were to be followed.
10. The referral was considered by a Member Case Assessment panel on 18 September 2020. The case was directed to oral hearing. A psychological risk assessment was directed, which recommended an autism assessment be carried out, leading to the adjournment of the first listed oral hearing in February 2021 to enable this to take place. Panel Chair directions were given on 11 May 2021 to ready the case for oral hearing on 17 June 2021.
11. On 24 May 2021 the hearing scheduled for 17 June 2021 was adjourned as the timetable for the provision of reports had not been complied with. The oral hearing was heard by video link on 13 September 2021 by a three member panel which included a specialist psychology member. Oral evidence was heard from the Community Offender Manager, the previous Community Offender Manager, the Prison Offender Manager, the previous Prison Offender Manager, a psychiatrist, a Prison psychologist, a mental health nurse and the Applicant. The Applicant was legally represented during this hearing. The case was adjourned following this evidence to be concluded on the papers, with directions for a full risk management plan to be provided by the Community Offender Manager and for any legal representations.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 11 October 2021 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019

13. 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)).

14. 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**. The decision here to recommend a move to open conditions is not therefore capable of being reconsidered.

Irrationality

15. 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."

16. 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.

17. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

The reply on behalf of the Secretary of State

18. The Secretary of State has indicated in an email dated 3 November 2021 that he does not wish to make representations in response to this application for reconsideration.

Discussion

Ground (a)

19. The decision letter sets out the views of the professional witnesses as expressed in their written reports in the dossier and confirmed at oral hearing. As the application for reconsideration acknowledges, it is well established that panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.
20. If a panel makes a decision contrary to the opinions and recommendations of all the professional witnesses, 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, per **R (Wells) v Parole Board (2019) EWHC 2710**.
21. The court in **Wells** considered that a more nuanced approach in modern public law to the question of irrationality is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the Panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied.
22. The panel had expert written and live evidence from a psychologist and psychiatrist as well as from the Community Offender Manager(s). The decision letter set out the concerns of the psychologist over the proposed risk management plan, in particular that the proposed Designated Accommodation was not a Psychologically Informed Planned Environment and that involvement with a regime to help people recognise and deal with their problems Pathway would be limited. The recommendations of the psychiatric witness that support be obtained from a local Forensic Intellectual and Neurodevelopmental Disability (FIND) service, which could not be achieved in the area to which the Applicant was to be released was also identified as an issue.
23. The decision letter also intelligibly set out the panel's own risk assessment and reasoning on the whole of the evidence it heard. This included the Applicant's behaviour in stressful situations, the breaching of boundaries with female staff, concerns over sexual behaviour and behaviour towards elderly family members of the Applicant's support network. The panel concluded that they needed to see further evidence of the Applicant's ability to analyse and manage potentially dangerous situations and more particularly to do further work to develop his ability to handle confrontation and challenge within interpersonal relationships. Additional concerns were that the risk management plan proposed a potential move on from Designated Accommodation to elderly members of the Applicant's family, given the Applicant's behaviour towards them and their ill-health.

24. I find that the reasons for the panel departing from those of expert witnesses were well set out and in the premises, there is nothing in this ground.

Grounds (b) and (c)

25. These grounds relate to the focus by the panel on the Applicant's autism diagnosis. The application for reconsideration acknowledges that *'the panel have explained their concerns in regard to the risk management plan'* but considers that the panel was 'sidetracked' into focusing on autism when the focus should have been on risks of harm to intimate partners.

26. The panel considered that there were several factors which increased risks of reoffending and causing harm that had been identified in the evidence. They explored the impact of the Applicant's autism on risk, as well as his personality disorder traits, alongside his attitudes to women and behaviour in relationships. The psychologist who was recorded as having consistently recommended the Applicant's release was identified as being concerned about some aspects of the proposed risk management plan.

27. The focus on autism when evaluating the effectiveness of the risk management plan was explained by the panel's conclusion, having heard the expert evidence, that most of the Applicant's behavioural difficulties were determined by his autism.

28. The panel assessed that it was important for those working with the Applicant to help him develop new rules and scripts for difficult situations, which would be both within relationships and in the community generally. The Applicant was assessed using the probation service assessment report as posing in the community a high risk of causing serious harm to the public (notably future partners) and a medium risk to children. All risks posed by the Applicant, not simply those relating to intimate partners, were quite properly analysed by the panel. It was open for the panel to conclude on the evidence it had that there was a need for the Applicant to undertake further work to develop his ability to handle confrontation and challenge within interpersonal relationships and that this should be done in the overall context of his autism diagnosis. There is nothing to substantiate either of these grounds.

Ground (c)

29. In August 2019 at the Applicant's last parole review a recommendation of transfer to open conditions had been made. The Applicant's subsequent transfer and his removal from open conditions were summarised in the decision, setting out that there had been concerns about offence paralleling behaviour. This behaviour did not directly relate to intimate relationships but concerned attempts to manipulate his elderly relatives to invest a large amount of money in a business venture, grievance thinking about his mother and threatening family members with violence.

30. The Applicant's explanations for his removal from open conditions were also set out in the decision. The application for reconsideration is correct when it says that the panel did not make any findings of fact about this and that the panel have not evaluated the reasons for removal in detail. The decision does evaluate the concerns by the prison psychologist and also by the panel over the Applicant's behaviour



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towards his grandparents, with particular concern over the potential for move on accommodation with them.

31. It is a matter of fact that following the last parole review the Applicant was removed from open conditions for the second occasion. It is unclear from the representations what 'finding' the Applicant now asserts should have been made, and in any event an explicit finding of fact does not appear to be necessary given the Applicant's own evidence which identified some of his 'quite inappropriate' behaviour in the 'rant' he had at his grandparents. The Applicant also acknowledged his frustration generally when people don't understand what he is trying to say, attributing his behaviour to an increase in his prescription medication. It is right that the impact of this specific occurrence on the decision not to release was not identified in the decision letter, with the decision identifying more generally the behaviours overall which caused concern when evaluating risk. Such an approach was not irrational, as it enabled it to look at the evidence in Applicant's case as a whole and focus on the aspects it considered relevant in its independent assessment of risk. This ground is not established.

Decision

32. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

Angharad Davies
18 November 2021