

[2021] PBRA 23

Application for Reconsideration by Simms**Application**

1. This is an application by Simms (the Applicant) for reconsideration of a decision by a panel of the Parole Board dated 7 January 2021 not to direct his release. The decision was made on the Applicant's seventh post tariff IPP sentence review.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on the basis that the decision is (a) irrational or (b) procedurally unfair.
3. The decision is challenged on the basis that it was both irrational and procedurally unfair.

Background

4. On 6 October 2000, the Applicant was sentenced to life imprisonment for rape and inflicting grievous bodily harm. The minimum custodial term was set by the trial judge at 4 years 9 months, after taking into account 3 months spent in prison on remand. A concurrent determinate period of imprisonment for 3 years was imposed for the false imprisonment of his victim.
5. The Applicant was 34 at the time of the index offences which were committed on the same occasion in July 1999. He had previous convictions between 1983 and 1992 for burglary, theft, assault occasioning actual bodily harm and failing to surrender to bail. Then, in December 1993 he was sentenced to a total of 8 years' imprisonment for rape and inflicting grievous bodily harm with intent, in circumstances described by the 2000 trial judge as being remarkably similar to those of the index offences.
6. After his release on licence in early 1998, the Applicant formed a relationship with a student. According to the trial judge, he had started to dominate her and became sexually jealous in an obsessive way. It was said he had locked her in his flat, controlled her finances, and beaten her. The index offences occurred in that context.
7. The sixth review had been conducted by way of an oral hearing before a two member panel of the Board on 16 June 2018 at which the Applicant gave evidence. He did not seek release at that time but did ask for a transfer to open conditions. That panel declined either to direct release or to recommend an open conditions move. Its reasons are contained in a decision letter dated 25 June 2018.



8. By letter to the Applicant dated 13 July 2018, HM Prison & Probation Service confirmed the Secretary of State's acceptance of the Board's recommendation that he should remain in closed conditions. The risk factors which remained relevant to his case were identified as follows: the holding of negative and discriminatory attitudes towards women; beliefs that his own needs should be gratified without consideration of others' needs; control and exploitation in intimate relationships; the use of violence and aggression as part of that control; and minimisation of his violence. It was noted that he had been re-categorised from a Category B to a Category C prisoner and was keen to be moved to a lower security prison accordingly.

Request for Reconsideration

9. The application for reconsideration is dated 18 January 2021 and has been submitted by the Applicant himself.

10. The grounds for seeking reconsideration are that the decision of the seventh review panel was irrational, described compositely by the Applicant as "Procedurally Irrationality" because:

- (i) The Applicant does not have a personality disorder;
- (ii) There is inconsistency within Parole Board decisions;
- (iii) The Parole Board has ignored lies in the SARA (Spousal Assault Risk Assessment);
- (iv) There are inaccuracies recorded in security files in breach of the Data Protection Act 1984;
- (v) The Programme Needs Assessment (PNA) Report has not been disclosed to the Applicant;
- (vi) It was wholly unfair, after 21 years in prison with a 4 year 9 month tariff, for the Applicant not to be given a chance to prove himself in open conditions;
- (vii) The written representations on the Applicant's behalf dated 25 February 2020 were limited to the issue of whether there should be an oral hearing and he should have been given the opportunity to put his case at an oral hearing;
- (viii) The Applicant did not instruct his Solicitor to have his review dealt with on the papers; and
- (ix) There has been a failure to acknowledge the existence of racism and the harm it does.

11. A response to the Reconsideration Application on behalf of the Secretary of State was sent to the Parole Board in a letter from Her Majesty's Prison & Probation Service dated 3 February 2021.

Current parole review

12. The Secretary of State referred the Applicant's case to the Board in July 2019 to decide whether to direct his release or, if that were not appropriate, whether to recommend a transfer to open prison conditions. It was the seventh review of the Applicant's case. He is currently located in a Category B closed prison.

13. Directions by a Parole Board Member Case Assessor (MCA) dated 6 May 2020 confirmed that the case should proceed to an oral hearing. Reference was made to the Applicant's case having previously been concluded on the papers on 24 April

2020, although that decision was not in the latest dossier. The MCA Directions on the 6 May 2020 made it clear that the Applicant's case was not suitable for a decision on the papers as had been sought by his legal representative. The MCA member stated that the purpose of the hearing was to enable the Applicant to engage with the parole process and also to provide his own account about his disputed issues in progressing his sentence plan which he faced during the review period. Directions were made for the provision of a full Psychological Risk Assessment to be followed by updated POM and COM reports no later than 4 weeks prior to the hearing.

14. Following the provision of a Psychological Risk Assessment dated 20 October 2020, the case was listed for an oral hearing on 15 January 2021. Prison Offender Manager (POM) and Community Offender Manager (COM) reports were accordingly due by 18 December 2020. The POM provided a report dated 17 December, but no report was provided by the COM.
15. In his report, the Psychologist concluded that the Applicant did not meet the diagnostic test for any personality disorder but that difficulties within intimate relationships were longstanding. These had not yet been satisfactorily addressed and the risk of future offending was high. The Applicant had not undertaken appropriate treatment and had not developed alternative means to manage intimate relationship difficulties. The Psychologist concluded that, were the Applicant to be progressed to open conditions or released into the community, anyone with whom he entered into such a relationship would be placed at risk of significant harm and that such risk was not manageable.
16. The latest reports from the COM and POM were dated respectively 27 January 2019 and 17 December 2020. The POM had seen the Psychological Risk Assessment and expressly took it into account when recommending that the Applicant remain in closed conditions. Reference was made in the POM Report to a number of negative P-Nomis Entries relating to the Applicant's recent alleged challenging behaviour, including racist remarks to officers and insults to female members of staff.
17. The COM had not made any report following the Psychological Risk Assessment. Furthermore, the dossier did not contain the PNA which had been made in 2019 and it was not included in the list of documents seen by the author of the Psychological Risk Assessment.
18. In a stakeholder response form (SHRF) dated 23 December 2020, the Applicant's legal representative confirmed having discussed the Psychologist's report with him. She had not seen the latest POM Report. She stated that the Applicant's instructions were that, in the light of the content of the Psychologist's report, he would like the Parole Board to conclude the case negatively on the papers. The legal representative further stated that the Applicant's intention then would be to concentrate his efforts on obtaining a transfer to a closed prison which could offer the necessary interventions to enable him to evidence a reduction in risk.
19. The Panel Chair's Response to the SHRF on 30 December 2020 confirmed that the Chair would complete the case on the papers "*as requested*", and that the COM Report, "*if completed*" should still be provided "*to inform the decision letter*" and "*should be received immediately*".

20.No COM report was provided, the oral hearing was cancelled, and the Panel Chair alone issued a decision letter dated 7 January 2021. This concluded that the Applicant's risk was not currently manageable either in open conditions or in the community and did not direct his release.

The Relevant Law

21.The Panel Chair correctly sets out in the decision letter 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

22.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

23.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."

24.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 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 proceedings demonstrates that the same test is to be applied.

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

26.In considering the amount of detail needed to be included in a decision letter, there has been guidance from the High Court, 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 require elaborate or impeccable standards of draftsmanship"*

27. In the cases of **Osborn and Booth-v-the Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis upon which the Board should consider requests for an oral hearing. Its conclusions are set out in paragraph 2 of the judgment. It did not decide that there should always be an oral hearing but that there should be if the Board were in doubt whether to order one. In summary, it decided that such a hearing should be directed when there is a dispute about the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk; and where it is necessary in order to allow the prisoner to properly put his case. The Board should take into account the prisoner's legitimate interest in being able to participate in the process of making a decision with important implications for him. Importantly, it is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

28. At paragraph 2(vi) Lord Reed said: "*when dealing with cases concerning post-tariff indeterminate sentence prisoners, (the Parole Board) should scrutinise ever more anxiously whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff.*" It follows that, where a prisoner is over tariff, the Board should do its best to avoid there being a further delay due to a failure to produce reports or comply with directions, so that when a prisoner is safe to release it can occur as soon as possible. Nonetheless, the test for release remains the same, however long after the tariff expiry date. Arguably, Lord Reed's statement, appearing as it does within the section of the Supreme Court's judgment dealing with the test for directing an oral hearing, may indicate that for a prisoner who is a long time over tariff, the Board should be more ready to direct an oral hearing.

Procedural unfairness

29. Rule 21 governs the procedure to be adopted for a decision to be made on the papers after a direction for an oral hearing. R 21(1) provides that where further evidence is received by the Board a panel chair can direct that an oral hearing is no longer necessary. Under Rule 21(3) the parties have 14 days to make representations on the further evidence and whether they agree to the case being decided by a panel on the papers. Subparagraph (4) provides that after the 14 day period, the panel chair will consider the further evidence and any representations made and make a direction that the case should be either decided by a panel on the papers or continue to be determined by a panel at an oral hearing. Under subparagraph 5 the panel may be constituted of the panel chair or a new panel.

30. Rule 21 (6) provides that a direction that the case should be decided on the papers under subparagraph (4) cannot be made where there is less than 3 weeks until the final hearing.

The Response on behalf of the Secretary of State (the Respondent)

31. PPCS on behalf of the Respondent has limited its response to the following:

32. In respect of the issue about writing lies about prisoners being ok, it is submitted that details of security related concerns are available in a wide range of records and are potentially subject to complaints procedures.

33. In respect of the Applicant's assertion that he was held back by the prison from going to a Category C establishment, there is no record of any complaint to the Prison Ombudsman, and the POM recommended further work on intimate partner violence before a Category C transfer.
34. In respect of the failure to disclose the 2019 PNA, the Applicant refused to engage in the disclosure process and the deadline for disclosure was 18 October 2019.
35. In respect of the alleged failure to provide enough support after the deaths of the Applicant's father and sister, and failure to acknowledge the existence of racism, the Applicant was offered a compassionate phone call, received visits from the Chaplaincy Manager, and an opportunity to listen in the Chapel to the music selected for the funeral at the time it was taking place.

Discussion

36. The decision letter provides a comprehensive analysis of the Applicant's offending behaviour, a review of his risk factors and an assessment of current risk based on the material available to the Panel Chair. It refers, not only to the latest Psychologist report but also to a SARA Assessment in 2017. However, the decision letter did not refer to the 2019 PNA which was known to exist but had not been provided.
37. In the decision letter, reference is made to the Applicant having completed a training course addressing sex offending, as well as a training course addressing decision making and better ways of thinking and a training course addressing the tendency to use violence but that, having initially indicated he would engage in a training course addressing the use of violence and sex offending, he declined to complete the full PNA process. According to the HMPPS response a PNA report does exist.
38. In this case, the Panel Chair failed to address adequately the lack of a COM's report. Reliance was placed upon the reports by the Psychologist and the POM and the submissions of the Applicant's legal representative. There should, in my judgment, have been a direction for the provision of a detailed report from the COM, with an up to date assessment of risk, commenting on the implications for future management of that risk, setting out a detailed resettlement and risk management plan, and confirming her recommendation in respect of the Applicant's release or otherwise.
39. The submissions made on the behalf of the Applicant, whether or not they accurately reflected his latest instructions, were relevant to the Panel Chair's consideration but should not be regarded as the decisive factor in deciding whether or not the oral hearing should proceed. In the light of behavioural issues related to relationships with staff and his varying stance in respect of offending behaviour programmes, this was a case where questioning of the Applicant should have been undertaken as an essential part of the process in evaluating his current risk and suitability for progression.
40. There was a failure to comply with the provisions of Rule 21 of the Parole Board Rules. The 23 December 2020 SHRF from the Applicant's legal representative constituted further evidence. No representations had been made by PPCS by the end of the 14 day period and the Panel Chair implicitly made a direction that the

case should be decided on the papers within the decision letter itself on 7 January 2021. However, on that date there was less than the 3 weeks required by Rule 21(5) of the Parole Board Rules until the final hearing listed for 15 January 2021.

Decision

41. Although not argued by the Applicant, there was accordingly a significant procedural irregularity in this case. Furthermore, applying the test as set out in case law, I also find that Panel Chair's decision was irrational on the basis of the evidence and submissions provided. The provision of an up to date COM report was essential. Insufficient consideration was given to the issue of whether or not an oral hearing was necessary. The case should have been decided by the duly appointed three-member panel, which included two psychologists.

42. The application for reconsideration is therefore granted.

HH Judge Graham White
10 March 2021