

[2021] PBRA 28

Application for Reconsideration by Murphy

Application

1. This is an application by Murphy (the Applicant) for reconsideration of a decision by a Panel of the Parole Board dated 18 January 2021 not to direct his release following recall from licence in the community on 7 October 2019.
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. I have considered the application on the papers. These are: the application for reconsideration; the decision letter; and the case dossier.

Background

4. On 9 March 2009, the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection (IPP) upon conviction of false imprisonment. The minimum custodial term was set by the trial judge at 4 years less time spent in custody on remand. Concurrent determinate periods of imprisonment were imposed for associated offences of burglary, theft, fraud and making threats to kill.
5. The Applicant was 33 at the time of the index offences which were committed on the same occasion in July 1999. He had previous convictions dating from 1991 when he was 16 years old and made subject to a supervision order for attempted robbery and possession of an offensive weapon. There were subsequent convictions for theft, dangerous driving, and possession of drugs. Finally, in 2001 the Applicant was sentenced to 8 years' detention in a Young Offender Institution for attempted robbery. He was in the community on licence when the index offences occurred.
6. The decision letter refers to the Applicant's history of breaching licence conditions and the fact that he had twice absconded from custody whilst serving previous sentences.



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7. This was the first review following recall. As a result of the restrictions imposed by the Covid-19 pandemic, it was conducted by way of a video-linked oral hearing before a three member panel of the Board, which included a psychologist member, on 18 January 2021 during which the Applicant gave evidence.

Request for Reconsideration

8. The application for reconsideration is dated 19 February 2021.
9. The grounds for seeking reconsideration are that the decision not to grant release was both irrational and procedurally unfair.
10. It is submitted on the Applicant's behalf that the decision was procedurally unfair because the Panel heard evidence from an investigating police officer in relation to allegations that the Applicant had committed several rapes in the community whereas information in the case dossier referred simply to sexual assault. This information had not been provided prior to the hearing.
11. It is further submitted that the decision was irrational because:
- (i) The Panel recommended that required 1-2-1 work could be completed in open conditions when the evidence of the Community Offender Manager was that this would not be possible in that environment and would be better undertaken in the community.
 - (ii) All professional witnesses had explained clearly why open conditions, where he had been located previously in the sentence, would not be beneficial to the Applicant.
 - (iii) The Panel expressed concerns in relation to the Applicant's openness yet none of the professionals working with him shared that view.
 - (iv) The Panel expressed concerns in relation to the security information provided at the hearing, despite the fact that none of it had previously been put to the Applicant, that no concerns had been raised by prison staff working with him, that no action had been taken against him, and that it had not led to him being removed from his trusted position of Peer Mentor working with vulnerable prisoners.
 - (v) The Panel did not give sufficient weight to the overall period the Applicant had spent in custody following recall and the praise he had received for additional peer mentoring and 1-2-1 work he had undertaken with younger offenders.
 - (vi) The Panel described the security entries as having been over a period from July 2020 to December 2020, placing additional weight on a 6 month period, whereas there had been one incident in July 2020, one in October

2020, and the remainder between 4 November 2020 and 4 December 2020.

- (vii) The Panel placed disproportionate weight on a comment made by the Applicant at the hearing that he would be more mindful of who he spends time with after learning for the first time that he had been accused of several rapes.
- (viii) The Panel placed disproportionate weight on a comment made by the Applicant at the hearing that he would be more mindful of who he spends time with after learning for the first time that he had been accused of several rapes.
- (ix) The Panel gave undue weight to what they described as possible “unresolved issues around his own sexual interests” when in reality [redacted].
- (x) The Panel placed inappropriate weight on the benefit of open conditions in developing and strengthening his family relationships when this had already been achieved during his period at his previous open prison.
- (xi) The Panel did not sufficiently take into account the unanimous view of all three professionals, in both their respective reports and in their oral evidence, that the Applicant’s risk is manageable in the community.

12. No representations have been made on behalf of the Secretary of State in response to the Reconsideration Application.

Current parole review

13. The Secretary of State referred the Applicant’s case to the Board on 5 November 2019 to decide whether to direct his release or, if that were not directed, whether to recommend a transfer to open prison conditions. It was the first review following the revocation of the Applicant’s licence and his recall to custody.
14. The Panel considered a dossier running to 524 pages ending with the decision letter dated 18 January 2021. The latest reports by the Community Offender Manager (COM) and Prison Offender Manager (POM) were dated respectively 15 and 18 December 2020. There was also a report from the Applicant’s Wing Officer dated 29 December 2020. The 25 June 2020 psychological report by a registered forensic psychologist employed by the Prison Service had been supplemented by an addendum from the same author dated 4 November 2020.
15. Closing representations on the Applicant’s behalf were made in writing by his legal representative.
16. In her final report, the Psychologist confirmed the assessment in her initial report that the Applicant posed a moderate risk of future violence and had a moderate degree of protection from future violence resulting from his protective factors. The addendum had been prompted by the allegations of sexual assault made by two [redacted] residents at the designated accommodation where the Applicant was residing during his time on licence. One allegation had been withdrawn and the other was undecided at the time. The evidence provided at the hearing was that the

investigation had now been closed. Given the lack of convictions and the Applicant's denial of sexually harmful behaviour, the psychologist considered that there would be insufficient information to allow an informed judgment about the nature and level of any risk of future sexual violence.

17. The psychologist concluded that the Applicant could be managed in the community. In her view, whilst a transfer to open conditions could provide the Applicant with a staged process to release, she did not consider this necessary for risk management. In her view, the Applicant had the skills and insight to engage with professionals and actively manage his risk with support. According to the closing submissions, she confirmed in her oral evidence to the Panel that, although the formation of relationships with younger [redacted] was a warning sign that professionals need to be aware of, it was not directly linked to an increase in the risk of harm.
18. Both the POM and the COM recommended release in their respective latest reports and they repeated that view at the hearing. A resettlement and risk management plan had been prepared by the COM involving initial residence at designated accommodation, a requirement for the Applicant to engage in 1-2-1 work using the 'New me MOT' catalogue of work, and other extensive licence conditions. This was set out in her latest report, and her recommendation had been endorsed by the senior probation service manager who countersigned it.
19. The POM had been the Applicant's supervising officer in 2018 during the period leading up to his initial release. He was allocated his current role as the POM as soon as the Applicant was recalled to the closed prison estate. He referred specifically to the information in the security reports about the Applicant's behaviour towards younger prisoners but was satisfied with the custodial manager's conclusion that there had been no evidence of grooming. The security reports all noted the Applicant's risks to be medium rather than high. The POM echoed the psychologist's view that the Applicant could be managed in the community and that a transfer to open conditions was not necessary.
20. The report by the Wing Officer, (who was not a witness at the hearing) referred to the Applicant's wealth of experience which had been put to good effect in providing help and guidance to other prisoners.

The Relevant Law

21. The decision letter correctly sets out 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 should the test for release not be met.

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”*

Procedural unfairness

27. The issue to be considered under this ground is whether there is evidence that the correct legal process was not followed either in the application of the Parole Board Rules or in the fair conduct of the hearing.

Discussion

28. 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 after consideration of the material available to the Panel.

29. However, in this case the Panel failed to address adequately the consensus view of all three professional witnesses based on the information available to them at the time of their respective reports and also the latest evidence given at the hearing.
30. There was no evidence upon which a reasonable tribunal could have found that the Applicant had committed any criminal offence or engaged in sexually grooming behaviour either during his period on licence or in custody. He admitted to pressurising one of the residents to return his mobile phone and accepted that this could have been perceived as threatening.
31. The recommendation by professionals that further 1-2-1 work with the Applicant should be undertaken had not been challenged on his behalf, but there was no evidence from any witness that it was necessary for this to take place in closed prison conditions. The Panel was told that it would not be available in open conditions.
32. Any Panel is entitled to reach its own view about the reliability of witnesses' evidence, and a reviewing body which has not itself heard evidence must always take care in reaching its own judgment. However, the Panel's opinion about the Applicant's lack of openness is not shared by those professionals who have worked closely with him and does not fairly reflect the evidence given.
33. The Panel heard that the Applicant's behaviour in custody mirrored some of his behaviour in the designated accommodation, in the sense that he was developing friendships with younger residents. According to the evidence recorded in the decision letter, there was insufficient evidence that his conduct on licence had led to any offending behaviour and no suggestion the Applicant had used his influence in a negative way in custody. Furthermore, the evidence was that the Applicant's insight about such matters had increased.
34. Having read and heard all the evidence before it, a panel is entitled to reach a balanced and objective conclusion about its relevance and effect. The Panel in this case accepted that there appeared to be no link between unresolved issues about sexuality and a risk of serious harm. It agreed with the assessment by the COM and POM that the Applicant poses a high risk of serious harm to the public and a medium risk to a known adult and to children. However, it did not adequately address the opinion of all three professionals that the risk was not imminent.
35. The Panel considered that the risk management plan was "*robust and theoretically capable of managing (the Applicant's) risks*". It stated that the key issue was his level of internal controls about which it had "concerns". However, it did not reach a fully reasoned conclusion about that. The COM expressed confidence in the Applicant's openness about relationships and sexual thoughts and considers, as did

the POM, that he is making progress in developing his insight. The psychologist concluded in her latest report that he has the skills and insight to engage with professionals and actively manage his risk with support.

36. In its evaluation of the plans to manage risk, the Panel referred to a wide range of external protective factors but it did not expressly balance these against the risk factors currently identified. Nor did it expressly conclude whether the Applicant's risks could be adequately managed in the community under the risk management plan.
37. Given the positive comments made by the professionals about the Applicant's engagement as a Peer Mentor, the rationale behind the Panel's conclusion that his level of insight was insufficient for him to decide on the appropriateness of such a role is problematic.
38. The Panel was entitled to find that the recall was justified on the basis of unchallenged evidence that the Applicant's behaviour had seriously deteriorated when he started drinking regularly and to excess, leading to an escalation of risk. That does not appear to have been challenged on his behalf.
39. According to the evidence, those concerns were addressed by the work which the Applicant has undertaken since recall as described by the POM and in the reports. None of the professionals considered the risk arising from such behaviour to be imminent and in their collective view warning signs would become apparent.
40. It is not in dispute that none of the security information led to any action being taken against the Applicant.
41. It would have been open to the Applicant's legal representative to have applied for an adjournment had she felt that he had been disadvantaged by the late admission of oral evidence by the investigating police officer. However, she did not do so and, in any event, the Applicant was able to comment fully on it.

Decision

42. For the reason set out above, I do not find that there was a significant procedural irregularity in this case.
43. Applying the test as set out in case law, I do find that the Panel's decision was irrational on the basis of the evidence and submissions provided. A Panel is not bound to follow the recommendation of professional witness. However, given the overwhelming and unreserved professional support for the Applicant's release,

backed as it was by evidence that the Panel accepted, the decision not to release him was one which no reasonable panel, properly directing itself, should have reached.

44. The Application for Reconsideration is therefore granted, and I make the following directions:

- (i) The review is to be listed for an oral hearing on the first available date after 1 April 2021 with a time estimate of 5 hours. The Panel Chair should decide in due course whether it will be conducted directly face to face or by way of a remote hearing.
- (ii) The Panel hearing the case should comprise 3 members, including a psychologist member.
- (iii) The Panel Chair may wish to add further directions of their own motion or on request by the Applicant.

HH Judge Graham White
14 March 2021