[2021] PBRA 63

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**Application for Reconsideration by O'Mona**

## Application

1. This is an application by O'Mona (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 7 April 2021 not to direct release.

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 Oral Hearing Decision;
   - *'Grounds to Reconsider Parole Board Decision'* dated 26 April 2021: these consisted of 19 pages and 49 paragraphs, which I found too diffuse, verbose and ill-organised to use as a basis for considering the application for reconsideration;
   - *'Grounds to Reconsider Parole Board Decision'* dated 4 May 2021, delivered in response to my Request for Further and Better Particulars: these still run to 7 pages and 26 paragraphs, but I hope I can get to grips with the issues they raise; and
   - The dossier, which consists of 326 numbered pages, ending with representations to the panel from the Applicant's solicitor.

## Background

4. The Applicant was 19 when he was sentenced on 1 April 2008 for offences of robbery, violent disorder, assault occasioning actual bodily harm and possession of a firearm with intent to endanger life. The offences were gang-related. The sentence was imprisonment for public protection, with a minimum term of 6 years less time on remand, the tariff expiring on 28 May 2013. He is now 32 years old.

## Request for Reconsideration

5. The application for reconsideration to which I shall refer is the one dated 4 May 2021.

6. The grounds for seeking a reconsideration are, as I understand and summarise them, as follows:

Irrationality

a) The panel rejected the opinion of professional witnesses. The Prison Offender Manager (POM) stated in evidence that the Applicant's risk could not be reduced unless he is tested in the community and she did not feel his detention is necessary for the protection of the public. The Community Offender Manager (COM) and Psychologist were of the opinion that if released, risk is not imminent.
b) The evidence placed excessive weight on what it described as *"two major unknown factors as to [the Applicant's] future"*: he is due to be tried in November 2021 for conveying unauthorised articles in to prison, an allegation that dates back to 2017; and he is subject to deportation proceedings.
c) The panel failed to take into consideration the considerable shift in the Applicant's behaviour and attitudes since the beginning of his sentence.
d) The Applicant's level of current risk cannot be tested until he is released or transferred to open conditions.

Procedural Unfairness

a) The panel proceeded on the basis of inaccurate information, namely that the Applicant is a foreign national.
b) The panel should have held a Directions Hearing and/or directed a report on the Applicant's immigration status and then obtained the subsequent opinion of the Secretary of State for Justice.
c) The panel's concerns about the Risk Management Plan (RMP) for the Applicant were finance, employment, education and accommodation. If the panel was concerned that the RMP was inadequate they should have further adjourned at the conclusion of the hearing.
d) The COM assessed the Applicant's family address as suitable, but the panel failed to provide reasons for why this address is unsuitable. It is irrational for the panel to fail properly to consider the fact that designated accommodation was available for the Applicant and his immigration status did not have any impact on this. The panel failed to consider or understand the RMP.
e) His immigration status is irrelevant. If the Parole Board directs his release, he will be detained solely on immigration matters and must make an application for Home Office bail. The evidence is that he would be likely to have a positive engagement if granted release.
f) The decision letter contains inaccurate information. His mother is not a [foreign] National. Contrary to what appears in the decision letter, he has not been found guilty of 11 prisoner adjudications, has never had a substance abuse problem and has always provided negative Mandatory Drug Tests.
g) Reliance on incorrect information is in breach of the *Data Protection Act*.
h) The panel should have had a case management hearing and considered the Applicant for the open estate.

i) There were procedural flaws in not allowing a further deferral to secure the missing information about designated accommodation. The panel has failed to substantiate why it rejected the evidence of progress in favour of further detention.

The Applicant's Submissions

a) The panel's decision is unsound, it is both irrational and procedurally flawed.

b) The panel's assessments and conclusions have been tainted by misinformation, a fair assessment has not been made of all the evidence resulting in the Applicant being unable to have a fair hearing, his immigration status, the fact that all appeal rights have not been exhausted, lack of understanding of the RMP what support is available if granted release. Further, the panel should have had a case management hearing and considered the Applicant for the open estate.

c) There were procedural flaws in not allowing a further deferral to secure the missing information about designated accommodation. The panel has failed to substantiate why it rejected the evidence of progress in favour of further detention.

d) It is submitted that the panel's decision is unsound, both irrational and procedurally flawed. All core risk reduction work has been completed, he can be released to designated accommodation, he can be safely managed in the community with the comprehensive RMP in place and if released on immigration bail would have not one but two licences.

e) There has been improper consideration of a progressive move to the open estate. It is evident that the Applicant meets the test for release into the community at this stage of his sentence. All sentence plan objectives have been met and, whilst his immigration status may be a factor, the risks he currently poses are not imminent. Evidence that he is not recognised as a Ugandan citizen has been provided.

7. I asked for further particulars of the Applicant's grounds. I have taken the above, to a certain extent verbatim, from the response to my request.

**Current parole review**

8. The Secretary of State referred the Applicant's case to the Parole Board for consideration of release. He is stated not to have been eligible for open conditions due to his immigration status, which has yet to be resolved. The oral hearing took place on 27 January 2021, when it was adjourned for further information about the Risk Management Plan, to be delivered by 29 March 2021, the case to be decided thereafter before 12 April 2021. The panel consisted of a judicial member and an independent member. After the hearing further material was added to the dossier, consisting of an Addendum Parole Assessment, a POM addendum report and legal submissions. At the time of the hearing the Applicant was 32 years old. In addition

to considering the dossier and the added documents the panel heard evidence from the Community Offender Manager, the stand-in Prison Offender Manager, the Prison Psychologist and the Applicant.

**The Relevant Law**

9. The panel correctly sets out in its decision letter dated 7 April 2021 the test for release.

*Parole Board Rules 2019*

10. 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)).

11. 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**.

*Irrationality*

12. 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."*

13. 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.

14. 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*

15. 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. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.

16. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:

(a) express procedures laid down by law were not followed in the making of the relevant decision;
(b) they were not given a fair hearing;
(c) they were not properly informed of the case against them;
(d) they were prevented from putting their case properly; and/or
(e) the panel was not impartial.

The overriding objective is to ensure that the Applicant's case was dealt with justly.

*Other*

17. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

**The reply on behalf of the Secretary of State**

18. The Secretary of State has indicated that he has no representations to make in response to this application.

**Discussion**

19. I should first deal with the question of a recommendation for open conditions. The making, or not making, of such a recommendation is not susceptible to the reconsideration process, so I will not discuss this aspect of the case at all, it being beyond my remit.

20. As to the panel not accepting the recommendations of the professional witnesses, the position is clear. 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.

21. However, if a panel were to make 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**.

22. The question here, therefore, is whether the panel explained clearly its reasons and, if so, whether those reasons justify its conclusions.

23. The panel carefully considered the Applicant's behaviour in custody. It described his behaviour as mixed, including as it did convictions in 2016 for possession of mobile phones. The panel commented on a number of high rated security information indications in 2018, including 11 adjudications. Issue is taken about the number of adjudications. The figure appears in an Offender Supervisor's report dated 12 December 2018. I do not know on what basis this figure is challenged.

24. It should be noted that in my Request for Further and Better Particulars of the Application dated 30 April 2021 I specifically stated:

> *'If it is alleged that the oral hearing panel either misunderstood the evidence given, or was given inaccurate evidence, such an assertion must be properly particularised, setting out what the panel said or heard, and in what way it was wrong.'*

25. The panel acknowledged that there had been an improvement in the Applicant's behaviour since the last adjudication in 2019, and noted positive entries and his expected recategorisation to Category C from Category B. The panel explored this mixed history with the Applicant, and discussed the problems with the professionals. The panel's principal concerns were over accommodation (no designated accommodation being available at present) and the Applicant's immigration status, which I discuss further below. The panel considered that the Applicant's custodial behaviour was such that release to designated accommodation would give necessary support that would not be available at a relative's address (the only alternative offered).
26. The panel's decision not to follow the recommendations of the professionals was based on their view of the evidence and properly explained. The fact that the Applicant disagrees with that decision is not a ground for reconsideration.

27. The issue of the Applicant's immigration status is a difficult one. The Home Office say he is a foreign national and liable to deportation. He has been deprived of his British citizenship. However, the country of his alleged birth denies that he is a

citizen, and refuses to issue (or has revoked) travel documents. This is alleged to be a practical bar to his deportation. I do not know whether it is also a legal bar. The Applicant's solicitor says that if an attempt is made to deport him, he will challenge it, as his brother did in similar circumstances.

28. The panel acknowledged the difficulties. Whether it was an error to say that the Applicant's mother was a foreign national does not matter, as such an error would be very far indeed from fundamental: see Paragraph 17 above.

29. The problem presented by the Applicant's deportation status is twofold, the panel pointed out. First, his COM said it made it difficult to devise a Risk Management Plan, as this would largely be dependent on the immigration outcome. Secondly, the Home Office has said that if he is released on licence, he will immediately be detained on immigration hold. He might or might not be granted bail. In any event he will not be permitted to work, obtain housing support, seek benefits or partake in voluntary work. The psychologist highlighted a concern that if he was released subject to such restrictions, the Applicant may be more likely not to adhere to his licence conditions. The COM raised similar concerns, particularly as to the availability of designated accommodation in the circumstances. The position at present, the COM said, is that there is no designated accommodation place available to him, he would need to be granted bail from the immigration hold status for it to be made available.

30. Complaint is made in the *Grounds to Reconsider Parole Board Decision* at Paragraph 13 that the panel was misled by a Home Office report that the Applicant would be removed immediately on securing flights. What the panel actually said was that, according to the Home Office, he would immediately be detained on immigration hold with the intention of deporting him. He would have the opportunity of applying for immigration bail, but would not be permitted to work, obtain housing support, seek benefits or partake in voluntary work.

31. There is no basis advanced to support a suggestion that what is set out in the preceding paragraph is not accurate. Nor is there any basis advanced to support the suggestion that an adjournment of the case for further information would have resulted in any different response from the Home Office. The panel acted on the information it had. It was relevant because the uncertainty of the Applicant's immigration status was highlighted by the psychologist as a destabilising factor. The panel stated plainly (and correctly) that if the Applicant met the test for release then his immigration status was not a matter for the panel.

32. The panel carefully considered question of the availability of designated accommodation. This too was affected by the Applicant's immigration status. If he were released, and then detained for deportation and released on bail, then, subject to certain conditions, Home Office funding might be available to enable him

to stay in designated accommodation. But the situation at the time of the hearing was that no designated accommodation was available to him.

33. The panel considered the possibility of the Applicant being released to live at his relative's home. There is no suggestion that the accommodation was unsuitable. The panel's decision was that release to this address was an unknown, and how he would be monitored there a further unknown. It considered that a Risk Management Plan based on such accommodation would be insufficiently robust to manage the Applicant's risk: he needs, the panel decided, intensive supervision, testing and monitoring such as would take place at designated accommodation. In particular, release to this address would not enable his Community Offender Manager to know whether he was mixing with old associates or have early notice of risk factors.

34. The decision not to release the Applicant to the relative's address was carefully considered, and based on the evidence. Complaint is made that there should have been a deferral to investigate the matter further. It is not suggested that the Applicant or his representative applied for such an adjournment, nor that an adjournment or deferral would have resulted in any different conclusion. The availability of designated accommodation would depend on unknown factors such as the Home Office's decisions as to funding.

35. A further area of concern was the Applicant's impending (probably November 2021) trial for conveying unauthorised articles into prison. The panel recognised that his co-accused in that case were on bail, and that the alleged offences date back to 2017. The panel considered these unproved charges according to the Parole Board's *Guidance on Allegations*. The panel decided that all it could do was note the allegation, and find that it brings an important level of concern. The panel considered there was some weight in the argument that the likely trial date being in November 2021 and the allegations being old there was less relevance to them. I cannot find any error in this approach.

36. The panel said that the Applicant's custodial behaviour had been mixed, and continued to be erratic, though there had been recent improvement. There were still concerns about his custodial behaviour which impacted on his manageability in the community. This assessment of risk was justified on the evidence the panel heard. The fact that the Applicant disagrees with it is not a ground for reconsideration.

**Decision**

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

**Patrick Thomas**
**20 May 2021**

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