

[2021] PBRA 66

Application for Reconsideration by Collins

Application

1. This is an application by Collins (the Applicant) for reconsideration of a decision by the Parole Board under Rule 25(1) of the Parole Board Rules 2019 (the 2019 Rules) that the Applicant was unsuitable for release (the Decision). The letter by which the Decision was communicated is dated 23 March 2021 (the Decision Letter).
2. I have considered the application on the papers comprising: a dossier of 245 numbered pages including the Decision Letter, and written submissions by the Applicant's solicitors dated 26 April 2021 in which reconsideration is requested.

Background

3. In January 2010 the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection, with a minimum tariff that expired in April 2013. The Applicant was sentenced after his conviction of two offences of arson and an offence of arson committed recklessly as to whether life would be endangered. The latter of those offences involved fire setting at a premises where three persons were present, including a child. The Applicant was aged 55 when he received the sentence in January 2010 and he is now aged 66.
4. The Applicant was released during the indeterminate sentence in November 2017 on an indefinite licence that was revoked in July 2018, leading to his immediate return to prison. The details of the recall that are stated in the case summary are that the Applicant had returned to heavy alcohol use and failed to address that issue with agencies as directed by his offender manager.
5. The Applicant was released again in June 2019 on an indefinite licence that was revoked on the same day, but on that occasion he was not returned to prison until December 2019. The details of the recall that are stated in the case summary are that the Applicant relapsed into alcohol misuse and was observed to be in possession of a lighter by staff in his designated accommodation.

Current parole review

6. The Decision was made on the Secretary of State's referral of the Applicant's case to the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release, and if not to advise on his suitability for open conditions.
7. The Decision was made by a panel of the Board that considered the Applicant's case at an oral hearing in April 2021 (the Panel). The Panel was comprised of two Independent



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members of the Board. The hearing was conducted remotely by an internet video link due to coronavirus restrictions on entering prisons.

Application and response

8. The 26 April 2021 written submissions assert that the Decision is marred by irrationality and request an order for reconsideration.
9. By an email dated 17 May 2021, the Public Protection Casework Section notified the Board that the Secretary of State offered no representations in response to the Applicant's reconsideration application.

The Relevant Law

10. 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.

Irrationality

11. 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."

12. 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.
13. 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

14. 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.

Discussion

15. Broadly, the Applicant puts his case for reconsideration on the following grounds:

- a) Irrationality arising from the weight given by the Panel to the Applicant's denial of his offending relative to factors that are said to have weighed in favour of release.
- b) Irrationality arising from the Panel's assessment of the Applicant's capability of managing his alcohol consumption.
- c) Irrationality in the Panel taking a contrary view of the Applicant's eligibility for release to the previous panels of the Board that directed the Applicant's release, and to the three professional witnesses.

16. I do not consider that the Panel was irrational in its consideration that the risk management plan was not sufficiently robust to manage the Applicant's risk in the community.

17. The weight to be given to any factor was a matter for the Panel, subject to the limits of the test for irrationality that is referred to earlier in the preceding section of my decision.

18. The Decision Letter reveals that the panel considered that the risk of serious harm posed by the Applicant will remain high until the causes of his fire setting are better understood and he has completed work to address that risk. That may or may not prove to be an accurate prediction, and it could be said that it is inappropriate for the Board to make such a prediction. The consideration of whether a prisoner is eligible for release is properly conducted with reference to the point in time of the Board's decision.

19. An assessment of a high risk of serious harm to the public is not in itself a barrier to release. The assessment by the Board of whether a prisoner is eligible for release is properly made on the basis of the assessment of that risk and of the likely effectiveness of any available measures to manage that risk. That consideration is properly conducted with reference to the point in time that the Board's decision is made and, in the case of an indeterminate sentenced prisoner, for an indeterminate period thereafter.

20. It is correctly asserted in the grounds that a prisoner's denial may well be a determinative consideration but not necessarily so; per King J in **R (Gourlay) v Parole Board [2014] EWHC 4763 (Admin)**. However, the Decision Letter reveals that the Panel's material reasoning in this connection was that the Applicant's risk of serious harm remains high presently because the causes of his fire setting were not well understood and he had not completed work to address that risk. It was not irrational for the Panel to consider that the Applicant's denial of his offending was the reason why the causes of his fire setting were not well understood and why he had not completed work to address that risk.

21. The Decision Letter reveals that the Panel was not persuaded of the Applicant's ability to manage his alcohol consumption, which the Panel considered a key risk factor. Those considerations cannot be described as irrational in the light of the evidence. That evidence included the circumstances of the index offences and of the two recalls, the more recent of which for alcohol use on the very day of release in the face of a licence condition prohibiting the consumption of alcohol and oral evidence by the professional witnesses that the Applicant did not see alcohol as a risk factor for him and that the Applicant lacked insight into his risk factors and used alcohol when he was not coping

and feeling overwhelmed. There was also a report that brewing alcohol had been found in the Applicant's cell, albeit that it was thought that the Applicant might have been exploited and his cell used for that purpose. In any event, evidence of an absence of alcohol consumption in the relative strictly controlled and monitored environment of a prison is not necessarily indicative of an ability to abstain from alcohol misuse in the community.

22. The Decision Letter reveals that the Panel was aware that there had been no suspicion of fire setting during the two periods of release on indefinite licence. The Decision Letter also however reveals that the Panel was aware that the Applicant had lighters in his possession during the latter licence period, which was also prohibited by the conditions of the licence.
23. It is noted in the Decision Letter that the Applicant's custodial behaviour had been good, but that the Panel considered that poor emotional management and alcohol misuse were key risk factors for the Applicant. It had been noted that the risk management plan included a mix of external measures and individual self-management, and that alcohol testing was suspended in approved premises at the time.
24. It is not the function of the Board to assess or determine the appropriate manner by which a prisoner's ability to manage an identified risk factor could or should be addressed in closed prison conditions.
25. It is important that a panel should explain clearly a decision that is contrary to the opinions and recommendations of professional witnesses. That is especially so in the case of unanimity among professional witnesses: **R (Wells) v Parole Board 2019 EWHC 2710**. However, the Parole Board is not obliged to adopt the opinions and recommendations of professional witnesses and it is a panel's responsibility to make its own risk assessment and to evaluate the likely effectiveness of any risk management plan proposed on the totality of the evidence, which it may be expected to perform with the benefit of its expertise in the realm of risk assessment; see **DSD**, for example. In the Applicant's case, I consider the reasons stated within the Decision Letter are adequate.
26. Turning to the assertion that there is irrationality in the Panel taking a contrary view of the Applicant's eligibility for release to previous panels of the Board that directed the Applicant's release, that assertion is not supported by any analysis of the reasons given by the earlier panels. In any event, it was the Panel's responsibility to make its own risk assessment and to evaluate the likely effectiveness of any risk management plan proposed on the totality of the evidence before it. That evidence included evidence of intervening matters including the circumstances leading to the Applicant's recall. I also note in passing that the previous panel to consider the Applicant's case decided, albeit on the papers, that the Applicant was not at that time eligible for release.

Decision

27. The Decision is not marred by irrationality or procedural unfairness. The application for reconsideration is, accordingly, refused.

Timothy Lawrence
25 May 2021