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**[2021] PBRA 99**

# Application for Reconsideration by Penn

## Application

1. This is an application by Penn (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 23 May 2021 not to direct his 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 decision letter, the dossier, and the application for reconsideration.

## Background

4. The Applicant is serving an extended determinate sentence of 13 years imposed on 8 September 2011 following conviction for robbery to which he pleaded guilty. The sentence comprises a custodial term of nine years with an extension period of four years. He was convicted on the same occasion for possessing an imitation firearm when committing an offence, to which he also pleaded guilty but received no separate penalty. His sentence expiry date is reported to be in October 2023.

5. The Applicant was most recently released on licence on 21 January 2020. His licence was revoked on 11 March 2020, seven weeks later, and he was returned to custody the following day. This is his third recall on this sentence, with previous recalls taking place in 2015 and 2016.

6. The Applicant was aged 33 at the time of sentencing. He is now 43 years old.

## Request for Reconsideration

7. The application for reconsideration is dated 4 June 2021 and has been submitted by solicitors acting for the Applicant.

8. It submits that the panel's decision was irrational as the panel failed to provide adequate reasoning to support its conclusion which did not follow the recommendations of the witnesses.

9. This single ground is supplemented by written arguments to which reference will be made in the **Discussion** section below. No matters of procedural unfairness are raised.

**Current Parole Review**

10. The Applicant's case was referred to the Parole Board by the Secretary of State following his recall to consider whether to direct his release (either immediately or on a fixed date) or make no direction as to release.

11. On 28 April 2020, the case was directed to an oral hearing by a single-member Member Case Assessment (MCA) panel. Directions were made for a full psychological risk assessment (PRA) to be provided by 30 October 2020, together with various other reports prior to the oral hearing including updates from the Applicant's Prison Offender Manager (POM) and Community Offender Manager (COM).

12. After some documented delays, a PRA (dated 28 January 2021) was provided which recommended the Applicant's re-release on licence. In addition, both the POM report (dated 18 April 2021) and COM report (dated 29 April 2021) recommended the Applicant's re-release.

13. An oral hearing took place on 19 May 2021. It was held remotely by video conference (due to COVID-19 restrictions) before a panel of two members consisting of a judicial member and psychologist specialist member. The panel heard oral evidence from the Applicant's POM and COM, the prison psychologist who completed the PRA and the Applicant. The Applicant was legally represented throughout.

14. The decision letter indicates that the POM and COM and the prison psychologist supported release in their oral evidence.

15. The panel did not direct the Applicant's release.

**The Relevant Law**

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

*Parole Board Rules 2019*

17. 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)).

18. 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*

19. 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."*

20. 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.

21. 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**

22. The Secretary of State has submitted no representations in response to this application.

**Discussion**

23. The basis of the application is essentially that, while acknowledging that the panel is not bound by the recommendations of witnesses, its conclusion and reasoning for that conclusion are inadequate and thus irrational.

24. 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. 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, following **R (Wells) v Parole Board [2019] EWHC 2710.** Moreover, the duty to give reasons is heightened when expert evidence is, implicitly at least, rejected by the panel (**Wells** at para. 40 *per* Saini J).

25. A number of points of contention are raised in the application.

26. It first notes that the hearing was heard at two prison establishment as stated in the decision. Moreover, it notes that the panel said the Applicant had held a clean driving licence since 2019, whereas the Applicant has actually held a clean driving licence for 19 years. While perhaps indicative of a lack of care in drafting, I do not find either error to be material to the rationality of the panel's decision-making.

27. The application also asserts that the decision letter did not include the standard *'reconsideration process'* paragraph and therefore the panel may have been ignorant of the expectation that extended determinate sentence prisoners serve the extended element of their sentence on licence where possible. The dossier before me contains two copies of the decision letter. These are identical, apart from the second one having the standard reconsideration wording on page 8. It is possible that an incomplete decision letter was issued. However, both versions of the decision before me refer to the Applicant's extended determinate sentence in their first line. Moreover, the Panel Chair Directions (PCDs) of 11 May 2021 correctly categorise this review as an *'Extended Sentence Recall'* (and, as an aside, identify the correct prison establishment). I am therefore not satisfied that the panel misled itself as to the Applicant's sentence type or failed to appreciate the consequences of a negative decision *'eating in'* to the extension licence period.

28. The application also notes the potential unfairness to an unrepresented prisoner which would arise if a decision subject to reconsideration under rule 28 was issued without the *'red hand'* wording pointing out that it was. While the Applicant in this case was legally represented, their submission on this point is, to my mind, sufficiently important to merit comment, albeit *obiter*. It is incumbent on panels, and both Parole Board and Public Protection Case Managers to ensure that, so far as is possible, such a situation never arises.

29. The application also notes that the panel (on the day of the hearing) had not seen five positive character references in support of the Applicant from prison staff since they had not yet been paginated into the dossier. It then goes on to assert that "*it seems the panel did not view the references after the oral hearing, despite being invited to do so*". The decision letter notes a dossier of 341 pages together with "*a small number of other documents not included in the 341"*. Looking forward from page 341 in the dossier before me, I see the PCDs of 11 May 2021 and the five character references. While it would have been helpful for the decision letter to specify what the other documents were, it is reasonable for me to conclude that the "*small number of other documents*" (plural) includes the character references.

30. As to the main thrust of the application, there are two questions that fall to be considered. The first question is whether the panel's logic in reaching its conclusion is discernible from the decision letter. If not, it will fail the **Wells** test. If it is, then the second question is whether that logic is irrational in the sense set out in **DSD**.

31. I approach these two questions in the light of the general principle that if a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.

32. The panel's conclusion is very brief. It notes that all witnesses concluded that the Applicant met the test for release. It goes on to say "*…the panel is however not persuaded in the light of your recalls and lack of compliance with your licence conditions that it is no longer necessary for the public protection that you should remain in custody. Drug misuse has been a persistent factor in your offending and will remain so"*. The panel's decision therefore seems to be founded on the following:

(a) the Applicant has had three recalls;
(b) all recalls resulted from a lack of compliance with licence conditions;
(c) drugs are an acknowledged significant risk factor (and featured in at least the second and instant recalls);
(d) the risks from drug misuse are still present and presented themselves quickly when last in the community;
(e) the panel therefore concluded that the risks from drug misuse are such that they cannot be safely managed in the community.

33. The panel's logic is therefore discernible, albeit requiring some effort. On balance, having read the decision as a whole, I find that it does (just) discharge the enhanced duty to give reasons imposed by **Wells**. It would, of course, be preferable for any panel's logic to be clearly set out in its conclusion section, so that all parties – particularly the prisoner for whom liberty is at stake – can be certain without having to piece the panel's reasoning together.

34. Is it irrational? It is argued that the Applicant presents a moderate risk of future violence, the risk management plan is robust (including drug testing and support from a local substance misuse agency), no further core risk reduction work was identified, the Applicant did not commit any further offences on licence, and there is no evidence to suggest the Applicant has used drugs in custody since his lapse in October 2020.

35. In its analysis of the proposed additional licence conditions, the panel notes that they are similar to the previous licence conditions that were breached. Although the request for recall report sets out four alleged breaches of licence conditions, the revocation order shows that the Secretary of State was satisfied that the Applicant breached only the standard good behaviour licence condition. The panel also concludes that the previous licence conditions were inadequate to manage the Applicant's risk in the community.

36. Looking at my interpolation of the panel's reasoning in paragraph 31 above, I find points (a) – (d) to be sound and fully supported by evidence. The final point (e) deals with the leap of reasoning between those points and the panel's overall conclusion.

37. While the Applicant's behaviour clearly deteriorated in the community and there were indications of escalating active risk factors, these were noticed and acted upon by returning the Applicant to custody before any serious harm manifested itself. In that sense, the risk management plan did protect the public from serious harm. The Applicant's risk factors are well-known, and it is not unreasonable for me to conclude that a plan which protected the public on this recall would do so again. I am therefore persuaded by the Applicant's submissions that the conclusion (that the risk management plan is inadequate to protect the public and therefore the Applicant must remain in custody) is irrational in the **DSD** sense.

38. It is almost certainly the case that the panel, who I have no doubt approached this review conscientiously, reasonably and sensibly, had a much firmer and logical set of reasons in its mind when reaching its conclusion not to release the Applicant. However, I cannot look into the panel's mind; the only way in which I can determine

this application is on the evidence before me and, having carefully considered the decision letter, cannot find a way in which its conclusion can be rationally and sustainably explained. My conclusion may have been different had the panel's reasons been more prominently and expansively articulated, but, in the absence of this, I cannot find a rational explanation.

**Decision**

39. Accordingly, applying the test as defined in case law, I find the decision not to release the Applicant to be irrational. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

**Stefan Fafinski**
**12 July 2021**