

Application for Reconsideration by Constantine

Application

1. This is an application by Constantine (the Applicant) for reconsideration of a decision of an oral hearing dated 6 October 2022 not to direct release. The application is made by his legal representatives.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are the dossier, the decision letter and the application for reconsideration.

Background

4. The Applicant is serving an extended determinate sentence for 2 counts of robbery and a concurrent sentence for possession of a bladed article. The sentence comprises 9 years custody and 3 years on extended licence. He was automatically released on 1 August 2019 and his licence was revoked on 29 June 2020. This is the first recall on his sentence, and the first review of that recall. His sentence will expire on 31 July 2025. He was 39 when sentenced, and he was 48 years old at the time of the hearing.

Request for Reconsideration

5. The application for reconsideration is dated 21 October 2022.
6. The application was not made on the published form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints and reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made.
7. The grounds for seeking a reconsideration are as follows:
 - (a) Irrationality



- The Applicant states he was never charged with any further offending whilst in the community and had been fully compliant with probation prior to recall.
 - The Panel assessed that drug misuse in the community increased the Applicant's risk, however the application submitted that the Applicant was honest with probation about his drug misuse and this was confirmed with drug testing. As no further offences had occurred, it was also submitted that drug use had not increased the Applicant's risk.
 - Since return to custody, the Applicant had engaged with relevant offence focused work and was known as a 'model prisoner'.
 - The Community Offender Manager had been confident that the proposed risk management plan significantly covered all areas of risk.
8. I asked for clarification of the extended sentence key dates from the Secretary of State, which I received. Although the Application is vague on whether or not the Applicant was submitting that the test applied by the panel was incorrect, the Application does mention the test for release and in reading the dossier and the decision letter it became obvious there might have been some confusion as to which test for release was being considered. I consider this issue under the heading of '*The Relevant Law*' below.

Current parole review

9. The Secretary of State's referral to the Parole Board to consider release for the Applicant is not dated however I am satisfied that it was provided for the purposes of this review. A Parole Board considered the referral and deferred making a decision as the Applicant was awaiting the outcome of police investigations relating to the circumstances of the recall. The review was further deferred on 4 March 2021 and again on 16 June 2021 because the police investigations were ongoing. A panel directed an oral hearing on 18 September 2020, and a further adjournment was directed, along with police reports, on 8 November 2021. On 23 February 2022, having reviewed a police report indicating that no further action was going to be taken with respect to the Applicant, an oral hearing was directed. This took place on 6 October 2022.
10. The panel consisted of two independent members. The panel considered a dossier of 424 pages, and evidence was taken from a stand-in Prison Offender Manager (POM), the Applicant's Community Offender Manager (COM) and the Applicant.

The Relevant Law

11. The decision letter evidences some confusion about the correct test for release. The first page of the letter template automatically populates the statutory test provided for in The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). This test states that 'The Parole Board will direct release if it is



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satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined'. The template does not however, take into account the test as defined in the case of *R (Sim) v Parole Board* [2013] EWCA Civ 1845 [2004] QB 1288. This test, known as the '*Sim test*' is to be used when a prisoner who is serving an extended sentence is recalled in the 'extension period' of their sentence. In the case of the Applicant, he was still within the custodial period of his sentence when he was recalled, this is something I confirmed from the Secretary of State. Therefore, the usual LASPO test did apply and the template was in fact correct.

12. The confusion arises in the decision letter. Under the heading '*Any Other Information*', the panel states, in effect, that the Applicant is now in the extended term of his sentence. That has been confirmed to be incorrect. The panel goes on to state that '*The panel should be minded to direct release unless it considers it likely that he would commit a further serious offence*'. This is not the *Sim test*, neither for that matter is it the LASPO test. Under the heading of '*Discussion*' I consider this issue.

Parole Board Rules 2019 (as amended)

13. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

14. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

Illegality

15. An administrative decision is unlawful under the broad heading of illegality if the panel:

- (a) misinterprets a legal instrument relevant to the function being performed;
- (b) has no legal authority to make the decision;
- (c) fails to fulfil a legal duty;
- (d) exercises discretionary power for an extraneous purpose;



- (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
- (f) improperly delegates decision-making power.

16. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Irrationality

17. 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."

18. 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.

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

Other

20. 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 prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship."*

The reply on behalf of the Secretary of State

21. The Secretary of State confirmed by way of email dated 10 November 2022 that he did not wish to make any representations in response to the application.

Discussion

22. Although illegality has not been cited in the Application, I consider it my duty where there is a ground that is apparent in the decision of a panel to take it into account in the reconsideration, in particular where the issue is the test for release and where the test has been raised in the Application.
23. I have already explained the confusion about the test for release above. I therefore considered whether, in light of the confusion, that the panel considered an incorrect test in making its decision. I have come to the conclusion that, although the panel wrongly thought the Sim test was the correct test (albeit they stated this test incorrectly), when it made its decision it in fact used the correct test.
24. The reason I have come to that conclusion is because in the panel's analysis of risk and public protection, it evidenced using the LASPO test. The most persuasive evidence is in the final paragraph in the decision letter which states: "*it remains necessary for the protection of the public that (the Applicant) be confined...*". This is so close to the LASPO test as makes no difference and satisfies me that despite its confusion the panel did in fact use the correct test for release.
25. I therefore turn to the Applicant's submission that the decision of the panel was irrational.
26. Part of the application focuses on the fact that the Applicant was not charged with any further offence. This is acknowledged in the panel's decision. The application also states that the Applicant was fully compliant with probation prior to recall. This last point can be quickly dealt with as the decision letter makes it clear that he had breached a licence condition by staying overnight in another place without seeking permission. In relation to further offending, the panel made no findings in respect of the matters for which the Applicant was being investigated by the police, however it did make decisions on the judgement and behaviour of the Applicant in finding himself in a situation where he was brought to the attention of the police. The panel took evidence from the Applicant and had written police evidence in the dossier. The panel did not find the Applicant's description of events that led to police involvement as credible and took care to explain why. The panel's concerns related to associating with negative contacts and drug misuse, and this concern, as well as the lack of credibility, is explained in the decision letter.
27. The next submission made by the Applicant is that he had been honest about his drug misuse while in the community on licence, and as no further offences had occurred, this drug misuse had not increased the Applicant's risk. The decision letter reports evidence about failed drug tests for Class A drugs. The panel also took evidence from the Applicant, who admitted that he had taken drugs while on licence but only rarely. The panel balanced this evidence with the evidence of the number of positive drug tests while the Applicant was on licence and came to the conclusion that the Applicant had minimised his drug misuse. It also found that the time that the Applicant was away from his residence (breaching his licence conditions) and associating with negative associates, he was likely involved in drug misuse. I note that the Applicant was being investigated for drug supply before the investigation was closed without further



action. The panel is clear that they do not find that the Applicant was involved in a conspiracy to supply drugs however that illicit drugs were involved in the circumstances that led to the police investigation. I find that a reasonable conclusion given the evidence before the panel. Having decided that drugs were a key continuing problem for the Applicant, the panel noted that drug misuse is a risk factor for the Applicant, and that much of his offending including the robberies were in order to fund the Applicant's drug habit. The panel is clear that it found that the Applicant was unable to avoid drugs on release and took the view that any relapse into drug misuse is likely to escalate the risk of further offending. In my view the panel fully explained its reasons for coming to this conclusion and was entirely reasonable in doing so.

28. The Applicant also submits that since return to custody the evidence was that he was a model prisoner. This is recognised in the decision letter, which notes that he has engaged with substance misuse work, reports that the COM states that he has completed a significant amount of (offence focused) work and held a trusted position in the prison, with no evidence of drug misuse. The decision letter indicates that these matters are encouraging, however the letter is clear that the panel placed weight on the Applicant's continued misuse of Class A drugs and associations with negative peers while in the community. The panel found that the Applicant presented a high risk of serious harm should he re-offend given his offending history and clearly states in its letter that drug misuse in the community on licence would be likely to increase the level of risk. Given the Applicant's past history and events leading to recall, I find that the panel balanced the Applicant's good behaviour in custody with his offending history and behaviour in the community and came to a justifiable conclusion about his risk.

29. Finally, the Applicant submits that the COM had been confident that the proposed risk management plan covered all areas of risk. The decision letter provides an analysis of the risk management plan. The panel acknowledges that the proposed risk management plan had licence conditions that were both proportionate and necessary, however the decision letter was clear that while the plan offered external controls to manage the Applicant's risk, it was concerned that the success of the plan would rely on the Applicant's compliance and honesty with his COM. The decision letter evidences the panel balancing the risk management plan with its concerns about the evidence of lack of compliance in the Applicant's history and the likely risk of return to drug misuse. It even considered whether strengthening the plan would make a material difference (such as the use of Approved Premises for release address). I conclude that the panel's conclusion that risk could not be managed with the plan was balanced and reasoned.

Decision

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




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15 November 2022

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