

[2022] PBRA 37

## Application for Reconsideration by Crossland

### The Application

1. This is an application by Crossland (the Applicant) for reconsideration of a decision by an oral hearing panel of the Parole Board (the Panel) dated 7 February 2022 not to direct his release (the Decision) following a hearing held remotely on 24 January 2022.
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. This is an eligible case.
3. I have considered the application on the papers. These include the dossier consisting of 1043 pages, the Decision and the application for reconsideration submitted by the Applicant's solicitors.

### The Background

4. The Applicant is now 38 years of age. He was excluded from school before completing formal education because of his disruptive behaviour. He was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Obsessive Compulsive Disorder (OCD). He has since been diagnosed with Autism Spectrum Disorder (ASD). He has a very limited employment history and had no permanent home at the time of the index offence. Prior to the index offence he had 14

convictions for 40 offences which included convictions for acquisitive offending; possession of a weapon; threatening behaviour; criminal damage; resisting or obstructing a constable; failure to comply with court orders and common assault against a security guard. He has admitted to other un-convicted offending, including



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taking vehicles without consent, burglary and arson (setting fire to vehicles he had stolen to avoid detection).

5. The index offence was a significant escalation in the seriousness of his offending. He had been living with a very close friend and that friend's partner in a flat in a communal block. The Applicant believed that his friend's partner had been responsible for informing the police about burglaries he and his friend had been committing. He planned his revenge by sending someone to buy petrol, returned to the flat which was at the time unoccupied and forced entry. He doused several rooms with petrol before throwing a burning rag into the flat. A significant explosion followed, engulfing the flat in flames and causing serious damage. Other occupants of the block of flats escaped unharmed. The Applicant showed no remorse, telling police that *"if the whole house had burnt down, I wouldn't have cared. They were all wrong 'uns."*
6. The judge in passing sentence on 11 November 2010 described the attack as *"a premeditated act of revenge which caused considerable fear and which endangered many innocent lives."* The Applicant had pleaded guilty to a count of arson, being reckless whether life would be endangered. The court imposed an Indeterminate Sentence for Public Protection (an IPP) with a minimum term to serve of 2 years. The Tariff Expiry Date was 29 May 2012.
7. A previous panel of the Board considered the Applicant's case at an oral hearing on 13 December 2018. In a decision dated 20 December 2018 that panel directed his release. He was released on 1 April 2019. His licence was revoked just over one month later on 4 May 2019 and he was returned to custody the same day.

### **Proceedings before the Parole Board**

8. This was the Applicant's first review since his recall. It is necessary to set out in a little more detail than usual some of the relevant history of the review.
9. The case was described by the Panel as having had a *"long and difficult history"*. It was due to be heard on 23 March 2020 – the first day of the Covid lockdown. The case had to be repanelled and was adjourned on several occasions in part to enable more work to be done on the proposed risk management plan. This process engaged a number of

different agencies. In due course it was agreed to reconvene the panel in December 2021. It had not proved possible to gather together the original panel and therefore on 2 December 2021 a new panel comprising of the original chair, an independent member and a psychologist member convened by video link to hear the Applicant's case afresh. He was represented throughout by solicitors. Between recall in May 2019 and the hearing in December 2021, the dossier had increased substantially from 311 to 1034 pages.

10. Events at the hearing on 2 December 2021 are the subject of Ground 1 of this application. A short and helpful summary of what took place at that hearing is set out at the beginning of the Decision (pages 3/ 4) as follows:

*"The panel took substantial amounts of evidence at that hearing which lasted over five hours. [The Applicant] (and the panel) clearly tired and [the Applicant] left the room...twice, having said he no longer wished to work with his COM. It was decided in fairness to [the Applicant] that his hearing be adjourned again to allow (the COM) to make further private contact with [the Applicant] and allow [him] and (the COM's) evidence to be concluded with no further time pressures."*

So it was that the panel reconvened on 24 January 2022 when the taking of the evidence was concluded.

11. A formal Adjournment Notice setting out the reasons why the hearing of 2 December 2021 had to be adjourned can be found in the dossier.

### **The Request for Reconsideration**

12. The grounds for seeking a reconsideration of the Decision are in effect as follows:

#### **Ground 1**

**The proceedings on 2 December 2021 were procedurally unfair because of their length, which had a negative bearing on the Applicant's ability to provide coherent evidence, given his diagnosis of ADHD.**

## Ground 2

**The refusal to direct the Applicant's release was contrary to the evidence given by the professional witnesses all of whom supported his release into the community.**

### The Relevant Law

#### *Parole Board Rules 2019*

13. 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)).
14. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28(1). This has been confirmed by the decision on a previous reconsideration application in the case of **Barclay [2019] PBRA 6**.

#### *Irrationality*

15. 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."*

16. This test had been 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.

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

### *Procedural unfairness*

18. 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.

19. 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.

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

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

21. PPCS on behalf of the Secretary of State has indicated that no representations in response to [the Applicant's] application will be made.

### **Discussion**

#### **Ground 1**

22. Hearing panels of the Parole Board are well aware of the stress that can be felt by all participants in an oral hearing. This was a serious and troubling case with a particularly long and difficult history. During a previous hearing the Decision records how the Applicant had walked out of the room twice and had become irate when giving evidence. The Panel were required to take into account all it knew and understood of the Applicant's history, circumstances and diagnoses and to assess as the hearing went on whether he was able and willing to continue to participate in it meaningfully.

23. To make good a claim of procedural unfairness the Applicant's representatives must satisfy me that he was not given a fair hearing and / or that he was prevented from putting his case properly.

## **Ground 2.**

24. This ground alleges, in effect, that the decision not to release was irrational because it was contrary to the unanimous recommendations of the professional witnesses.

25. There are classes of cases in which there is a duty on the decision maker to give reasons. One such group is where the subject matter, as in this case, involves personal liberty.

26. The importance of giving adequate reasons in decisions made by the Parole Board has been made clear in two High Court cases **Wells [2019] EWHC 2710 (Admin)** and **Stokes [2020] EWHC 1885 (Admin)** both of which I am bound to follow. They provide helpful guidance on the correct approach to be followed where a hearing panel of the Board decides either to accept or reject evidence presented to it.

27. In the case of **Wells** the court suggested that rather than ask the question "*was the decision being considered irrational*" the better approach is to test the panel's conclusions against all of the evidence and ask whether the conclusions reached can be justified on the basis of that evidence while giving due deference to the panel's experience and expertise.

28. Panels of the Board are wholly independent and are not obliged to adopt the opinions or the recommendations of professional witnesses. A panel's duty is clear. It must make

its own assessment of risk and evaluate the likely effectiveness of any proposed risk management plan. This will require a panel to both test and then assess the evidence and decide what evidence it accepts and what evidence it does not accept.

29. Once a panel has reached that stage the next step is for it to follow the guidance given in the case of **Stokes** which requires a decision maker (a panel) to explain its reasons whether or not it is going to follow or depart from the recommendations of professional witnesses.

30. Therefore, my decision in respect of Ground 2 of this application is in two parts. First, whether I am satisfied that the conclusions reached by the Panel were justified by the evidence and secondly, whether I am satisfied that the conclusions that it did reach were adequately and sufficiently explained.

31. I should make it clear that the reconsideration mechanism is not a process where I am required to reach a conclusion as to whether or not I would have reached the same or a different conclusion from the one reached by a panel. My duty when deciding a reconsideration application is to examine all of the material that was considered by a panel and then scrutinise in detail the decision itself and decide if in approaching its task and reaching its decision the panel complied with its public law duty to reach an evidence based and properly explained decision.

32. The giving of reasons by a decision maker is "*one of the fundamentals of good administration*" (**Breen v Amalgamated Engineering Union [1971] 2 QB 175**). The reason why this principle is so important is clear. When reasons are provided, they may indicate that a decision maker has made an error or has failed to take a relevant factor into account. An absence of reasons does not automatically give rise to an inference that the decision maker has no good reason for the decision. On the other hand, it is not necessary for every factor to be dealt with explicitly for the reasoning to be legally adequate in public law.

33. The way in which a panel fulfils its legal duty to give reasons will vary depending on the facts and circumstances revealed by the evidence in any particular case. For example, if a panel is intending to reject the unanimous recommendations of professional witnesses then detailed reasons will be required. If on the other hand a

panel is accepting the evidence of one or more than one professional witness, then perhaps less detailed reasons may be required. This much is, as I read it, implicitly recognised by the Judgment of the High Court in the case of **Wells** (para. 40) :

*"The duty to give reasons is heightened when the decision maker is faced with expert evidence which the panel appears, implicitly at least, to be rejecting".*

34. Bearing in mind this guidance, I turn to consider the Decision itself:

- i. The Panel set out in some detail the matters upon which it based its conclusions.
- ii. It set out its analysis of the Applicant's background, history, diagnoses, custodial conduct, present circumstances and future plans. It carried out a careful assessment of his risk and a thorough analysis of the manageability of that risk in the future. It noted that if the Applicant were to be released he would pose a high risk to the public and to (known) adults. The Panel considered that his risk factors included poor emotional control and management; a lack of insight into his offending and his personality; a reluctance to engage with professionals; accommodation and social stability; a lack of victim empathy; negative peers; lifestyle and substance and alcohol misuse. The Panel recorded and analysed carefully and fairly the evidence given by the professionals who considered that the Applicant's risk of causing serious harm could be managed in the community.
- iii. The Decision dealt with the Applicant's recall in April 2019. It reached the conclusion that his recall was appropriate, finding that in the light of his sudden departure from where he was living on licence and the indication that he was potentially declining into chaotic and non-compliant behaviour had demonstrated that his risk could no longer be managed in the community. Having dealt with recall the panel then went on to consider the test for release.
- iv. It set out and analysed the evidence of the professional witnesses in appropriate detail. It made it perfectly clear that it had taken "*careful note*" of the recommendations of the professionals and in doing so had noted examples of the Applicant having conducted himself appropriately. The Panel went on to set out the matters that they judged needed to be placed against those positive aspects of his review. Unsurprisingly, it looked with care at his attitude to fire. The Panel found that it was not reassured that he did not continue to hold a particular fascination



with it and remained concerned with the differences in his previous accounts of unconvicted fire setting.

- v. While finding that during the 19 months or so since his recall the risk management plan had been considerably strengthened, the Panel noted that it remained unconfirmed in a number of very important areas.
- vi. The Panel took into account the Applicant's various diagnoses but found no substantive differences in his understanding of his risk, insight into his offending or in his ability to manage his emotions appropriately. It concluded that all the factors it had addressed cast significant doubt upon the potential effectiveness of the risk management plan and expressed doubt about his adherence to proposed licence conditions.

## **Conclusions**

### **Ground 1**

35. It is rare that a complaint of this nature will succeed in an application such as this when the matters in issue are not raised at the time or as soon as possible thereafter. I have been provided with the written closing submissions prepared on the Applicant's behalf by his legal representative dated 24 January 2022. I note that they make no mention of the matters raised in this Ground.

36. The Panel was clearly well aware of and sensitive to all the Applicant's difficulties. Taking all relevant factors into account the Panel decided, in order to ensure fairness, to adjourn the hearing on 2 December 2021 and to reconvene. No doubt it had become concerned about the Applicant's ability and willingness to engage meaningfully in the hearing process. It is to be noted that in the application for reconsideration his legal representatives confirm that the Panel went so far as to give assurances that his behaviour on the 2 December "*would not impact their decision making*". That in my judgment provides by itself the clearest indication that the proceedings were conducted with impeccable fairness.

37. I am therefore driven to the conclusion that this Ground is without merit. It was in my judgment precisely in order to ensure fairness that the Panel decided after a long and difficult hearing to adjourn. I find that there is no basis upon which to find that the

Applicant's hearing was in any sense procedurally unfair. On the contrary, in my judgment the Panel went to considerable lengths to achieve the overriding objective to deal with this review justly.

## **Ground 2**

38. This was a prolonged and difficult review. A highly experienced panel was required to examine in detail the opinions and recommendations of the professional witnesses which, in my judgment, they did fully and fairly. The Panel in the Decision (page 4) gave an assurance to the Applicant that while their decision was not intended to reflect every detail of the evidence, it focused on those elements that were relevant to its risk assessment while confirming that the totality of the material had been considered.

39. There are, as I have explained, two main issues that I must decide, first whether I am satisfied that the ultimate conclusion reached by the Panel was justified by the evidence and secondly whether that conclusion was adequately and sufficiently explained.

40. The Panel in setting out its careful analysis of the manageability of the Applicant's risk and in reaching its findings and conclusions thereon, provided detailed reasons why it had reached the clear conclusion that the statutory test for release into the community had not been met.

41. I am entirely satisfied that the decision not to release was one that was justified on the evidence. Taking a step back and considering the Decision as a whole I am similarly satisfied that the Panel fulfilled its public law duty to provide evidence-based reasons that adequately and sufficiently explained the conclusion that was reached not to direct the Applicant's release.

## **Decision**

42. For all of the above reasons I do not consider that the decision was procedurally unfair and / or irrational.

43. Accordingly, the application for reconsideration is refused.

**HH Michael Topolski QC**

**14 March 2022**