

[2023] PBRA 111

Application for Reconsideration by Ullah

Application

1. This is an application by Ullah (the Applicant) for reconsideration of a decision of an oral hearing panel dated 1 May 2023. The decision of the panel was not to direct release.
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, and/or (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 consisting of 409 pages; the Application for Reconsideration submitted by the Applicant's legal representative; and the response by the Secretary of State.

Background

4. On 16 May 2008 the Applicant was convicted of three offences of robbery and one offence of attempted robbery. There were also 98 similar offences taken into consideration by the judge, an offence of wounding with intent was left to lie on the file. The Applicant was aged 20 when convicted. The Applicant was sentenced to an indeterminate sentence for public protection. The minimum term fixed by the judge was five years and 274 days.
5. The Applicant, with a co-defendant, committed a series of robberies using weapons and force. He was said to be under the influence of alcohol and illicit substances when committing the offences. Weapons such as knives and a hammer were used to intimidate the victims. On one occasion a victim was struck on the head with a golf club causing injury.
6. The Applicant was noted to have an extensive history of criminal offending and a substantial number of offences prior to the index offences.

Request for Reconsideration

7. The application for reconsideration is dated the 23 May 2023.
8. The grounds for seeking a reconsideration are set out below.



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Current parole review

9. The Applicant was released on licence in October 2017 and recalled in January 2019. He had taken a motor vehicle without the owner's consent in February 2018. He was detected by the police and stopped after a police chase. He had driven into a police vehicle. He was charged and bailed but not recalled at that time. The Applicant then appeared in court in January 2019 charged with driving a motor vehicle dangerously and while over the drug driving limit. He was sentenced to a period of 10 months in custody. The record indicates that the Applicant had been on bail for a period of 10 months prior to the conviction in January 2019.
10. In May 2021 the Applicant absconded from prison and was eventually returned. He returned to prison in August 2021. He was charged with absconding and sentenced to a period of six months imprisonment in relation to the absconding.
11. Since being transferred back to prison there had been two positive drug tests in November 2022 and February 2023.
12. The oral hearing panel consisted of three independent members of the Parole Board. Oral evidence was received from the Prison Offender Manager (POM), the Community Offender Manager (COM), a prison commissioned psychologist, and a psychologist commissioned by the Applicant. The Applicant gave evidence and was legally represented. A dossier consisting of 390 pages was considered.

The Relevant Law

13. The panel correctly sets out in its decision letter dated 1 May 2023 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

14. Pursuant to 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)).
15. 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

16. 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."

17. 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.
18. 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

19. 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.
20. 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.
21. The overriding objective is to ensure that the Applicant's case was dealt with justly.
22. 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."*
23. 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.

The reply on behalf of the Secretary of State (the Respondent)

24.The Respondent offered no representations.

Reconsideration grounds and discussion

25.The Applicant's solicitor recited in the application for reconsideration a substantial summary of the evidence which was given in the oral hearing.

26.The Applicant's solicitor particularly referred to evidence adduced by a prison commissioned psychologist and a psychologist commissioned by the Applicant's solicitor. The Applicant's commissioned psychologist took the view that the Applicant's risk could be safely managed in the community and recommended release. The prison commissioned psychologist took the view that the Applicant's risk could not be managed, and that further work was required.

27.The COM gave evidence and took the view that further behavioural work was required and did not recommend release.

28.The POM took the view that based upon the Applicant's prison behaviour release was recommended.

29.This, therefore, was a case where there were differences of opinion from the professionals. The fact that there were differences of opinion was acknowledged by the panel in their decision letter.

30.I will deal with the specific grounds for Reconsideration as I identify them.

Ground 1

31.The panel chair should have directed a psychologist to attend as a co-panellist in the light of the fact that there were two conflicting psychological reports.

Discussion

32.Members of the Parole Board are highly experienced in the field of analysing professional reports particularly from psychologists and psychiatrists. Whilst the instruction of a specialist member can be helpful (and sometimes essential), in this case the evidence adduced by both psychologists did not involve unusually complex psychological issues, both psychologists used a well understood and known psychological tool for measuring the risk of violence and in both cases the psychologists set out reasonably clearly the arguments for their conclusions.

33.I am not therefore persuaded that the absence of a specialist psychologist member in this case was either procedurally irregular or irrational. Parole Board members are perfectly capable of assessing the expert evidence of psychologists in cases such as the Applicant's.

Ground 2

34. The panel inaccurately recorded information about drugs which were said to be in the possession of the Applicant at a time when he had been arrested relating to a vehicle matter. This being the arrest and incident which eventually led to his recall.

Discussion

35. The background to this complaint is that the Applicant had taken and driven a car without the permission of its owner. The police had detected the Applicant driving the car. The Applicant failed to stop the vehicle when required to do so by the police. The Applicant then rammed a police vehicle in efforts to escape. When arrested the Applicant was found to be in possession of a bag of white powder. He was arrested on suspicion of possessing a controlled drug. The police did not pursue the arrest for the drugs matter in court. It appears the Applicant was not charged with the offence.

36. Later in the oral hearing the Applicant was asked about the powder. He told the panel that the white powder was in fact his medication and that he had arranged his own prescribed medication tablets in self sealed bags. The panel did not find this explanation credible.

37. The fact that the police did not pursue charges is not, in my determination the relevant factor. Of relevance were the circumstances of the finding of the substance, the description of the possessed items, and the Applicant's explanation. In the light of the background circumstances, the panel were entitled to assess the Applicant's evidence and to reach their own conclusions as to its credibility. I therefore determine that the issue as to whether the items were subject to a formal police charge or were pursued in court is of limited relevance.

38. The issue was clearly the circumstances of the finding of drugs and the possession of these substances. In my estimation the panel's conclusion, that the drugs were unlikely to be prescribed medication carried by the Applicant, could not be considered to be irrational in the sense set out above.

Ground 3

39. The Applicant's solicitor sets out in the representations a number of issues relating to the panel decision. In essence the Applicant's solicitor challenges the proposition (in the decision) that illicit drug use, alcohol, absconding, and breach of licence conditions are linked to serious harm in this case.

Discussion

40. I have considered the panel decision and in particular the concluding paragraph of the decision letter.

41. The panel noted that the Applicant's previous offending indicated that the Applicant had a capacity to use significant levels of violence. This was clearly unarguable in the light of his previous offending history.

42. The panel concluded that the use of violence by the Applicant was *'instrumental'* and used as a means to commit acquisitive offences (particularly robbery). The panel further noted that, based on recent evidence, issues relating to illicit drugs *'remained alive'*. The panel indicated that they did not feel that drug issues had been sufficiently addressed.
43. The panel also noted that it was the view of the prison commissioned psychologist that the Applicant had not undertaken intervention work to address problems concerning emotional management, this work was considered, by the psychologist, to be *'core'* (essential) risk reduction work.
44. The panel also took the view that there was a likelihood, based on historical evidence, that the Applicant might abscond in the future.
45. Finally, the panel took the view that the Applicant may not comply with the terms of any licence in the future, again based upon historical evidence.
46. It is clearly well established that the factors set out above, and cited by the panel in their concluding paragraph, could all lead to an elevation of risk, and result in serious harm either psychological or physical. As the panel noted, the Applicant had used physical violence to commit robberies which were the basis of his index offences. The panel correctly noted that the Applicant had the *'capacity'* to commit acts of violence as evidenced by the historical convictions.
47. It is also obvious that an inability to manage emotions can lead to violent behaviour or psychological harm. Absconding from custody may also lead to harm possibly in circumstances where the absconder uses violence in order to prevent arrest or detection. Breaches of licence conditions may also lead to an elevation of the risk of violence, again in circumstances where the licensee is seeking to avoid detection or arrest, or possibly where higher and reckless risks are taken in the contemplation that the licensee will be detected and recalled in due course.
48. In this case, whilst the panel listed a number of concerns as set out above, the panel omitted to explain how the particular concerns led them to believe that this Applicant's risk of serious harm was elevated to a point where it was necessary for him to be confined for the protection of the public. The panel were concerned about drug misuse, however the panel failed to explain how they concluded that drug misuse would lead to an elevation of risk such that the Applicant should be detained. Equally, the panel were concerned about emotional management, however again the decision gives no indication of how emotional management was linked to an elevation of the risk of serious harm. Absconding also appeared to be a concern, however again the panel failed to explain how the risk of absconding was linked to an elevation of the risk of serious harm.
49. The panel therefore, in my determination, failed to engage directly with the issues of concern and to explain clearly why it believed that those listed concerns would lead to serious harm. It was clear that a number of the listed behaviours would almost certainly lead to a recall to prison, however the test to be applied by the panel was not whether the Applicant would act in a way which would lead to a recall to prison, but whether the anticipated behaviour was such that he created the risk of serious harm to the public, which thereby necessitated his confinement.



50. In this case this issue was particularly relevant because the Applicant had absconded for a number of months. There appeared, save for reckless driving when arrested, to be no evidence of the use of violence or a risk to the public during that period at large, albeit that the Applicant was unlawfully at large and therefore failing to comply with his licence condition to be in contact with his supervising officer.
51. It is incumbent upon panels not only to list the concerns, but to apply those concerns to the statutory test. In this case there is, in my determination, insufficient explanation by the panel as to how their concerns led them to conclude that the test for release was not met.
52. The panel was also faced with a difference in the opinion of two psychologists. The panel had no obligation to accept the opinion of any professional, they were required to reach their own conclusions based upon the evidence as a whole. However as has been repeated on many occasions, if a panel make a decision contrary to the opinions and recommendations of professional witnesses it is important that the panel explain clearly its reasons for doing so, and its reasons should sufficiently justify its conclusions. In this case the panel failed to explain the reasons for rejecting the views of the independent psychologist.
53. The panel cited one issue with which they disagreed with the view of the independent psychologist and that was an issue concerning the technical nature of the Applicant's violence. The independent psychologist posited that the violence was '*expressive*' (understood to mean impulsive) rather than '*instrumental*' (understood to mean deliberate violence to secure an end). The panel appeared to take the view that the violence was instrumental, however this was insufficient to explain why the views of the Applicant's commissioned psychologist were rejected as a whole.
54. It should be noted that the decision letter in this case is clearly and succinctly drafted and addresses the Applicant's history and the factual findings of the Panel. However, as I have indicated above, I determine that the panel failed to set out clearly the rationale and analysis of their factual and historical findings, in such a way as to enable the Applicant to understand why the panel had concluded that those listed factual matters, led to a risk of serious harm.

Decision

55. In all the circumstances therefore, I conclude that the decision in this case was irrational in the legal sense set out above and I direct a reconsideration.

HH Stephen Dawson
21 June 2023