[2023] PBRA 125

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**Application for Reconsideration by Darby**

## Application

1. This is an application by Darby (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 9 June 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 613 pages; the application for Reconsideration submitted by the Applicant's legal representative; and the response by the Secretary of State (the Respondent).

## Background

4. On the 8 July 2005 the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection (IPP) in relation to an offence of robbery. The minimum term fixed by the judge was three years.

5. The Applicant demanded money from the victim of the offence (who was a child) and threatened to stab the child if he refused.

6. The Applicant was noted to have an extensive history of criminal offending and a substantial number of offences, including robbery offences, prior to the commission of the index offence.

## Request for Reconsideration

7. The application for Reconsideration is dated the 23 June 2023.

8. The grounds for seeking a reconsideration are set out below.

## Current parole review

9. The Applicant had been released by the Parole Board on two earlier occasions. He had been recalled following releases. The current panel were therefore considering release following recall. The Applicant's first recall had occurred nine months after release in circumstances where the Applicant had failed to comply with licence conditions and where his alcohol consumption had increased. He

was also convicted of a further offence whilst on licence. The offence involved an assault and the possession of a knife.

10. The Applicant was released again by a Parole Board panel in 2021. After a six-week period in the community he tested positive for substances on two occasions and was also observed to be under the influence of a substance. He was recalled to prison.

**Oral Hearing**

11. The review was conducted by an independent Chair of the Parole Board, a psychiatrist member of the Parole Board and an independent third member of the Parole Board. Oral evidence was given by the Prison Offender Manager (POM), a prison instructed psychologist, two support workers and a Community Offender Manager (COM). The Applicant was represented by a solicitor.

12. A dossier consisting of 594 pages was considered.

**The Relevant Law**

13. The panel correctly sets out in its decision letter dated 9 June2023 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.*"

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

23. The Respondent offered no representations.

**Reconsideration grounds and discussion**

**Ground 1**

24. Outstanding core risk factors not explained.

25. The Applicant's solicitor submits that the panel did not fully explain the core risk factors which were referred to in their conclusion. The conclusion of the

Panel was that the Applicant had outstanding core risk factors that needed to be addressed in closed conditions.

**Discussion**

26. At paragraph 1.3 of the decision the panel identified a number of risk factors relevant to the Applicant. The panel noted a major factor as substance misuse which historically had the effect of disinhibiting the Applicant and made him more likely to offend.

27. The Applicant had been addressing substance misuse in custody following the most recent recall. He had voluntarily moved to a substance free wing of the prison. He had been tested for drugs and the test results were negative. He had completed the expected relevant term on the drug free wing and was eligible for return to the main prison wings. At the time of the oral hearing, he had declined to move as he feared a return to drug use. The panel noted the Applicant's concerns about a return to drug use. Whilst it was to the Applicant's credit that he had sustained a drug free period on a specialist wing of the prison, the panel's concern was the Applicant's ability to sustain abstinence in the more exposed circumstances of a general prison wing and in the community. I am therefore satisfied that the core risk factors were explained by the panel namely a return to substance misuse which was directly associated with the Applicant's historical serious offending. The panel indicated that the Applicant's ability to manage abstinence remained a concern and was therefore a matter which needed to be further addressed. At paragraph 3.6 the panel noted that the prison commissioned psychologist had also indicated that the Applicant's ability to manage substance misuse required further consolidation in a closed prison. The panel, therefore, in my determination, adequately explained the reasoning behind their decision. Whilst there were differing views, the panel clearly concluded that the Applicant had not sufficiently addressed substance misuse in such a way to sustain abstinence beyond the controlled environment of the specialist prison wing.

**Ground 2**

28. Positive behaviour not recognised.

29. The Applicant took the view that his positive behaviour in custody had not been recognised.

**Discussion**

30. At paragraph 4.2 the panel indicated that the panel acknowledged that the Applicant had begun a recovery process, however the process was at an early stage and the panel were unsure about the Applicant's motivation. The panel

therefore acknowledged progress but took the view that the Applicant was in the early stages of demonstrating that recovery could be sustained. I am not persuaded that this complaint amounts to an irrational decision in the sense set out above.

**Ground 3**

31. Not considering open conditions.

32. The Applicant's solicitor complains that the panel's reasons for not recommending a transfer to an open prison are unclear

**Discussion**

33. 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 a previous reconsideration application in **Barclay [2019] PBRA 6**.

**Ground 4**

34. Concerns about a motivation to remain abstinent.

35. The Applicant's solicitor indicates that his client took the view that the panel were irrational to conclude that the Applicant's motivation to remain abstinent remained unclear. The Applicant took the view that his move to a drug free wing on the prison and his ability to prove abstinence by negative drug tests were evidence of his ability to remain abstinent.

**Discussion**

36. As indicated above, the panel acknowledged that the Applicant had made progress and had demonstrated an ability to remain drug free on the specialist wing. However, the panel took the view that the Applicant's resolve had not been tested in the more realistic conditions of a general prison wing where substances would be more freely available. The panel also noted in their decision (at paragraph 2.4), that the Applicant had been recalled on the last occasion after a period of six- weeks in the community having tested positively for illicit drugs on two occasions and having been found by staff in probation premises under the influence of a substance.

37. The panel therefore clearly explained the reason why there were concerns about whether the Applicant would and could sustain his motivation to remain substance free. I am therefore not persuaded that this ground amounts to evidence of an irrational decision in the sense set out above.

**Ground 5**

38. The use of recall would protect the public.

39. The Applicant's solicitor argues that the panel failed to explain why the power of recall was not considered a sufficient safeguard to protect the public, particularly as the COM indicated that there would be warning signs if the Applicant's behaviour deteriorated.

**Discussion**

40. The panel had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant as well as the witnesses. The Applicant was also legally represented throughout. Where there is a conflict of opinion, it was plainly a matter for the panel to determine which opinion they preferred, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above.

41. 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.

42. As indicated above the panel set out the reason for their conclusion. Whilst the power of recall may be a deterring (and possibly) protective factor, it is but one consideration in assessing and evaluating risk. The power of recall is unlikely to be a solely determinate factor in the assessment of risk by a panel. I am not persuaded that this issue amounts to an example of irrational decision making by the panel.

**General**

43. The Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

44. In this matter, as is frequently the case there were conflicting views. There were both positive and negative indicators. The panel, in my determination, identified those factors and clearly and adequately set out the reasons for their decision.

**Decision**

45. In all the circumstances therefore, I conclude that the decision in this case was not irrational in the legal sense set out above and that the decision was not procedurally unfair. I refuse the application for Reconsideration.

**HH S Dawson**
**13 July 2023**