

[2019] PBRA 59

## Application for Reconsideration by Sheehy

### Application

1. This is an application by Sheehy (the Applicant) who is 52 years old. The Applicant applies for reconsideration of the decision of a panel not to direct his release.
2. I have considered the application on the papers. These comprise of the dossier, the provisional decision letter of the panel, the application for reconsideration, the response of the Secretary of State, and an email from the solicitors acting for the Applicant.

### Background

3. The Applicant is serving an automatic life sentence for a second offence of Section 18 Wounding with Intent. The Applicant was released in 2015, later in that year he was recalled having committed further assaults. In 2018 he was transferred back to an open prison. He spent 4 ½ months in open conditions. He was then transferred back to the closed estate because of drug misuse.
4. His case was reviewed by a panel in 2019.

### Request for reconsideration

5. The application for reconsideration is dated 29 October 2019. The Applicant complains of irrationality on the basis of the following:
  - a. That the decision of the panel placed 'reliance' on the availability of Mentalisation Based Therapy (MBT) within open conditions (when in fact it was not available) this led to a determination that he could complete this intervention within the prison system.
  - b. That the panel placed too much weight on unsubstantiated allegations of the Applicant's behaviour so far as drugs are concerned in open conditions and failed to take account of several negative voluntary drug tests in closed conditions.
  - c. That the panel failed to investigate an issue relating to a failed MDT test in open conditions with sufficient thoroughness, in particular by requesting oral evidence from the Offender Supervisor at the open prison.



## The Relevant Law

6. Rule 25 and rule 28 of the Parole Board Rules 2019 apply in this case. Rule 28 (1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case
7. In **R (on the application of 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 paragraph 16: *'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'*. 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 Board in making decisions relating to risk. The Board when considering whether or not to direct a reconsideration will adopt the same high standard for establishing 'irrationality'.

## Discussion

8. **Availability of MBT** – In one area of the report to the panel, the Psychologist who prepared the risk assessment in this case concluded that the Applicant's risk of intimate partner violence (IPV) was not fully understood. The Psychologist suggested that the Applicant would benefit from further exploring his interactions with others. The Psychologist suggested that these outstanding areas could be addressed by individual work or by MBT. The Psychologist accepted that this was not 'core' work.
9. In its provisional Decision Letter, the panel noted the fact that all professionals were supporting release. The letter referred specifically to the arguments articulated in the recommendation of the Offender Manager. The panel also noted that the psychologist who had prepared the report for the hearing had originally recommended a move to open conditions but there had been a change of view having considered the Offender Manager's report and the risk management plan.
10. The panel noted that the Applicant had been violent in relation to a female friend within weeks of leaving designated accommodation in 2015; had misused alcohol in the community; had misled his supervising officer about his living arrangements; had used drugs while in custody following recall; and on their finding had demonstrated 'serial untruthfulness' making it difficult for the panel to accept the Applicants explanations. It was for these reasons that the panel concluded that the Applicant's risk of causing serious harm had not reduced sufficiently for the Applicant to be managed safely in the community.
11. The panel made no reference to the availability or otherwise of MBT or any other intervention as affecting their decision not to order release.
12. In recommending open conditions the panel expressed the hope that the Applicant would be able to receive one-to-one sessions of Mentalisation Based Therapy. This was clearly a link to the psychology report. In the report the



psychologist had made it clear that MBT was not a programme available in the prison system. However, the psychologist went on to indicate that individual work could take place in open or closed conditions. It was clear therefore that distinction was being made between an intervention available in the community and alternative work which was available in custody. A careful reading of the Decision Letter clearly indicates that the panel understood the distinction between one-to-one sessions as recommended by the psychologist and community based MBT. The panel in fact used the phrase 'one-to-one' and confirmed that it was the work 'as recommended by' the psychologist. The position could have been made clearer if the panel had referred to one-to-one sessions of therapy, rather than mentalisation based therapy, however the sentence read in the context of the psychology report is clear and accurate.

13. Accordingly, I do not find that the panel's decision to decline to release the Applicant was based on any misunderstanding of the availability or otherwise of MBT in the prison estate. The decision to decline release was based on a number of factors as set out by the panel. As I have indicated the decision clearly indicates an understanding that MBT was not delivered within the prison estate and accordingly I find that the panel's decision to decline release and recommended a transfer to open conditions had no connection with a mistaken understanding of the availability of MBT. Thus, dealing with the MBT point, I do not find that the decision not to release the Applicant was irrational.
14. **Unsubstantiated allegations** - as indicated above the Applicant was recalled and eventually returned to open conditions. After a period of months, the Applicant was returned once again to closed conditions because of drug misuse. Drugs were detected by Mandatory Drug Testing (MDT) in December 2017, April 2018, and May 2018. According to the LISP4 (Lifer Sentence Plan) document the detections in December and April resulted in adjudications. The detections in May 2018 were not proceeded with because the Applicant had been moved back to closed conditions.
15. At the hearing the Applicant denied knowingly taking drugs save for on one occasion in the open prison. He said he thought the December detections arose because he had been "spiked". He admitted taking drugs leading to a positive drug test in April. He denied giving a sample at all and therefore any knowledge of the detection in May.
16. The panel analysed the evidence relating to drug misuse with some care. The panel took account of the fact that there had been a decision (as indicated in the LISP 4) to move the Applicant from open to closed conditions based upon the drug history and the final detections in May. It was reasonable to conclude, on balance, therefore that records existed of the sample being taken and of its result. It was also reasonable to conclude that those records had been acted upon by staff within the prison (more than one person would be involved in the decision to move a prisoner in these circumstances).
17. The panel also noted that the Applicant had admitted all the drugs tests in a conversation with his Offender Supervisor after his move to closed conditions.



18. The panel also noted the pattern of incidents associated with drug use over the last 2 or 3 years.
19. Finally, the panel noted that the Applicant had voluntarily requested to be placed on a methadone prescription in the open prison and continued with the prescription for a period of time after the move to the closed prison. A request which was arguably at variance with being drug free since 2015 as indicated to the panel.
20. In **R (on the application of DSD and others)** the court made it clear that a Parole Board panel could and should use evidence of what the court called “wider offending” in reaching a conclusion about risk. In **DSD** the subject matter was offences which had been left on the file and not proceeded with or which were allegations.
21. In this case the fact or otherwise of adjudications was of less significance for the panel. The significant factor was whether the Applicant had been detected using illicit drugs and more importantly whether his denial of such use was an issue relating to risk. To reach a determination about the denied incidents the panel were perfectly entitled to consider; evidence in the form of a LISP 4; a report of an admission to an Offender Supervisor; and his pattern of admitted drug misuse incidents. It was for the panel to weigh that evidence against the prisoner’s denial and his subsequent voluntary drug tests, and to come to a fair conclusion. The panel also had the opportunity to assess the Applicant himself at the hearing.
22. The panel set out in some detail the basis upon which it concluded that the denial by the Applicant of drug detection lacked credibility.
23. Although not specifically referred to by the panel, it is of note that the Applicant reportedly spoke to the reporting Psychologist on the topic of the May 2018 drug detection saying that he ‘did not want to comment upon the positive test for opiates’ until the outcome of the adjudication was known. This comment again appeared to be an indication that the Applicant accepted he had been tested and was aware that the test had detected opiates.
24. The Applicant’s solicitors argue that the panel should have adjourned the matter and called a witness from the open prison to reinforce the evidence of the disputed MDT. It is incumbent on panels to make decisions as to the usefulness or otherwise of additional evidence. Reliance upon a variety of differing hearsay sources to reach a conclusion upon this discrete issue was not unusual and, in my determination, reasonable and proportionate. It is highly speculative to imagine that calling the author of the LISP4 document would have resulted in any substantial change in the substance of the evidence before the panel.
25. It is also noteworthy that no application appears to have been contemplated by the Applicant to apply to call further witnesses either in advance or at the oral hearing.
26. Accordingly I find that the panel’s process in analysing the evidence relating to the drug detections in the open prison were fair and reasonable, and thus I do not



find that the panel acted irrationally in reaching its conclusions about the detections or in its conclusion, that the evidence of the Applicant on this topic lacked credibility.

27. I note the reference in the Applicant's application to prison guidance relating to inclusion of documents (specifically that adjudications which are 'unproved' or 'quashed' should not be included in the dossier). The guidance appears to have been last revised some years before **DSD**. As I have indicated, this High Court decision makes it clear that the Board is not precluded from considering allegations of relevant risk related behaviour, by the fact that the allegations have not been concluded in a formal hearing. Indeed, the court asserted that it would be irrational not to consider such material.

28. Accordingly, I do not find that it was inappropriate or irrational for the panel to consider the available evidence relating to allegations of drug detections and use.

### **Overall Decision**

29. For the reasons I have given I do not consider that the decision in this case was irrational and accordingly the application for reconsideration is refused.

Stephen Dawson  
18 November 2019