

[2020] PBRA 130

Application for Reconsideration by Lang

Application

1. This is an application by Lang (the Applicant) for reconsideration of a decision of an oral hearing dated 13 August 2020 not to direct his release.
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.
3. I have considered the application on the papers. These are the decision letter, the dossier and the application for reconsideration.

Background

4. The Applicant was sentenced to imprisonment for public protection on 22 July 2005 following conviction for robbery. A minimum term of three years (less time spent on remand) was imposed. His tariff expired on 10 October 2007. The Applicant was 23 years old at the time of sentencing and is now 38 years old. He is almost 13 years post-tariff.
5. He was released on licence by the Parole Board on 12 June 2019 following an oral hearing. His licence was revoked on 26 February 2020 and he was returned to custody on 7 April 2020, having spent a period unlawfully at large.

Request for Reconsideration

6. The application for reconsideration is dated 4 September 2020 and has been submitted by solicitors acting for the Applicant.
7. The application was not explicit in identifying the grounds for review or the legal basis on which reconsideration was sought. My extrapolation of the ground for seeking a reconsideration is that the panel irrationally followed the recommendation of the Prison Offender Manager (POM) rather than that of the Community Offender Manager (COM).
8. In support of this, it is submitted that too much weight was given to the recommendation of the Applicant's COM and that more weight should have been given to that of the Applicant's POM since they have had more contact with the Applicant and arguably knew him better than his COM.



Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State in April 2020 to consider whether or not it would be appropriate to direct his re-release and, if release was not directed, to advise the Secretary of State on his continued suitability for open conditions.
10. The case was directed to oral hearing which took place on 10 August 2020. The panel took evidence from the POM, the COM and the Applicant.
11. In a written report (10 July 2020), the POM notes they had met with the Applicant twice since the Applicant arrived at his current establishment on 7 May 2020. Their report did not recommend release; it recommended that a fully psychological assessment should be undertaken before determining whether the Applicant's risks could be managed in the community.
12. In their written report (also of 10 July 2020), the COM notes two telephone contacts with the Applicant. Their report also did not recommend release. They were also of the view that the Applicant needed to consolidate work on thinking skills and undergo further psychological assessment.
13. At the oral hearing the POM recommended release on the basis that no interventions had been identified, that in-cell work had been completed, and that the Applicant has engaged as well as he was able to during the COVID-19 restrictions.
14. The COM, who had only managed his case for a few months, acknowledged the work the Applicant had done in custody and agreed that a psychological risk assessment was no longer necessary. Although he remained of the view that the Applicant's risks were unmanageable in the community, he supported a progressive move to open conditions. A full community risk management plan was nonetheless put forward.
15. The panel concluded that the Applicant's risks were not manageable in the community and did not direct release but did recommend a transfer to open conditions.

The Relevant Law

16. The panel correctly sets out in its decision letter dated 13 August 2020 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

17. 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



3rd Floor, 10 South Colonnade, London E14 4PU



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0203 880 0885

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)). This is an eligible decision.

18. 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

19. 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."

20. 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.

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

The Reply on behalf of the Secretary of State

22. The Secretary of State has submitted no representations in response to this application.

Discussion

23. The issue in this application is simply whether it was irrational of the panel to follow the recommendation of the Applicant's COM not to direct release rather than the view of the POM who knew him better and was supporting release.

24. 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 POM and COM. 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.



25. In its decision, the panel carefully analysed and weighed up the evidence of both the POM and COM as well as the elements of the proposed risk management plan. It was correctly focussed on risk throughout. It concluded, on the totality of the evidence, that the test for release was not met. It was perfectly entitled to do so. The legal test of irrationality is a very strict one. This case does not meet it.

Decision

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

Stefan Fafinski
17 September 2020

