

[2020] PBRA 131

Application for Reconsideration by Bunker

Application

1. This is an application by Bunker (the Applicant) for reconsideration of a decision of an oral hearing dated the 13 August 2020 not to direct release or recommend open conditions.
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 dossier of 326 pages which includes the decision letter and the application sent by way of an attachment to an email dated 27 August 2020.

Background

4. The Applicant is serving a sentence of Imprisonment for Public Protection (often known as an IPP sentence) imposed on 30 June 1996 for possession of a firearm with intent to cause fear of violence. He received no separate penalties for offences of possessing a firearm without a certificate and possession of an air weapon when prohibited. He was 26 years old when he committed the offences.
5. He is now 40 years old. His minimum term of nine months less time served on remand expired on 15 December 2006.
6. This review followed the third recall on his sentence.

Request for Reconsideration

7. The application for reconsideration is undated but was received by way of email within the required time limit. It has been completed via the correct CPD2 form and sets out 13 paragraphs of submissions. Those submissions all relate to a contention that the decision was irrational and have been grouped together to identify the grounds.
8. The grounds for seeking a reconsideration are as follows:

(a) The panel based its decision on evidence from the Community Offender Manager (COM) and the Prison Psychologist who have had limited contact with the



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Applicant since March 2020, disregarding the evidence from those who have continually worked with the Applicant during this time.

(b) The panel has not considered the explanations given by the Applicant, in particular the reasons as to why the Applicant did not engage with the COM and Prison Psychologist.

(c) The Applicant has been of good behaviour, committing no further offences or demonstrating any use of violence during his sentence or in the community. The panel was too focussed on historical events in its decision-making, rather than his current presentation.

Current parole review

9. The case was referred to the Parole Board in January 2019. The referral was for the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release. If release was not directed, the Parole Board was invited to consider whether the Applicant was ready to be transferred to open conditions.

10. The referral was considered by a Member Case Assessment (MCA) in February 2019 and was deferred with directions including the preparation of a psychological risk assessment by a Psychologist employed by the prison service. It was then considered by way of MCA in August 2019 and directed to an oral hearing.

11. The oral hearing was originally set for May 2020 but was deferred. The oral hearing was heard remotely by way of video link on 10 August 2020. It was not possible to hold the hearing face to face at the prison due to restrictions imposed by the COVID-19 pandemic. The Applicant consented to his hearing being heard this way.

The Relevant Law

12. The panel correctly sets out in its decision letter ('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

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. This has been confirmed by the decision on the previous reconsideration application in **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 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.

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

18. 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

19. The Secretary of State has not made any submissions in response to the application.

Discussion

20. The panel had the advantage of an extensive dossier of reports and other material. It had the advantage, too, of seeing and hearing the Applicant as well as the COM, the Prison Offender Manager (POM) and the Prison Psychologist. The Applicant was also legally represented throughout.

21. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that it saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.



22. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is the panel's responsibility to make its own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. The panel must make up its own mind on the totality of the evidence that it hears, including any evidence from the Applicant. The panel would be failing in its duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if it failed to do just that. As was observed by the Divisional Court in **DSD**, panels of the Parole Board have the expertise to do it.
23. Where there is a conflict of opinion, it was plainly a matter for the panel to determine which opinion it 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.
24. The Applicant submits at paragraph 13 of his application that "*another panel given the same evidence would have been able to find that [he] meets the test for release with the proposed risk management plan and support available*". However, 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.

Ground (a)

25. The Applicant submits that the panel based its decision on evidence from the COM and the Prison Psychologist who have had limited contact with the Applicant since March 2020, disregarding the evidence from those who have continually worked with the Applicant during this time.
26. The Applicant however goes on to say in his application at paragraph 4 that he has been engaging with his COM by way of telephone.
27. The COM and Psychologist did not recommend release. The POM did recommend release. The Applicant's POM has worked with him since February 2019. However, his COM has worked with him since his second release on licence, recorded as 2017 in the dossier, and that same COM was a witness at a previous oral hearing in July 2018. When Psychologists complete assessments on prisoners it is usual that they have not had a long-standing relationship with the prisoner and meet with them purely for the purposes of completing their report.
28. As set out above, where there is conflict of opinion, it is a matter for the panel to decide which opinion they preferred. The panel clearly set out in the conclusion of the Decision Letter, stating that they did not go against the recommendation of the POM "*lightly*" but took into consideration the Applicant's evidence and the views of the other witnesses and agreed with the COM and Psychologist that there were outstanding treatment needs to be addressed in closed conditions.
29. The panel explained their reasons sufficiently in the Decision Letter which are rational and reasonable. Accordingly, this ground fails.



Ground (b)

30. The Applicant submits that the panel did not consider the explanations given by the Applicant, in particular the reasons as to why the Applicant did not engage with the COM and Prison Psychologist.
31. The panel in the Decision Letter sets out the Applicant's explanation as to why he did not attend various appointments, including an offer of both a telephone and personal visit with the Psychologist. The panel heard evidence from the POM that there was no corroborating evidence to support the Applicant's reasons for not attending those appointments. It is therefore clear to me that this information was taken into account by the panel.
32. The panel have to make a decision on the evidence heard and read. Regardless of the reasons for not attending appointments, the panel had to consider the opinions of witnesses based on the evidence it had, be that via contact with the Applicant or not. The panel weighs up any limitations of that evidence. The panel has set out the contact the Applicant has had with each of the witnesses as part of the Decision Letter. The panel indicates that the Psychologist's diagnostic assessment is over a year old and that in the panel's opinion it may no longer reflect the Applicant's risk, but the sole reason for that issue was the Applicant's failure to attend two offered appointments. The panel has made its own assessment as it is required to do.
33. There is no suggestion that the Applicant's legal representative made any application for the case to be adjourned so that further contact could take place. No submission is made on that basis.
34. It is difficult to see what else the panel could have done on this occasion. Accordingly, this ground fails.

Ground (c)

35. The Applicant submits that he has been of good behaviour, committing no further offences or demonstrating any use of violence during his sentence or in the community and the panel was too focussed on historical events in its decision-making, rather than his current presentation.
36. The Decision Letter references "*mixed*" behaviour in custody and refers to aspects of negative behaviour including an adjudication, dismissal from the workplace due to aggressive behaviour and issues raised regarding substance misuse and abuse towards staff. However, the Decision Letter also details some positive behaviour including positive comments about attitude, a role as a peer mentor and good engagement with services. Importantly, the Decision Letter notes and takes account of the submissions by the Applicant's Solicitor which include "*not exhibiting any violence*".
37. In his application, the Applicant sets out his disagreement with various risk factors, indicating that they are either no longer present or are not matters which give rise



to a risk of serious harm. In order to discharge the duty under the referral, a panel will often have to discuss historical events. Any matter relevant to the risk assessment must be considered but it is then up to the panel to decide how much weight it attaches to each relevant piece of information or evidence.

38. The panel has set out the correct test for release in both the introduction and the conclusion. The panel has set out risk factors associated at the time of the Applicant's offending and details the work that he has completed to address those risk factors. Finally, the panel has set out the risk reduction work that remains outstanding. At all times the evidence that has led to those assessments and conclusions is set out.

39. The panel has taken into consideration the points raised by the Applicant and has made its own assessment based on the evidence. I see no reason to interfere with the decision of the panel and accordingly this ground fails.

Decision

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

Cassie Williams
18 September 2020

