

[2020] PBRA 143

## Application for Reconsideration by Zafar

### Application

1. This is an application by Zafar (the Applicant) for reconsideration of a decision of an oral hearing dated the 6 September 2020 not to direct 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 Oral Hearing Decision Letter;
  - The Dossier (now containing 339 numbered pages), that is, the same dossier as the Oral Hearing Panel (OHP) had with the addition of the Decision Letter;
  - The Request for Reconsideration dated 15 September 2015; and
  - The Applicant's Response to my Request for Further and Better Particulars of the Request for Reconsideration.

### Background

4. The index offence was committed in May 2005, when the Applicant was 18. He received a sentence of Imprisonment for Public Protection with a minimum term of 1 year and 9 months, the tariff expiring in September 2007. The Applicant was on licence at the time from a 45-month Young Offender Institution sentence for 4 offences of robbery committed in 2003. In May 2013, a month after moving into open conditions, the Applicant made a serious attempt to abscond with three other prisoners. He received a 9-month sentence for that in October 2014. He also has earlier convictions for racially aggravated assault, theft, dwelling house burglary and possession of a blade.
5. The Applicant was released on licence in October 2017. Whilst on licence he committed an offence of assault occasioning actual bodily harm on his partner. He had not told his supervising officer of the relationship. He was returned to custody in April 2018. For that offence the Applicant received an 8-month sentence in September 2018. This was his first conviction for intimate partner violence.


### Request for Reconsideration

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6. The application for reconsideration is dated 15 September 2020.
7. The grounds for seeking a reconsideration are as follows:
  - A. Procedural Unfairness
    - (1) Proceeding instead of deferring after the Offender Supervisor (OS) said the Applicant may not be suitable for a training course addressing the use of violence;
    - (2) Not deferring if the panel were concerned about the recommendations of the OS and the Offender Manager (OM) supporting release; and
    - (3) Not having sight of an up-to-date report about the Applicant's mental health from an earlier prison.
  - B. Irrationality
    - (1) (1) above is also said to be irrational;
    - (2) Dismissing the OS's evidence regarding suitability [for a programme available in the community];
    - (3) Failing to take into account the recommendation was always for the Applicant to complete a training course addressing the use of violence or a training course addressing relationships and the handling of emotions; and
    - (4) In the light of information since the hearing that no transfers for offender behaviour work are permitted at the Applicant's current prison, that a recommendation for the Applicant to complete a training course addressing the use of violence was unrealistic.
8. I asked for further particulars of the Applicant's grounds as the original application was in rather confusing terms, and, of course, raised some obvious questions. As a result, further particulars have been supplied by the Applicant as follows:
  - (A) (1) No application for deferral was made as the solicitor was not able to discuss this with the Applicant until after the hearing had concluded, because it emerged in evidence, not in any reports.
  - (A) (2) The OHP was critical in the decision letter by [sic] the recommendation of the OM and OS recommending release and in light of their recommendations should have suggested a psychological risk assessment. If the panel had these concerns, they should have asked the witnesses whether a psychological risk assessment would be beneficial and the solicitors would have requested a deferral for this to be undertaken.
  - (A) (3) The solicitors asked in their written representations for directions relating to reports on the Applicant's mental health at the earlier prison, but these were never directed.
  - (B) (2) The OS's evidence was that the Applicant does not meet the criteria [for a training course addressing his use of violence] due to his low scores

and therefore supported release with a recommendation for a training course addressing relationships and the handling of emotions.

*NB No reply was given to the request under this head "Please specify what was irrational about the OHP's decision."*

## Current parole review

9. The Secretary of State referred the Applicant's case to the Parole for consideration of release after recall. The Applicant was 33 years old at the time of the reconsideration.
10. The Oral Hearing took place on 2 September 2020, remotely, with the agreement of the Applicant and his legal representative, because of the Covid-19 public health crisis. The OHP, consisting of a psychologist Chair and two independent members, considered a 327-page dossier and heard evidence from the Prison Offender Manager (OS), the Community Offender Manager (OM), and the Applicant. This was the second review since recall.

## The Relevant Law

11. The panel correctly sets out in its decision letter dated 6 September 2020 the test for release: is it no longer necessary for the protection of the public that the Applicant be confined?

### *Parole Board Rules 2019*

12. 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)).

### *Irrationality*

13. 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."*

14. 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.

15. 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*

16. 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.
17. 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.
- The overriding objective is to ensure that the Applicant's case was dealt with justly.

18. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them.

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

19. The Secretary of State has indicated that he does not wish to make any representations in response to the application.

### **Discussion**

#### *Procedural unfairness*

20. The procedural unfairness argued amounts, first, to a complaint that if the OHP was minded to disagree with the recommendations of the OM and OS it should have deferred or adjourned the hearing and directed a psychological risk assessment. The further particulars supplied establish that no application was made to the panel for such a deferment. The explanation given, that there was no opportunity for the legal representative to take instructions, as the matter arose during evidence, is unacceptable. Chairs of Oral Hearing Panels invariably inform the prisoner that if he wishes to confer with his lawyer, even in a remote hearing, arrangements will be made for him to do so. The legal representative must in any event have known that



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this was something to which she, and the Applicant, were entitled. If the legal representative wanted an opportunity to confer, she only had to say so. If she did not, there can be no unfairness in the panel not acceding to an application that was never made.

21. The suggestion that it was procedurally unfair for the OHP not to defer or adjourn of its own motion is presumably founded on a notion that if, when the panel conducts its discussion at the end of the evidence, it decides to disagree with one or more witnesses it should have said so during the evidence. This cannot be right: the panel does not decide what evidence it accepts, rejects or disagrees with until it has heard all the evidence the parties place before it. The obligation then is to explain, if the panel dissents from the view of professional witnesses, why it does so: see **R (Wells) v Parole Board 2019 EWHC 2710**. This the panel clearly did.
22. In fact the OHP's conclusion was that little had changed since a panel, and the professional witnesses who gave evidence before it in 2019, had expressed concern about the lack of any specific work done since recall to address the specific and imminent risk of serious harm to current and future partners. The decision of the 2019 panel was part of the dossier. Therefore, the Applicant and his legal representative were on notice of a possible approach that might be taken by the panel on this occasion and, had the opportunity to deal with it in evidence.
23. It is correct that in written Representations dated 27 April 2020 the Applicant's solicitors said "*We ask for an up to date report from the mental health team at [an earlier prison] and confirmation when his medication was started exactly and the dosage.*" No direction for such a report to be obtained seems to have been given: nor did the Applicant's solicitors pursue the matter through the available mechanism of a Stakeholder Response Form, as, if they thought it a matter of importance, they could have done.
24. In fact, the OHP was fully aware of the Applicant's, and the professional witnesses', view that the medication prescribed in the earlier prison had made the Applicant feel calmer and that he felt better equipped to deal with his emotions. His behaviour in custody had improved since March 2020, though this was during a significantly restricted regime due to the Covid-19 public health crisis. There had been four proven adjudications up to 30 June 2020, two involving abuse or threats, but none thereafter. There is no reason to think that sight of any such report as was requested would have made any difference to the OHP's assessment of the case. In any event, see Paragraph 18 above.

### *Irrationality*

25. As to irrationality, none of the matters raised amount to a suggestion of irrationality as defined in Paragraph 13 above, nor do the complaints taken together. This is perhaps demonstrated by the lack of a response to the request "*Please specify what was irrational about the OHP's decision*" in respect of the suggestion that it was irrational to dismiss the OS's evidence as to suitability. Nor, in fact, does it appear from the Decision Letter that the OHP "dismissed" the evidence of the Prison Offender Manager on this or any other topic.

26. 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.
27. In this case, the OHP took and expressed the view that the Community Offender Manager and the Prison Offender Manager had not fully addressed the question the panel had to answer. When the panel addressed that question, the conclusion it came to was that it is still necessary for the protection of the public that the Applicant be confined. The panel decided that the Applicant needs to carry out offence-focused work in custody before his risk is sufficiently reduced. Community-based work after release, the panel decided, would not be a sufficient protection given the panel's assessment of the imminence of risk. All of that was a matter for the judgement of the OHP, and there was evidence on which the panel was entitled to come to the decision it did.
28. The matter raised about the availability of courses in the Applicant's current prison cannot be taken into account on a Reconsideration unless it was before the panel in evidence, and in any event does not affect the question of the risk presented by the Applicant if released.

## Decision

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

**Patrick Thomas**  
**07 October 2020**