

[2020] PBRA 180

Application for Reconsideration by James

Application

1. This is an application by James (the Applicant) for reconsideration of a decision of an oral hearing Panel of the Parole Board dated 5 October 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 dossier comprising 323 pages, the Decision Letter dated 5 October 2020 and the Reconsideration Application. In addition, I have received an email dated 16 November 2020 in response to a request I made for clarification from the Panel chair in relation to one specific aspect of the oral evidence. I have also considered the Applicant's email response dated 17 November 2020. The Secretary of State did not make any formal representations in response to the application.

Background

4. The Applicant is now aged 45. At the age of 21 he was given a mandatory life sentence, with a minimum term of 15 years, following conviction after trial for murder. The offence was a planned, deliberate attack involving the use of a knife upon another male who had insulted his sister. Although he had no significant prior convictions, the trial judge described him as a strong willed, ruthless young man who would need to be thoroughly tested for his ability to control his anger, violence and drinking before he could be released in the future.
5. He was released for the first time in January 2012, 10 months after his minimum term expired. He has since been recalled on life licence 3 times after periods in the community of 4 months, 2 years 10 months and 2 years 8 months respectively. Each recall followed allegations of domestic abuse, in the first instance against his wife, and on the second and third occasions against his partner 'A'. None of the allegations resulted in conviction; indeed, the Applicant has not accrued any further convictions since the offence of murder.
6. The Applicant challenges the decision of the oral hearing panel which considered his case following the third recall.



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Request for Reconsideration

7. The application for reconsideration is dated 20 October 2020.
8. The grounds for seeking a reconsideration are as follows:
 - (i) There has been an error in interpretation of fact and therefore the reasoning cannot be rationally based; specifically, the panel erred in concluding that the Applicant had breached the condition of licence prohibiting him from entering the street where A lived (the "exclusion zone"). The Applicant maintains that he did not at any time breach the exclusion zone;
 - (ii) The panel made a further error of fact in relation to an allegation that the Applicant punched A, whereas he states he accidentally elbowed her;
 - (iii) In the absence of exceptional circumstances, it was irrational for the panel to depart from the recommendations for release from professional witnesses and to disregard assessment tools such as the Probation service assessment report;
 - (iv) The panel imputed drug misuse to the Applicant from his use of a prescribed medication as an opiate blocker, when there was no evidence of opiate use; and
 - (v) The panel "placed over reliance on impressionability and inference" rather than substance, and on past allegations and reputation rather than what was current in terms of risk.
9. Accordingly, the Applicant submits, the decision is both irrational and procedurally unfair.

Current parole review

10. The oral hearing took place by video conference before a panel comprising three independent members. Oral evidence was given by the Applicant, his Offender Supervisor ("OS") and his Offender Manager ("OM"). Both the OS and the OM recommended release. The Applicant was legally represented. The panel concluded that he did not meet the test for release, nor did they recommend that he was suitable for open conditions (although it should be noted that the issue of open conditions is not a matter subject to reconsideration).

The Relevant Law

Parole Board Rules 2019

11. 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

12. 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."

13. 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.

14. 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

15. 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.

16. 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.

Mistakes of fact

17. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be



fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: *"there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."* See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide *"objectively verifiable evidence"* of what is asserted to be the true picture.

Discussion

18. The current review followed the Applicant's recall to prison (for the third time) following the revocation of his licence on 31 March 2020 for breaching the condition of licence requiring him to be of good behaviour. In particular, it had been alleged that (a) he had visited his partner A at her home, in breach of the exclusion zone, and (b) had assaulted her. The exclusion zone had recently been imposed following concerns about the volatility of the relationship and unproven allegations of domestic abuse.
19. There was evidence in the dossier capable of substantiating both allegations. So, for example, in the initial Recall Report, dated 31 March 2020, the OM quoted an extract from a police report to Children's Services, which referred to an alleged incident at 11pm at A's home the previous evening, in which the Applicant elbowed A in the eye whilst she was holding their young child. This had been seen by a witness who refused to make a statement, there were 3 different calls to say there was an ongoing argument and A had been assaulted by the Applicant, but when the police arrived A denied she had been assaulted and said it had been an accident. The OM established from the police report that the alleged incident occurred at A's address. Elsewhere in the dossier it is noted that the police had recorded that A had a visible swollen left eye, bruising and a small cut. The dossier also records an account by A that the incident had occurred because the Applicant had posted his keys through her letterbox and refused to leave when she opened the door.
20. In discussions with the Applicant prior to the hearing, the OM recorded that he denied breaching the exclusion zone as he had not gone to A's home but to the adjacent street, and he denied punching or a deliberate elbow to A's face.
21. It is clear from the Decision Letter that the panel explored this in evidence, as well as the previous history of alleged assaults on A. It noted the Applicant's evidence to the panel that in the incident immediately prior to recall, A had not sustained any injury, just a "watery" eye, and the elbow contact had been accidental. The panel did not – nor was it obliged to – make a finding of fact as to whether the Applicant had deliberately assaulted A. At its highest, the panel referred to "ongoing concerns about allegations of violence" to A and stated that *"notwithstanding the fact of whether you have or have not been violent in your relationship, the panel cannot ignore the concerns expressed by [the OM], Children's Services and the Police"*. I



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find that the panel's approach to the unproven allegation of assault is entirely consistent with the Parole Board's **Guidance on Allegations (March 2019, v.1)**.

22. The Decision Letter also includes an account of the Applicant's evidence to the panel and records, *"You accepted that you had breached the licence condition by entering [the street where [A] lived]."* In previous accounts to his OM (and recorded in the dossier) the Applicant had accepted only that he had travelled (frequently) to A's address but not the prohibited street -i.e., that he had gone only to the adjacent street and therefore was not technically in breach of the exclusion zone. I requested clarification of this aspect of the Applicant's evidence to the panel. I am informed that the panel chair's notes record that he was pressed on this point in the hearing as to whether he accepted he had entered the exclusion zone. The chair reports that he *"stated that when he returned (to the address to pick up his keys) [A] was, by then, working. He explained that she works as a hairdresser at home. She had a client at the house. He also described how the baby was in a nappy on the stairs, which is why [A] threw the keys down (instead of handing them to him)"*. The Applicant, in response to this clarification, reasserts that he at no time did he admit to being on the prohibited street or at A's address and that, when he saw the baby in the nappy (on the stairs) he was on the road opposite, and *"the stairs can be seen from across the road if the door is open"*.
23. I can accept the possibility that the panel has misunderstood his evidence as an admission that he had indeed entered the prohibited street. In his reconsideration application he denies that his evidence was an admission to that effect and insists that he did not at any time breach the exclusion zone. If the panel was in error and his evidence did not amount to an admission I then have to go on to consider whether this was a material error. I do not consider that it was. The error relates to whether what he said to the panel was an admission, not whether he did in fact breach his licence by entering the exclusion zone. On the latter question there was ample evidence before the panel that he did enter A's street, and this evidence included A's account (para.18 above) that he had posted his keys through the letter box and refused to leave when she opened the door, the police report, the plausibility of his account of seeing the baby on the stairs from an adjacent street in an incident at 11pm on 30 March, and the panel's global assessment of his credibility, having already noted that for a number of reasons *"a circumspect approach to your evidence is justified"*.
24. I conclude on this point that, if the panel did misunderstand his account as an admission, this did not materially affect its decision. The panel was entitled to find, as it did, that the Applicant *"wilfully disregarded explicit instructions to keep your partner and children safe"*, those instructions including not just the technicalities of the exclusion zone but also the clear warnings prior to recall from both the OM and the Social Worker that he was not to visit A's address or travel along her street.



25. The Applicant's third Ground refers to the recommendations for release from the OM and OS. The Applicant accepts that a parole panel makes its own assessment of risk but asserts that to depart from those recommendations and to disregard the mechanisms for assessing risk, such as the Probation service assessment report, is irrational "*without exceptional circumstances otherwise it would be pointless seeking such assessments and views*". I cannot accept that as a proposition. If this was correct, the corollary is that it would be pointless having a Parole Board hearing where witnesses agree in their recommendation unless there were exceptional circumstances. That is not the legal position. As the Administrative Court reaffirmed in **R(Wells) v Parole Board [2019] EWHC 2710 (Admin)**, the panel is not bound by the expert evidence before it. It is the responsibility of the panel to make its own risk assessment on the totality of the evidence that it hears, including any evidence from the Applicant. It would be failing in its duty to protect the public from serious harm (whilst also protecting the prisoner from unnecessary incarceration) if it failed to do just that. As was observed by the court in **DSD**, the panel has the expertise to do it. Where, however, the panel disagrees with professional witnesses, it should clearly explain its reasons for doing so (as per **Wells**).
26. In the Applicant's case, the panel did not share the confidence of the OM and OS that the Risk Management Plan would be effective. This was now the third time he had been recalled on licence, on each occasion following concerns about violence and abusive behaviours in relationships, which the Applicant denied. Having considered all the evidence, the panel found that he minimised incidents of alleged violence, lacked insight into his behaviour and the potential for serious harm, wilfully disregarded explicit instructions designed to keep his partner and children safe, and lacked the necessary degree of openness and honesty with those supervising him; the panel concluded that it could not be confident that he would comply with restrictions on re-release to safeguard A and, in the panel's assessment, further work was needed to address key risk factors before he could be safely released. I am satisfied that the panel explained in its thorough reasons the factors that weighed for and against his re-release and why it reached the conclusion that it did.
27. I turn now to the complaint that the panel "*imputed drug misuse with reference to continued use of [a prescribed medication] as an opiate blocker where there was no evidence of any opiate misuse*". In fact, the panel noted that the recall highlighted previously unidentified concerns about substance misuse, particularly heroin and cocaine, but the panel went on to say that the relevance of this as a risk factor was not entirely clear given that, as the OM noted, the Applicant was not always open and honest about his substance misuse. The decision letter records that "[w]hen asked about your substance misuse, you admitted to the panel...that you had used heroin on perhaps three occasions and cocaine on a number of occasions". The Applicant's assertion, therefore, that there no was evidence of opiate use is misconceived.



28. The Applicant's final challenge to the panel's decision relates to alleged over-reliance on "impressionability and inference" rather than substance, and a focus on reputation and past allegations rather than current aspects of risk. No specific aspects of the panel's decision are identified in support of this challenge. I have considered the decision letter in detail and as a whole. I bear in mind that, as the Administrative Court expressed in **DSD** a risk assessment such as that undertaken by the panel is likely to be "*multi-factorial, multi-dimensional and at the end of the day quintessentially a matter of judgment for the panel itself*". The Court went on to say that, "*In short, there is no implied limitation on the nature or temporal character of the information the Parole Board may take into account in assessing risk: the only constraint is that the board must act fairly*". Here, the panel explained in its thorough reasons how it had analysed, balanced and weighed the competing factors and told the Applicant why it had decided not to accept the opinions of the OM and OS in favour of release. The panel stated and applied the correct test. It did not misdirect itself. It was entirely focussed on risk throughout and the rationale of its decision was clear. It was a conclusion that the panel was entitled to reach, on its own evaluation of all the written and oral evidence presented to it. It is not for me to substitute my own view. The legal test of irrationality is a very strict one and the Applicant's grounds do not meet it.

Decision

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

Elaine Moloney
25 November 2020

