

[2020] PBRA 19

## Application for Reconsideration by Sutton

### Application

1. This is an application by Sutton (the Applicant) for reconsideration of a decision of the Parole Board made following an oral hearing held on 18 December 2019 not to direct his release on the basis that the decision was irrational.
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. This is an eligible case.
3. I have considered the application on the papers before which included:
  - (i) The Dossier that was before the panel, containing 399 pages;
  - (ii) The Oral Hearing Decision itself dated 30 December 2019;
  - (iii) A Letter to the Applicant dated 18 July 2018 referring to the outcome of an earlier Review;
  - (iv) The Application for Reconsideration submitted by solicitors acting on behalf of the Applicant dated 2 January 2020; and
  - (v) An email dated 9 January 2020 from the Public Protection Casework Section (PPCS) confirming that on behalf of the Secretary of State, they offer no representations in response to this application.

### Background

4. The Applicant is now aged 34. The index offences were committed in September 2007. The Applicant and two others attacked the victim at gunpoint. He was struck by a firearm (which was loaded), bundled into his own car and driven a considerable distance. He was held for some ten hours.
5. In April 2008 the Applicant and his two co-defendants pleaded guilty to an Indictment containing two counts alleging Kidnap and Possession of a Firearm. The Applicant was sentenced to an indeterminate sentence (IPP), the tariff being set at 4 years and 6 months (less time on remand). The tariff expired on 12 May 2012.



The Applicant was released on licence in September 2015 and recalled precisely one year later in September 2016 when he was suspected of having committed very similar offences to the index offence. Following a prolonged police investigation of those matters a decision was taken not to launch a prosecution against him.

6. The Oral hearing which took place on 18 December was therefore his fourth review.

## Request for Reconsideration

7. The application for reconsideration is dated 2 January 2020 and has been made by solicitors on behalf of the Applicant.

8. The Applicant submits that the panel's decision was irrational on **four grounds**:

**(i) That the panel placed too much reliance on the Applicant's security report and were not entitled to reach their conclusion that the report evidenced a continuation of the Applicant's "*entitled thinking and negative attitude*".**

**(ii) That the panel failed to provide sufficient explanation as to why they found that the Applicant had failed to apply the learning from his offence focused work to his "*daily routine*"**

**(iii) That the panel failed to explain why they found that "*a return to old associates*" was likely if the Applicant was to be released.**

**(iv) That the panel failed to adequately address why they did not accept that the proposed Risk Management Plan was sufficiently robust to manage the Applicant in the community.**

9. There is no submission made that there was any procedural unfairness in this case.

## The Relevant Law

10. The panel correctly set out in its decision letter dated 30 December 2019 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:

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.

15. 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."*

### Discussion

16. Before dealing with the specific grounds put forward on behalf of the Applicant it will be helpful to make the following observations:

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(i) The dossier before the panel included an earlier panel decision from June 2018. The Applicant was represented by a Solicitor throughout the review process and at the oral hearing.

(ii) The panel had the advantage, too, of hearing from the Offender Manager and the Offender Supervisor. The Applicant chose to give evidence. This was important because the panel necessarily had to form a view as to the Applicant's reliability and credibility.

(iii) One of the purposes of an oral hearing is to examine and challenge the assertions made. The fact that the professionals agree that the risk is manageable or is not manageable does not mean that the panel is bound to agree. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of the risk management plan proposed. They must make up their own minds on the totality of the evidence they hear, including that of 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. The panel are a tribunal who are regarded as experts in carrying out the task of assessing risk.

(iv) In this case the panel did not agree with the professional witnesses. The obligation upon them in the light of that was to provide detailed and clear reasons why they did not agree. My task is to decide whether they have done so, or whether it would be appropriate to direct that the panel's decision be reconsidered. I am able to do that only if I decide that it is manifestly obvious that there is a compelling reason to do so.

(v) It is important to bear in mind in considering this application that the panel had before them an offender who on his own admission, was involved in gang related criminal activity on a regular basis and was someone who resorted to the use of weapons including firearms and whose offending was carried out with associates as part of his lifestyle. The panel found that important risk factors in his case included *"lifestyle and associates"* and *"a lack of openness and honesty"*.

17. With those matters in mind I turn to address the four grounds:

## Ground (i)

- a) The Applicant had been engaged in a Progression Unit from October 2018. That engagement came to an end in October 2019 because the Applicant was deselected as he had been classed as a nominal at the prison. That classification came about largely as a result of the contents of a Security Report (Dossier pages 208 – 213).
- b) It is submitted that the Panel placed too much reliance upon the Security Report and furthermore should not have used it as evidence of the Applicant's entitled thinking and negative attitude.

- c) The Applicant had the opportunity of dealing with the content of the security reports. He did so in his evidence to the panel by denying all of them and offering explanations for some. One example will suffice. A report referred to another prisoner carrying out a particularly unpleasant menial task for the Applicant (which involved the recovery of two mobile telephone from the toilet in the Applicant's cell). In the opinion of the panel this evidence *"at best suggests entitlement thinking and at worst suggests undue influence over other prisoners"*. Furthermore, they concluded that this was an example of the Applicant not behaving appropriately on the Progression Unit, justifying their finding that this was evidence of entitlement thinking and a negative attitude.
- d) The panel noted, in the Applicant's favour, that none of the incidents contained in the security report led to adjudications and that some prisoners attracted security interest and that some reports might be malicious. The panel observed in its judgment that there were just too many of these reports to ignore (which was the Applicant's submission) offering little confidence that there had been a distinct shift in the Applicant's attitude and behaviour.
- e) In my judgment there is nothing in this ground. It represents a good example of the panel considering material, hearing the Applicant's explanation and coming to a justifiable and entirely reasonable conclusion, which was open to them to reach and which was carefully and fairly explained in their decision.

## Ground (ii)

- a) From a reading of the decision as a whole, the panel were clearly searching for evidence of improvements in the Applicant's thinking, attitude and behaviour. It accepted that the Applicant was in a difficult position in respect of his recall, recognising that he should not feel compelled to give evidence that might incriminate him. However, the panel found other examples of entitlement thinking, for example, when in evidence the Applicant admitted associating with a particular individual (at the time of the recall offence) when he was prevented by licence conditions from doing so.
- b) In light of evidence of that kind, a panel is perfectly entitled to consider the extent to which a prisoner is able or willing to apply the learning he has acquired from courses designed to address various aspects of his offending behaviour.
- c) The panel found that notwithstanding progress, there were in it's judgment continuing and serious concerns about the Applicant's thinking, attitude and

behaviour in custody. In my judgment the panel in its decision identified examples and explained why it reached the conclusion that there was insufficient evidence that the Applicant was applying his learning.

- d) In my judgment this was a conclusion that the panel were, on all of the evidence, entitled to reach. I do not find anything in this ground.

### Ground (iii)

- a) I have mentioned already that an important risk factor in the opinion of the panel was the Applicant's lifestyle and associates. It will be recalled that the Applicant admitted being in company with a particular person at the time of the recall offence in breach of a clear and specific licence condition. The panel noted that this was despite the Applicant telling an earlier panel that he understood his licence conditions and anticipated no problem in complying.
- b) An integral part of the decision making process in proceedings of this kind is for the decision maker to reach fair and safe conclusions based upon evidence he/she feels able to rely upon, while applying the appropriate burden and standards of proof and the appropriate tests.
- c) In my judgment it was reasonable and justifiable for the panel to describe the possibility of a return to old associates as a "*likely risk*". It is well understood that risks cannot in normal circumstances be wholly eliminated but they can, with appropriate safeguards, be successfully managed. The question I must ask is whether on all the evidence and material before it the panel were justified in reaching this particular conclusion.
- d) In my view they were, and this ground must fail.

### Ground (iv)

- a) The Risk Management Plan had the support of the professional witnesses. In the dossier beginning at page 381 is a document prepared by the Applicant entitled the "Resettlement Plan". I simply observe that it is written in the first person singular. I do not see it referred to in the Decision Letter but I proceed on the basis that it would have been considered by the panel. I have little doubt that the Applicant would have been asked some questions about it.

- b) The panel set out in some detail the views of the Offender Manager and the Offender Supervisor. They go on to set out, again in some detail, why, mindful of the joint recommendations, they do not feel able to agree. The complaint made on the Applicant's behalf is that the panel did not "*adequately address why they do not accept the proposed RMP*".
- c) I disagree. The decision has to be read as a whole and in particular the passages on the "Evaluation of Effectiveness of the Plans to Manage Risk" and the panel's "Conclusions and Decisions". The panel accepted that the management plan was likely to be effective while the Applicant was within the hostel setting. It was the period following his departure from Designated Accommodation when in the panel's opinion the risk would emerge. In their carefully worded and balanced judgment they made clear that the Applicant's case was one in which the risks could only be safely managed if he was demonstrably open and honest and desisted from negative behaviour and negative associations.
- d) In my judgment it is clear from a reading of the decision as a whole, precisely where the evidence based concerns of the panel are to be found and why they disagreed with the opinions of the professionals.
- e) Again I find that this final ground must fail.

## Decision

18. For the reasons I have given, it follows that whether the four grounds are taken individually, in combination, or as a whole, there is no reason for ordering that this decision be reconsidered. I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

**HH Michael Topolski QC**

**23 January 2020**