

[2020] PBRA 206

## Application for Reconsideration by Gerald

### Application

1. This is an application by Gerald (the Applicant) for reconsideration of a decision of a decision by the Parole Board under Rule 25(1) of the Parole Board Rules 2019 (the 2019 Rules) that the Applicant was unsuitable for release (the Decision). The letter by which the Decision was communicated is dated 26 October 2020 (the Decision Letter). The Applicant asserts that the Decision is marred by irrationality and/or procedural unfairness.
2. I have considered the application on the papers comprising: a dossier of 567 numbered pages that includes written submissions for the Applicant by his solicitors dated 20 October 2020 and the Decision Letter; written submissions for the Applicant by his solicitors requesting reconsideration dated 17 November 2020; and written submissions for the Secretary of State for Justice by the Public Protection Casework Section of Her Majesty's Prison & Probation Service, dated 26 November 2020, which oppose the application.

### Background

3. In March 2003, the Applicant was sentenced to life imprisonment for rape, with a minimum tariff that was later reduced by the Court of Appeal to four years less 58 days and expired in January 2007. The Applicant was aged 41 when he received the sentence in March 2003 and is now aged 59.

### Current parole review

4. The Decision was made on the Secretary of State's referral of the Applicant's case to the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release, and if not, and if relevant, to advise on suitability for open conditions. That was said to be the eighth such referral of the Applicant's case by the Secretary of State during the sentence received by the Applicant in March 2003.
5. The Decision was made by a panel of the Board that considered the Applicant's case at two oral hearings on 18 August 2020 and 16 October 2020 (the Panel). The Panel was comprised of three members of the Board, one of whom was a psychologist member. The hearing was conducted remotely, by video link, due to restrictions on entry to prisons during the COVID-19 pandemic.

### The Relevant Law



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6. 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.

### *Irrationality*

7. 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."*

8. 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.
9. 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*

10. 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.

### **Discussion**

11. The Applicant submits that the Decision is irrational and procedurally unfair.
12. The submissions are not labelled as discrete grounds, but I have divided them as such insofar as is discernible.

### *Ground 1*

13. The Applicant has submitted that the Decision is irrational in suggesting that the Applicant suffered with a high level of psychopathic traits because the Decision places reliance upon psychological assessments that partly relied upon an assessment in 2008 that should no longer be relied on. The Applicant also submits that there was procedural unfairness in the Board's failure to direct a fresh assessment of psychopathy. The Applicant submits that the 2008 assessment needed to be revisited on the basis of significant changes. It is submitted that those changes were that the Applicant had taken responsibility for the index offence and for his offending generally. In relation to such other offending, it is submitted that the Applicant had in this review questioned the basis on which he was convicted in

1987 of being involved in one count of grievous bodily harm as a principle or secondary party but also as a conspirator, and the Applicant submits that comments by the Court of Appeal that there was a “*total illogicality in those convictions*” was new and significant information that undermined the 2008 assessment.

14. I consider that there is no such irrationality or procedural unfairness.
15. The expertise of the Board deserves due deference, and perhaps especially so in relation to an issue of psychological risk assessment where the panel included a specialist psychologist member of the Board, as in this case.
16. The Panel was provided with the 2008 assessment by a suitably qualified clinician using the personality assessment, which was said to measure relatively stable personality traits over a lifetime. The 2008 clinician considered that the Applicant fell below the cut-off for a diagnosis of psychopathy, but that he had levels of psychopathic traits that were within the very high range when compared with a sample of similar offenders. The clinician stated that the personality assessment measures relatively stable variables over a lifetime and that reassessment would be unlikely to be useful unless further offences were committed, or additional evidence comes to light that might cast doubt on the assessment.
17. The Panel was provided with a psychological risk assessment dated September 2019 by a suitably qualified clinician who considered that, in light of there being no further offending and ‘*no new significant information*’ since 2008, a repeat of the personality assessment would not be appropriate or necessary. The clinician is recorded in the Decision Letter as having confirmed that view in oral evidence.
18. The author of the 2019 assessment did however review and comment on the traits previously identified as relevant to the Applicant in relation to any possible impact on treatment and future risk management. The clinician noted the Applicant had denied his involvement in the index offence in the early stages of his sentence, and described his current stance as accepting he had committed the offence but minimising aspects of his behaviour.
19. In relation to the grievous bodily harm conviction, the clinician noted the description of the Applicant’s role in that offending in comments by the Court of Appeal in a judgment on appeals brought by the Applicant’s co-defendants, to which he was not a party, and in which the Court also made the comment regarding the “*illogicality*” in the Applicant’s convictions. The Decision Letter records that the matter was raised in oral evidence with the clinician who confirmed that the Court of Appeal documentation within the dossier relating to the Applicant’s earlier conviction did not alter the assessment. I also note that the Court of Appeal in 1998 dismissed the Applicant’s own appeal against the convictions for causing grievous bodily harm with intent and conspiracy to cause grievous bodily harm with intent.
20. The clinician also noted the evidence that the Applicant had engaged in a more positive and meaningful way in recent intervention, and considered that it was evident that the Applicant had developed his cognitive insight into his risk areas and has been able to develop an understanding of new ways to think and act. It is apparent therefore that the 2019 clinician had had regard to the Applicant’s development of insight. However, the clinician considered that the Applicant

continued to struggle to apply these consistently which was linked with personality traits, particularly being grandiose and entitled and of shallow affect. The clinician stated that those personality traits are not amenable to be eradicated or permanently changed and will likely be a continued part of the Applicant's on-going presentation. However, those could be better managed through psycho-education regarding his personality function and continued skills training. Given the links between these traits and his beliefs at the time of offending, it was the clinician's assessment that the Applicant required further support to recognise when those traits were 'live' and how he can manage them more appropriately. It was open to the prisoner to obtain and provide an independent assessment of psychopathy if he considered that the 2008 assessment might no longer be valid.

21. The clinician author of the psychological risk assessment dated September 2019 had also had regard to and the Panel was provided with an assessment by a suitably qualified (supervised) clinician of personality disorder(s), personality traits and presenting behaviours, dated September 2019 and described as concurrent to the psychological risk assessment. The clinician noted some consistency with the 2008 personality assessment but did not rely on that assessment as having been correct at the time the assessment was carried out or since. The clinician also considered that the personality traits were unlikely to change. It is moreover noted in the Decision Letter that the Applicant challenged the findings of the personality assessment, and that no independent psychological report had been provided to indicate an alternative diagnosis.

## Ground 2

22. The Applicant submits that the Panel were irrational in placing weight upon the psychological risk assessment and personality assessment, which were of considerably less weight for not taking into account positive developments that might occur between the date of the assessments and the hearing. The Applicant also submits that the Panel were irrational in placing weight upon the oral evidence of the author of the psychological risk assessment that the clinician had been unable to identify significant reductions in the Applicant's risk since the date of the report. The clinician had not had any contact with the Applicant since a meeting arranged shortly after the original report had been completed and, it is submitted, it was inevitable that the clinician would not be able to identify significant reductions when she had been unable to discuss any changes that the Applicant might have achieved or internalised.
23. I consider that there is no such irrationality.
24. The expertise of the Board deserves due deference, and again perhaps especially so in relation to an issue of psychological risk assessment where the panel included a specialist psychologist member of the Board, as in this case. The expert Panel was aware of the date of the assessments and can be expected to have anticipated the possibility of material developments occurring between the date of the assessments and the hearing. The Panel heard oral evidence from the clinician author of the psychological risk assessment, who had not had direct contact with the Applicant since completing the assessment, but had reviewed the dossier and heard the Applicant's oral evidence during the hearings in August 2020 and October 2020,

and the Decision Letter records the clinician's assessment of the same during the clinician's oral evidence.

25. The clinician author of the personality assessment was not called as a witness, but had stated in the assessment report that the identified personality traits were unlikely to change, although insight could be developed by the Applicant into how they link with the Applicant's offending, risk factors and schemas, and to recognise when they become live and learn how to manage these more effectively. Again, it is noted in the Decision Letter that the Applicant challenged the findings of the personality assessment, and that no independent psychological report had been provided to indicate an alternative diagnosis.

### Ground 3

26. The Applicant submits that there is irrationality in the reference in the Decision Letter to a willingness to carry weapons being a significant risk factor in the Applicant's case. The Applicant submits that that is an error because the reference suggests multiple offences using weapons whereas, while there was '*deployment of a knife within the context of the index offence*', that was the only incident of such behaviour within the Applicant's history and he had no previous convictions for possessing an offensive weapon or bladed article in a public place.
27. I consider that there is no such irrationality. The threat to the victim of the index offence with a knife is a perfectly rational basis for considering that the Applicant's risk factors include a willingness to carry weapons.

### Ground 4

28. The Applicant submits that there is irrationality in the reference in the Decision Letter to a "*repeated capacity to cause serious harm to others*" on the part of the Applicant. The Applicant submits that there is no reasonable basis upon which that conclusion can be drawn given the comments by the 1988 Court of Appeal in relation to the 1987 conviction, and he submits that it was never suggested that the Applicant had directly caused harm to any other party and in any event the exact nature of his participation remained unclear.
29. I consider that there is no such irrationality. The Court of Appeal in 1998 dismissed the Applicant's own appeal against the convictions for causing grievous bodily harm with intent and conspiracy to cause grievous bodily harm with intent. Causing grievous bodily harm with intent and conspiracy to cause grievous bodily harm with intent can only rationally be described as seriously harmful offending.

### Ground 5

30. The Applicant submits that there is irrationality in the '*suggestion*' in the Decision Letter that the Applicant had been subject to an adjudication for submitting claims relating to work which were false and the omission in the Decision Letter of any mention of, or regard to the (claimed) facts that the Applicant had been retained in the same employment following the adjudication. The Applicant also submits that the Decision Letter erroneously states that the Applicant was placed in the segregation unit for seven days when in fact the list of adjudications supplied to the

Panel prior to the completion of the oral hearing indicates that he received a caution for that matter.

31. I consider that there is no material irrationality. The Decision Letter records that the Applicant received a further proven adjudication for a matter of submitting bio-hazard forms to claim for work that he had completed, without actually completing the tasks specified, and a number of bio-hazard forms being found in his cell, for which he was punished by being placed in the segregation unit for seven days. That does contradict the adjudications record, which confirms a proven adjudication for bio-hazard forms being found in the Applicant's cell, for which he received a caution. However, the Decision Letter does not suggest that the Applicant was dismissed from the employment and the submissions do not explain how or why the Applicant's claimed retention in that employment is a material issue. The Decision Letter places no obvious reliance on the severity of the punishment, and I consider that the error is a minor issue that was not material to the Decision.

#### Ground 6

32. The Applicant submits that there is irrationality in the suggestion in the Decision Letter that the Applicant could not be trusted to make relevant disclosure to the National Probation Service in the event that he was released and supervised within the community. The Applicant submits that *'that judgement seems to ignore the fact that [the Applicant] had disclosed the problem of false rumours circulating within the prison and the issue remained unresolved as the authorities took no steps to look into this matter.'* The Applicant also submits that no examples were given of the Applicant holding back information at any time in custody or displaying any ongoing pattern of behaviour as to the holding back of information during the relevant review period, and there was evidence that the Applicant had been swift to air grievances and discuss his situation. Therefore, it is submitted, the conclusion was unreasonable.
33. I consider that there is no such irrationality.
34. The Decision Letter refers to oral evidence by the Prison Offender Manager that the Applicant had declined a recent opportunity to speak with the Prison Offender Manager, which the Prison Offender Manager considered was evidence of the Applicant's *'grievance thinking'* towards the Prison Offender Manager because the Prison Offender Manager was not supporting the Applicant's progression.
35. The Decision Letter refers to the Applicant's oral evidence that he had lost trust in the professionals who were involved in his case, because they were not supporting the Applicant's progression.
36. The Decision Letter refers to the Applicant's account that false rumours about him that had circulated within the prison had led to conflict between him and other prisoners, rather than the occasional provocation and antagonising of other prisoners by the Applicant that was described by the Prison Offender Manager. The Decision Letter takes no view on which of those accounts is true, and the Applicant's account is not correctly described as *'fact'*. In any event, I do not consider that the Applicant's disclosure of such information is clear evidence that he is, or would be willing and able to work openly with those managing him, because the information

is apparently favourable to him in terms of the extent of his responsibility for conflict with others and his safety within the prison.

37. The Decision Letter refers to the evidence of the clinician author of the September 2019 psychological risk assessment that the Applicant could still struggle to accept "no" as an answer from professionals, based on the clinician's interview with the Applicant, interactions between the clinician and the Applicant during meetings, and evidence provided by 'multiple staff' about the Applicant's conduct and presentation.
38. The Decision Letter refers to the Applicant having reportedly declined the offer by his Community Offender Manager of telephone contact in the build up to the first oral hearing. The Decision Letter recorded the Applicant's explanation that he was unable to attend because he had been in the Segregation Unit, rather than refusing to attend.
39. The Decision Letter records that the panel accepted the evidence of all three professional witnesses that the Applicant's traits of entitlement and grandiosity were '*still manifest at times within the custodial setting*' including that he had shown a repeated sense of entitlement in custody alongside evidence of grievance thinking and a reluctance to work openly with those managing him. I consider that that is an assessment that was open to the Panel on the evidence referred to in the Decision Letter.

#### Ground 7

40. The Applicant submits that the Decision is irrational in failing to explain why electronic GPS (global satellite positioning) tagging would not have constituted a significant protective factor, rather than deferring to the view of the offender manager without reasons and in the face of a direct challenge to that view by the Applicant in his 20 October 2020 written submissions.
41. I consider that there is no material irrationality. It is regrettable that the Decision Letter does not directly address the point made in the October 2020 written submissions, but I do not consider that the omission is material to the rationality of the Decision.
42. The Decision Letter refers to the oral evidence of the Community Offender Manager that the suggested monitoring would not provide much reassurance about the Applicant's conduct, which was a view that deserved to be given some weight by the Panel. As the 20 October 2020 submissions acknowledge, such a condition could only be imposed for a maximum of six months, albeit potentially following on from a period in designated accommodation and is capable of enhancing supervision and scrutiny.
43. However, the Panel's material reasoning is that the Applicant's reluctance to be open with professionals is a significant barrier to his potential management in the community, that he had been unable to demonstrate that he had fully internalised the learning from offending behaviour interventions and that his behaviour in custody over the last year had not shown a sufficient maturation and level of change to evidence that he has fully addressed his core risk factors. Therefore, the Panel accepted the assessments of all professional witnesses that '*core risk reduction work*'

remained outstanding before the Applicant could safely be managed outside of the closed prison estate. I do not consider that that is an assessment that was not open to the Panel on the evidence considered in the Decision Letter.

#### Ground 8

44. The Applicant submits that the Decision is irrational in failing to give weight to the views of the Applicant's keyworker in a report that is included in the dossier and that, it is asserted, '*presented a far more positive picture of the Applicant than had previously been the case.*' The Applicant submits that the Panel was expressly invited to place weight on those views by the Applicant in his 20 October 2020 written submissions.
45. I consider that there is no irrationality. The Decision Letter does not directly address the invitation made in the October 2020 written submissions. However, the Decision Letter confirms that the Panel had regard to the contents of the dossier and noted that there had been positive reports about the Applicant, which the Panel considered to be to the Applicant's credit, but the Decision Letter clearly expresses the Panel's rational assessment that such positive reports were outweighed by the evidence of disobedient and inappropriate conduct on the part of the Applicant.

#### Ground 9

46. The Applicant submits that the Decision is irrational in failing to acknowledge or address an argument put by the Applicant in the 20 October 2020 submissions regarding the significance of the opinion of the clinical author of the September 2019 psychological risk assessment that sexual preoccupation was lacking as a present risk factor for the Applicant.
47. I consider that there is no irrationality. The Decision Letter records the submission that there was no evidence that the Applicant was sexually preoccupied or likely to pose an imminent risk of reoffending in a similar manner to the index offences if released. However, the Decision Letter expresses the Panel's rational assessment, in agreement with the professional witnesses, that the Applicant's prevailing, problematic personality traits indicated a high risk of the Applicant causing serious harm to others, given his diverse offending history and a repeated capacity to cause such harm through general violence in addition to sexual violence.

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

48. The Secretary of State's submissions add nothing to the case, because the submissions seek to adduce information that was not before the Panel.

#### Decision

49. The Decision is not marred by irrationality or procedural unfairness. Reconsideration is accordingly refused.

**Timothy Lawrence**  
**14 January 2021**