

[2020] PBRA 34

## Application for Reconsideration by Kelly

### Application

1. This is an application by Kelly (the Applicant) for reconsideration of a decision dated 6<sup>th</sup> February 2020 following an oral hearing held on 17<sup>th</sup> January 2020. The panel did not direct his 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 a dossier of 310 pages (all of which was disclosed to the Applicant) including the decision letter following the oral hearing which took place on 17 January 2020, the application for reconsideration prepared by the Applicant in person dated 24 February 2020 and an email from PPCS on behalf of the Secretary of State offering no response to the Applicant's reconsideration application dated 3 March 2020.

### Background

4. The Applicant is serving an Indeterminate sentence imposed for Public Protection (IPP) on 21/6/2010, in respect of Aggravated Burglary. During the index offence the Applicant broke into the victim's home, went upstairs to his bedroom and held an axe above his head. The minimum term/specified part, including any relevant sentence reduction was set at 4 years 165 days, that minimum term expired on 3 December 2014.
5. The Applicant was released from this sentence on 4 February 2019 but recalled on 20 March 2019 after he was witnessed by staff at his probation hostel on CCTV punching another resident.

### Request for Reconsideration

6. The application for reconsideration is dated 24 February 2020.
7. The grounds for seeking a reconsideration are as follows:



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## Irrationality

(a) That when summing up, the panel indicated that the Applicant did not have an understanding of his risk factors and that they added extra risk factors not previously identified by professionals during his custodial sentence; and

(b) That there has been a violation of the Applicant's basic human rights relating to the Applicant's entitlement to use a pre-emptive strike as self-defence to justify his use of violence in the events leading to his recall.

## Procedurally unfair

(a) The Applicant complains that the individuals who submitted witness statements recommending that he remains in closed conditions were not present at the hearing and therefore he was not provided with an opportunity to question them; and

(b) That the Applicant was not provided with the opportunity to speak following the Offender Manager's evidence.

## Current parole review

8. The Applicant's case was referred to the Parole Board on 3 April 2019 requiring a decision on whether it would be appropriate to direct the Applicant's release; or alternatively to recommend to the Secretary of State that the Applicant should be transferred to open conditions and, if so, to advise on any continuing areas of risk.
9. The panel comprising three members convened to hear the Applicant's case on 17 January 2020. The panel had available a dossier of 301 pages and were provided on the day with an extract from the log of activity from the Applicant's designated accommodation provided by the Offender Manager. The CCTV showing the incident does not appear to have been made available to the panel despite the duty member having directed it be provided on 31 October 2019.
10. The panel took oral evidence from the Applicant's current Offender Supervisor, his current Offender Manager and from the Applicant. The Applicant was represented throughout by Counsel.

## The Relevant Law



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11. The panel correctly sets out in its decision letter dated 6 February 2020 the test for release and the issues to be addressed to enable it to make making a recommendation to the Secretary of State for a progressive move to open conditions.

### *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.



## The reply on behalf of the Secretary of State

17. On 3 March PPCS confirmed that the Secretary of State offered no representations in response to the Applicant's reconsideration application.

### Discussion

18. The panel took evidence from the Applicant, the Applicant's current Offender Manager and current Offender Supervisor. Having read the comprehensive dossier and heard this evidence, the panel identified a comprehensive list of the Applicant's risk factors. The panel also identified a number of protective factors (factors which would reduce the risk of reoffending) which might be developed if the Applicant were motivated and willing to undertake further work. The panel further concluded that they were concerned about the Applicant's apparent lack of insight and the difficulty he was experiencing in 'being reflective and self-aware'. The panel gave clear examples of this from the Applicant's evidence. On the one hand the Applicant identifies drugs and alcohol as risk factors but then said that he 'only drank 5 times in 6 weeks' and when asked what he would do if someone hit him he stated in evidence that '[I] like to think that I would get away from the situation. You are allowed to protect yourself up to a certain point'.

19. The panel had the advantage of an extensive dossier of reports and other material and the advantage, too, of seeing and hearing the Applicant as well as the Applicant's current Offender Supervisor and Offender Manager. In the circumstances it is right to give due deference to the expertise of the panel who were fully entitled as part of the hearing to identify additional risk factors (as well as protective factors which would reduce the risk of reoffending) not previously identified by report writers. The panel's conclusion that the Applicant still does not have sufficient insight into those risk factors is also well reasoned and the panel has identified appropriate examples from the evidence as support for that conclusion. This comes nowhere near the high bar for 'irrationality' and I find nothing in the decision or the supporting reasons to suggest that it was.

20. The evidence included reports, which contained the log of activity from the Applicant's probation hostel, about his behaviour on licence. The panel took into account a report from probation which stated that the Applicant was witnessed by staff on CCTV punching another resident in an unprovoked assault. The panel took detailed evidence from the Applicant about exactly



what had happened which is detailed carefully in the Decision Letter and can be summarised by an assertion that the Applicant felt an immediate threat of harm when he believed that the person he had assaulted, would otherwise have left to fetch a knife which he would use to assault the Applicant, so he had thrown punches as a pre-emptive strike. The panel's finding on this assertion is set out as follows:

*'You were unable to provide a credible explanation as to why, when the problems arose, and with the victim having left your room, you did not lock yourself in; or having left the room as well, why you did not simply push the victim away from you and then run downstairs to alert staff to the problem'.*

21. The panel correctly identified that they were obliged to consider the necessity of the recall in accordance with ***Calder v The Secretary of State for Justice (2015) EWCA Civ 1050*** but it is of note that the Applicant (and his legal representative) did not dispute the need for recall and so the panel did not consider this issue to have been contested. Nevertheless, the events were rightly considered in some detail in any event because of their relevance to the Applicant's risk of serious harm. The panel concluded that the incident was concerning in this respect because *'The panel assesses that the behaviour was offence paralleling, the incident evidenced poor conflict resolution, poor decision making, lack of emotional self-control, acting on a belief that it is acceptable to use violence against another, poor thinking skills and the incident occurred after you had consumed alcohol'.*
22. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they 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. I see no reason to interfere with the conclusion of the panel on this aspect of the evidence and do not find the panel to have dealt with it irrationally.
23. The dossier, as might be expected, contains numerous historic reports from professionals who had previously worked with the Applicant. Whilst it is open to a panel to take these into consideration when assessing risk, with appropriate weight given to hearsay statements, the Parole Board Rules do not require every report writer to give oral evidence. It is a matter for the discretion of the panel chair who to direct to give evidence and, whilst it would have been open to the panel to require (and for the Applicant to apply for) additional witnesses, there is nothing remarkable about those



professionals in these roles who have the most recent knowledge of the offender being the sole witnesses to give evidence. The Applicant has not identified and I have not found, any procedural error in allowing this to happen. Furthermore, no unfairness was caused as the decision letter does not refer to the evidence of the report writers named in the application and there is no evidence that undue reliance was placed on their opinions.

24. The Applicant was represented by Counsel throughout the hearing and the panel stated that it noted all written and oral evidence carefully, including the closing legal submissions of Counsel.

25. The Applicant states that he was not provided a formal opportunity to speak after the Offender Manager had given evidence. There is nothing to suggest that his Counsel was not permitted in the usual way to question the Offender Manager's evidence or to point out any weaknesses or contradictions in her evidence in the closing submissions. In the circumstances, it is hard to see how the Applicant was in any way prevented from putting his case properly or that procedural unfairness can have been said to have occurred. I find that it did not.

## Decision

26. 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.

**Kay Taylor**  
**7 March 2020**

