

[2020] PBRA 48

Application for Reconsideration by Smith

Application

1. This is an application by Smith (the Applicant) for the reconsideration of a decision by a Panel, that his recall to prison had been appropriate and to make no direction for re-release, following a hearing on 26 February 2020.
2. I have considered this application on the papers. These comprise of the dossier, the provisional decision of the Panel dated 28 February 2020, the application for reconsideration dated 12 March 2020 (received 17 March 2020) and the Response of the Secretary of State (by e-mail dated 27 March 2020).

Background

3. On 4 November 2014, the Applicant was sentenced to an extended sentence totalling 9 years consisting of a custodial period of 6 years with an extended period of 3 years and was also made subject to a Hospital Order under Section 45A of the Mental Health Act 1983, for the offences of robbery, attempted robbery, theft from a dwelling and possession of a bladed article in a public place. On 4 July 2016, he was sentenced to 30 months imprisonment for wounding with intent to cause grievous bodily harm while resident in a forensic psychiatry services unit and, the Panel recorded, to a 6 months custodial sentence for criminal damage. The sentence expiry date is reported to be 13 March 2025.
4. He was automatically released on licence on 12 September 2018 but recalled on 3 October 2018 for alleged breaches of his licence, involving relapse into substance misuse and erratic and aggressive behaviour making him no longer manageable in the community.

Request for Reconsideration

5. The application for reconsideration, made by the Applicant in person, consists of a six-page, largely handwritten, document. It is not necessary to reproduce the



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application in full, but all sections have been considered and aspects relevant to issues of irrationality or procedural unfairness are dealt with below:

Procedural Unfairness:

- a. That the Prison Psychology witness gave evidence by phone.
- b. That there was no up-dated probation service assessment report prepared since 2005 and that he had had minimal contact with Probation Services (described by him as "inside Probation").

Irrationality:

- a. That the Panel unfairly classified his involvement in "a fight" as indicative of high risk.
- b. That the conditions in prison placed him in danger and he was motivated not to return because of his fear that he would die in prison.
- c. In addition, the Applicant raised a number of factual issues relating to his time in custody and whilst in designated accommodation.

6. The Secretary of State offered no representations in response to the application.

Current parole review.

7. The Secretary of State referred the Applicant's case to the Parole Board to consider whether it was appropriate to direct re-release. At the oral hearing, the Applicant, who gave evidence in person, was represented by Counsel and evidence was given by his Offender Supervisor, Offender Manager and by a Prison Psychologist who gave evidence by telephone link.
8. The hearing had originally been listed for 25 April 2019 but was deferred for a mental health assessment, following which he spent a period in a hospital forensic psychology unit before being discharged back to prison on 22 July 2019.
9. The Panel recorded that none of the professional witnesses considered that the formal Risk Management Plan would be effective without further steps being taken by him to reduce risks. In its findings as to the extent of his behaviour in the designated accommodation prior to recall, it recorded that in his evidence, the Applicant had accepted that "aggression, anger and upset" came out. The Panel, whilst accepting that additional information might have been sought as to the underlying reasons for his behaviour, noted the view of his Offender Manager that pre-emptive action would have been taken by the accommodation staff to avoid serious harm. The Panel concluded that the recall was appropriate and that full knowledge of the reasons would have been unlikely to have made a material difference to the decision.

10. The Panel found that, since recall, he had made significant positive progress which included engagement with substance misuse services and undergone counselling, was not presenting in a manner consistent with psychosis and that his mental health was sufficiently stable for him to undertake and benefit, after an appropriate needs assessment, from programmes. It, further, indicated that it had been impressed by the way he conducted himself during the hearing and the way he gave evidence. Nonetheless, it found that there was insufficient evidence of core risk reduction, and concluded that, for the protection of the public, he should remain in custody.

The Relevant Law

11. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis that the decision is (a) irrational or that it is (b) procedurally unfair. This is an eligible case.

12. In **R (on the application of 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".

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 uses the same word as is used in judicial review demonstrates that the same test should be applied. This test for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.

13. Procedural unfairness under the Parole Board Rules relates to the making of the decision by the Parole Board and an assessment is required as to whether the procedure followed by the Panel was unfair.

Discussion

14. Irrationality:

In my judgment, the decision to approve the recall and to refuse release cannot be said, in any way, to meet the test of irrationality. The Panel, having clearly considered with care, the documents in the dossier and the oral evidence, gave a



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clear and reasoned decision:

- a. In approving the recall, it made findings of fact, as to relevant matters, which it was clearly entitled to do and adopted the correct test as to whether it was necessary for the protection of the public that he remained confined.
- b. In dealing with release, it placed emphasis on the Applicant's behaviour in the designated accommodation, the evidence of which it did not appear he had challenged, and that offender behaviour work, to reduce risk, still needed to be undertaken.
- c. The Applicant raises a number of issues of fact relating to the period prior to release and to his fears of personal safety in the prison environment. These include reference to the incident whilst he was held in a psychiatric unit leading, in 2016, to an additional custodial sentence. These matters did not form the basis for the Panel's decision.

15.Procedural Unfairness:

- a. The Applicant was represented by Counsel at the hearing and there appears to have been no objection to the Prison Psychologist giving evidence through the telephone link or any suggestion that the evidence was flawed as a result.
- b. The Panel considered a dossier of 281 pages. Pages 215 onwards included a probation service assessment report completed on 17 February 2020.
- c. I find nothing in these submissions to suggest that there was any procedural unfairness in the Panel's review. The Applicant both personally and through his Counsel was able to give evidence, challenge witnesses (including the raising of any issues relating to levels of contact with those responsible for his supervision) and to make submissions.

Decision

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

Edward Slinger
1 April 2020