

[2020] PBRA 60

## Application for Reconsideration by Mr Morley

### Application

1. This is an application by Mr Morley (the Applicant) for reconsideration of a decision of a Parole Board member not to direct his release following a consideration on the papers.
2. The decision itself was dated 25 February 2020 and was provisional by virtue of Rule 19(6) of the Parole Board Rules 2019. A prisoner may apply within 28 days to the Duty Member to request an oral hearing, but no such application was made in this case.
3. 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.
4. I have considered the application on the papers. These consisted of the dossier running to 153 pages (that included the decision letter) and the representations for reconsideration.

### Background

5. The Applicant is now aged 30 years old. He was sentenced to Imprisonment for Public Protection on 18 May 2012 for an offence of s18 wounding. The tariff was set at 7 and a half years (with allowance for time on remand) and expired on 30 January 2019.
6. The Applicant was released on licence on 01 April 2019 but recalled on 07 January 2020 after he was arrested on suspicion of committing a further offence.

### Request for Reconsideration

7. The application for reconsideration is dated 14 April 2020.
8. The grounds for seeking a reconsideration are as follows:
  - (a) The Panel did not obtain information about the further allegations that led to the recall and in general (procedural unfairness).
  - (b) The Panel erred in relying on the recommendation from the Offender Manager when she had not been given full details of the police investigation (irrationality).

9. Much of the grounds are taken up with the Applicant's explanation of the circumstances of the events leading up to the recall and an analysis of his risk, as well as proposed directions.

### **Current parole review**

10. The Secretary of State referred the Applicant's case to the Parole Board on 22 January 2020 following his recall to consider whether he should be released. If not, then the Panel was invited to advise the Secretary of State on whether a transfer to open conditions could be recommended.
11. The case would then have been allocated to a Parole Board member with the date of 25 February 2020 being fixed to allow for the Applicant to make representations (either himself or through a lawyer). No representations were submitted.
12. The Parole Board member concluded that in light of the breaches of his licence, the Applicant's risk was not manageable in the community.
13. In the decision letter it was made clear on several occasions that it was open to the Applicant to apply for an oral hearing. Despite that, no application was made for one.

### **The Relevant Law**

14. The panel correctly sets out in its decision letter the test for release.

#### *Eligibility under Parole Board Rules 2019*

15. 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. The question of whether to make a recommendation to the Secretary of State for a progressive move to open conditions is not addressed but is outside of the scope of the reconsideration mechanism.
16. It is necessary in this case to consider whether this is an eligible decision. The usual avenue of challenge or someone dissatisfied with a provisional decision of a Parole Board member is to request (with reasons) an oral hearing.
17. That application will go to a Parole Board Duty Member (not the original member) who will decide that question. If they decide not to direct an oral hearing, then an application can be made to reconsider the original decision of the Parole Board member (Rule 20(5) and Rule 28(1)).
18. The effect of the Rules is that it does not matter whether a prisoner makes an application for an oral hearing or not – the original decision can still be subject to an application for reconsideration.
19. Further, whilst there is a strict time limit of 21 days after service of the decision, by virtue of Rule 20(3), this time limit is put on abeyance whilst a prisoner has the opportunity to apply for an oral hearing.

20. For those reasons, I am satisfied that this is an eligible decision.

#### *Scope of the review mechanism*

21. Such a decision is eligible for reconsideration on the basis that (a) the decision is irrational and/or (b) that the decision is procedurally unfair.
22. I remind myself that I am not conducting an assessment of risk myself but am considering the question of whether the decision itself was irrational or procedurally unfair (**Williams [2019] PBRA 7**, at para 9).
23. The reconsideration mechanism is “*not an opportunity for persons disappointed by a decision of the Parole Board to put fresh evidence before it*”. There is a duty on the parties to put before the Parole Board member all the relevant evidence. If that evidence is not available, and a party considers that the decision maker should have it, then an application to adjourn or defer should be made (**Nightingale [2019] PBRA 40**, at para 37).
24. The fact that material evidence was not put before the decision maker does not mean that there is procedural unfairness, even where that evidence could have made a difference to the outcome of the case (**Williams [2019] PBRA 7**).

#### *Irrationality*

25. 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.”*

26. 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.
27. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28 (see **Preston [2019] PBRA 1** and others).

#### *Procedural unfairness*

28. 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.

29. 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 properly informed of the case against them;
  - (c) they were prevented from putting their case properly; and/or
  - (d) 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

30. The Secretary of State has stated that he does not wish to make any representations.

### Discussion

31. As stated above, the grounds for reconsideration set out the Applicant's account of his time on licence and the recall.
32. It is suggested that a direction to the CPS or police is made in order to establish the progress of the investigation and "*encourage the production of documents*", as well as a psychological assessment, to allow for a "*successful and fair assessment of the risk*" that the Applicant presents.
33. Evidence is also provided as to the Applicant's progress in custody since recall.
34. The matters raised in the request for reconsideration may well have been enough, especially in light of the principles of **Osborn, Booth and Reilly [2013] UKSC 61**, to persuade a Parole Board Duty Member that it was appropriate to direct that an oral hearing be held had such an application been made.
35. However, the test that I have to apply is a different one. It is not suggested that the decision that was made was either irrational or unfair on the material that the Parole Board member had. In light of the principles set out above, that is a complete answer to the application which, in my view, must be refused.
36. There was no application to adjourn or defer to obtain further information. When faced with a case where there is an ongoing police investigation a decision (that some Parole Board members would have taken) to defer the case to seek more information would be a proper decision. However, there is no general obligation to do so, and it cannot be said that the decision to proceed to determine this case was not one properly open to the Parole Board member.
37. For the same reason, the Parole Board member is entitled to take account of a recommendation from a Probation Officer, which was based on the information that she had at the time.

## Decision

38. For the reasons I have given, I do not consider that the decision was irrational, nor was it procedurally unfair.
39. Accordingly, the application for reconsideration is refused.

**Daniel Bunting**  
**30 April 2020**