

[2020] PBRA 82

## Application for Reconsideration by Francis

### Application

1. This is an application by Francis (the Applicant) for reconsideration of a decision of a three-member panel of the Parole Board not to direct his release following an oral hearing conducted by telephone link during the Coronavirus lockdown, and at which he was legally represented.
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 the dossier comprising 459 pages, the Decision Letter dated 18 May 2020 and the Reconsideration Application. The Secretary of State did not make any formal representations in response to the application.

### Background

4. The Applicant is now aged 39. He was sentenced to Imprisonment for Public Protection on 17 October 2007 following his conviction for two offences of robbery, both committed when he robbed a bookmakers, stealing monies from the two cashiers after threatening them that he had a weapon, although no weapon was ever seen. The Applicant's minimum term was fixed at five years (less remand time) and expired on 11 April 2012. He is, therefore, over eight years "post-tariff" and has remained in closed prisons throughout this time.
5. The Applicant has previous convictions for violence, including a robbery aged 15, when he was sentenced to two years detention; and four robbery offences, including one with a weapon, aged 20, when the Applicant was sentenced to eight years detention. The Applicant had been released from this last sentence just two months before the index offences and was on licence at the time. Save for that two month period, the Applicant has now been in custody for over 18 years.
6. The current review is the fifth review of the Applicant's case by the Parole Board. His custodial behaviour has been problematic, with many adjudications, which included assaults on prisoners and prison staff, setting a fire, and possessing a weapon. By March 2017 it appeared that the Applicant's behaviour was settled, and he was making progress but, in that month, he assaulted a member of staff, punching him multiple times. The matter was referred to the police and, on pleading guilty at



3rd Floor, 10 South Colonnade, London E14 4PU



[www.gov.uk/government/organisations/parole-board](http://www.gov.uk/government/organisations/parole-board)



[info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)



@Parole\_Board



0203 880 0885



INVESTORS  
IN PEOPLE | Bronze

court, the Applicant was sentenced to two months imprisonment. Following this assault, the Applicant was transferred to another prison where, the following month, he became involved in a riot and was subsequently sentenced, on 30 April 2019, to two years imprisonment for violent disorder. Following the riot, the Applicant was again transferred to another prison where, two months later, he was involved in assaults upon other prisoners following tensions arising from a high profile terror attack that had taken place in 2017. However, he was not adjudicated or charged in relation to this last incident.

7. In August 2018 the Parole Board, following oral hearing, recommended the Applicant's transfer to open conditions. That panel (and, it seems, the Applicant also) were wrongly informed that he was not implicated in the riot and there was to be no further action against him. However, sometime after this hearing, and before he could be transferred to an open prison, the Applicant was charged with the violent disorder for which he was subsequently convicted. Following charge, his behaviour deteriorated again and became settled once again and it is reported that there have been no adjudications since February 2019 and no instances of aggressive behaviour since July 2019.

### **Request for Reconsideration**

8. The application for reconsideration is dated 6 June 2020.
9. The grounds for seeking a reconsideration are as follows:
  - (a) The panel's decision was irrational in failing to consider the statutory test for release fairly; specifically:
    - (i) The panel should have placed more weight on the professional evidence regarding the Applicant's insight and attitudes towards violence;
    - (ii) It was irrational for the panel to ignore the professional's recommendations for open conditions as, contrary to the panel's findings, "it is within these recommendations" that his lack of insight has been addressed and he has addressed core risk and has made good progress;
    - (iii) The panel failed to make allowances for the quality of the evidence the Applicant gave via remote hearing;
    - (iv) Inadequate weight was given to protective factors of vocational skills and educational courses completed; and
    - (v) The panel focussed on historic negative behaviour and failed to give due weight to improved custodial behaviour following his completion of risk reduction work.
  - (b) The panel's decision was procedurally unfair as the panel did not properly address, and failed to provide specific reasons, why the Applicant did not

meet the statutory test for release and why risk could not be managed by the risk management plan proposed.

## Current parole review

10. The oral hearing took place by telephone link on 5 May 2020, where evidence was given to the panel by the Applicant, his Offender Supervisor ("OS") and his Offender Manager ("OM"). Submissions were also made by his legal representative and the panel considered a detailed dossier of evidence.
11. The Secretary of State was not represented and did not submit any written view. The Applicant's application was for release or, in the alternative, a recommendation that he should be transferred to open conditions. Neither the OS nor the OM supported release, but both recommended that he was suitable for open conditions.
12. The panel correctly set out in its decision letter dated 18 May 2020 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. The panel decided that the Applicant did not meet the test for release, nor did they recommend a transfer to open conditions.

## The Relevant Law

### *Parole Board Rules 2019*

13. 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. This is such a case.
14. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**. Accordingly, this Reconsideration Panel did not consider whether the panel adequately assessed the Applicant's case for open conditions.

### *Irrationality*

15. 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."*

16. 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.

17. 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*

18. 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.

19. 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.

### **Discussion**

20. The key issues to address are whether it was open to the panel to conclude that the test for release was not met and, if so, whether sufficient reasons were given in doing so.

21. The panel not only had an extensive dossier of reports, but it also had the advantage of hearing the Applicant and the two professional witnesses, the OS and the OM. The Applicant was also legally represented throughout. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (whilst also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the court in **DSD**, they have the expertise to do it.

22. The Applicant submits that, in order for the OS and OM to recommend open conditions, they were satisfied that the Applicant had developed insight into his use of violence and offending behaviour; the Applicant's reasoning is that "it is within these recommendations" of the OS and OM for open conditions that his lack of

insight is addressed, and it was wholly irrational for the panel to ignore these recommendations. Furthermore, the Applicant complains that the panel placed considerable weight on his evidence, which they found (and gave examples) demonstrated a willingness to justify the use of violence and did not place weight on the professionals' assessment of his insight.

23. There are a number of problems with this submission. Firstly, it does not necessarily follow that, by recommending open conditions, the professionals had accepted that the Applicant's insight and attitude to violence had been addressed. It also does not follow that the panel rejected the professionals' assessments; on the contrary, it is implicit in the professionals' recommendations for open conditions that the Applicant did not, in their view, meet the test for release, a view which was indeed accepted by the panel.
24. The decision letter shows that the panel carefully explored in evidence the Applicant's history of violence both prior and subsequent to the imposition of the indeterminate sentence, including the serious custodial violence in 2017 and his aggressive and threatening behaviour in 2018/2019. It noted that in reports in June 2019 the Applicant continued to justify his custodial violence and was contemplating committing another serious offence in an erroneous belief that a further sentence would be "the best way to get the IPP squashed".
25. The decision letter records that the Applicant in his evidence to the panel: (i) continued to justify his behaviour resulting in his 2017 conviction for assaulting an officer; (ii) denied being involved in any violence in the 2017 prison riot for which he was convicted and received a two year concurrent sentence; (iii) admitted that he "hit as many people as I could" in the further violent incident in June 2017; and (iv) explained that his recent improvement in behaviour was because "everyone is laid back and not getting on my case or antagonising me".
26. It is not a valid ground for complaint that the panel placed too much emphasis on the Applicant's evidence to the panel. It was for the panel to probe his evidence, assess his credibility and determine the appropriate weight to be attached to his evidence. It was clearly open to the panel on the evidence it recorded to find, as they did, that his attitude towards violence was not yet at a stage compatible with a progressive move and that he needed to develop his level of insight and attitude towards violence.
27. The Applicant goes on to assert that the panel failed to make allowances for the quality of his evidence via a remote hearing. There is no suggestion that any objection was raised, either prior to the hearing, during the course of the hearing or that proceeding by telephone link was inappropriate in this case. There is nothing in the decision letter to indicate that there were any technical problems or that the panel was impeded in any way in assessing the evidence. No evidence is placed before me as to how, and to what extent, his evidence was adversely affected. The previous reconsideration case of **Baker [2020] PBRA 73** confirms that in an appropriate case it is not unfair or irrational to conclude a review by a telephone hearing and that if a party wishes to object to this way of proceeding because it was not appropriate, he should do so before the hearing and not wait for the decision before doing so. In the Applicant's case, at the very least I would have expected any ongoing concerns to have been raised during the course of the

hearing or in submissions. The mere assertion, after the hearing, that the quality of the Applicant's evidence was affected and that the panel failed to make allowances for this is not supported by any evidence before me. I am unable to find, therefore, that the hearing was unfair on this ground.

28. The Applicant also complains that the panel failed to give adequate weight to the protective factors of vocational skills and educational courses completed, and which would better equip him for managing in the community. The Applicant states that he gave evidence about the courses he has completed in custody. Whilst offending behaviour courses completed are commented upon, favourably, in the decision letter no specific mention is made of vocational and educational achievements. The dossier suggests that he has made limited progress in these areas. However, it is not incumbent on the panel to itemise every individual factor it has considered.
29. In **Oyston [2002] PRL 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 require elaborate or impeccable standards of draftsmanship"*.
30. In the Applicant's case, the decision letter identified a number of protective factors but concluded that plans to manage risk would be primarily dependent upon external controls and even these would be insufficient to manage risk beyond the limited period of designated accommodation residency.
31. Finally, insofar as the rationality challenge is concerned, the Applicant complains that the panel placed too much weight upon historic negative behaviour and insufficient weight upon improved custodial behaviour following completion of risk reduction work. This ground is misconceived. The last risk reduction work completed was between January and March 2018, i.e. after the custodial violence in 2017. However, the decision letter fairly records not only aggressive and threatening behaviour later in 2018 and in 2019, but also evidence of improved engagement and behaviour since September 2019 and a lack of adjudications since February 2019. The decision letter was a balanced assessment of the Applicant's custodial behaviour up to the date of hearing. Equally significant, the decision letter also recorded the panel's real concern about the Applicant's continuing justification for and insight into his previous negative behaviour, and it was appropriate in those circumstances for the panel to decide on the appropriate weight to attach respectively to earlier and more recent behaviour.
32. Turning finally to the complaint that the panel's decision is procedurally flawed, this rests on the assertion that the decision letter does not address or provide adequate reasoning as to why the statutory test is not met, or why the risk management plan is inadequate to address risk. There is nothing in this ground. On the contrary, the decision letter sets out a clear and comprehensive analysis of the evidence which was considered. The panel set out its analysis of the risk factors and the current risk levels. The panel correctly focussed on risk throughout and explained its reasons and how it weighed and balanced competing factors. It set out the details

of the risk management plan, which it carefully considered, and explained why it would be insufficient to manage risk beyond a short term stay in designated accommodation. In its summary the panel set out the reasons why it had concluded that it was necessary for the Applicant to remain confined. The decision logically follows from the stated reason. The statutory test was correctly cited and applied. There was no support for release from the professional witnesses. The conclusion is a succinct and well-reasoned summation of the relevant matters that makes the rationale of the decision letter obvious to the reader.

## Decision

33. For the reasons I have given, I do not consider that the decision was irrational/ procedurally unfair and accordingly the application for reconsideration is refused.

**Elaine Moloney**  
**25 June 2020**