

[2021] PBRA 104**Application for Reconsideration by Stewart****Application**

1. This is an application by Stewart (the Applicant) for reconsideration of a provisional 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 31 May 2021 (the Decision Letter).
2. I have considered the application on the papers comprising:
 - (a) A dossier of 357 numbered pages;
 - (b) The Decision Letter; and
 - (c) Written submissions by the Applicant's solicitors dated 22 June 2021 in which reconsideration is requested (the Applicant's Submissions).

Background

3. In February 2009, the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection with a minimum tariff that expired in June 2012 in relation to his conviction for wounding with intent to cause grievous bodily harm.
4. The Applicant was released in October 2018 on a licence that was subsequently revoked, leading to the Applicant's recall to prison in May 2019.
5. The Applicant was aged 23 when they received the sentence and they are now aged 36.

Current parole review

6. 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.
7. The Decision was made by a three-member panel of the Board that considered the Applicant's case at an oral hearing in May 2021 (the Panel). The Panel included a psychologist member of the Board. The oral hearing was conducted remotely by video links due to constraints imposed by the coronavirus pandemic.

Application and response

8. The Applicant's submissions assert that the Decision is marred by irrationality and procedural unfairness.
9. By an email dated 12 July 2021, the Public Protection Casework Section notified the Board that the Secretary of State offered no representations in response to the Applicant's reconsideration application.

The Relevant Law

10. 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

11. 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."
12. 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.
13. 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. The application of this test has been confirmed in previous decisions on applications for reconsideration under Rule 28: **Preston [2019] PBRA 1** and others.
14. The duty of statutory bodies to give reasons was summarised by Lord Carnwath in the Supreme Court case **Dover District Council v CPRE Kent [2017] UKSC 79** as follows:

"51. Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed (see R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531; R v Higher Education Funding Council, Ex p Institute of Dental Surgery [1994] 1 WLR 242, 263A-D; De Smith's Judicial Review 7th ed, para 7-099). Doody concerned the power of the Home Secretary (under the Criminal Justice Act 1967 section 61(1)), in relation to a prisoner under a mandatory life sentence for murder, to fix the minimum period before consideration by the Parole Board for licence, taking account of the "penal" element as recommended by the trial judge. It was held that such a decision was subject to judicial review, and that the prisoner was entitled to be informed of the judge's recommendation and of the reasons for the Home Secretary's decision:

"To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed. If there is any difference between the penal element recommended by the judges and actually imposed by the Home Secretary, this reasoning is bound to include, either explicitly or implicitly, a reason why the Home Secretary has taken a different view..." (p 565G-H per Lord Mustill).

It is to be noted that a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so make effective the right to challenge the decision by judicial review."

15. The application of those principles to decisions of the Parole Board where the liberty of the subject is at stake has been expressed in recent judgments by the High Court authorities including **R (Wells) v Parole Board [2019] EWHC 2710 (Admin)**, **R(PL) v Parole Board and Secretary of State for Justice [2019] EWHC 3306 (Admin)** and **Stokes, R (On the Application Of) v Parole Board of England and Wales [2020] EWHC 1885 (Admin)**.

Procedural unfairness

16. 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.

Consideration

17. I am persuaded by the assertion in the Applicant's Submissions that the Decision is inadequately reasoned.
18. In the Applicant's case, it is stated in the '*Conclusion and decision of panel*' section of the Decision Letter that the Applicant committed a serious index offence and demonstrated by that and by some of the Applicant's earlier offending behaviour that the Applicant is capable of causing serious harm. It is stated that, despite completing programmes and treatment prior to release, the Applicant demonstrated by their behaviour in the community that they were unable to consistently put their skills into practice and instead reverted to previous non-compliant behaviour, demonstrating that many of the Applicant's risk factors remained live. It is stated that the Applicant, following their return to custody, minimised their behaviour in the community, blaming everyone but themselves.
19. It is however stated in the same section of the Decision Letter that the Applicant had since then had time to reflect on their behaviour and that '*all of the professionals*' considered the Applicant to have made progress in addressing their outstanding risks and to have a better understanding of what went wrong and why.

20. That section of the Decision Letter continues as follows:

'None of the professionals consider [the Applicant] to meet the test for release but they all consider [the Applicant] to have made sufficient progress to benefit from open conditions, where [the Applicant] can continue to practice and consolidate [his] skills and build on [his] release plans. None of them considered [the Applicant] to present a risk of abscond. Taking everything into account the panel concluded that the test for release was not yet met but that [the Applicant's] risk has reduced to a level where it can be managed and tested in open conditions and recommended this to the Secretary of State.'

21. I do not consider that the wording of the *'Conclusion and decision of panel'* section of the Decision Letter reveals the reasons why the panel considered the Applicant not to meet the test for release, given the acknowledgment of the Applicant's progress since being recalled to prison.

22. I do not moreover consider that those reasons are revealed by the wording of the other sections of the Decision Letter, and I do not consider that the reasons are apparent on reading the Decision Letter in the whole. By way of further example, it is stated in the *'Evaluation of effectiveness of plans to manage risk'* section of the Decision Letter that *'The panel considered the risk management plan to be robust. However, it did not consider [the Applicant] to meet the test for release at this stage.'* The reasons why the panel considered that the robust risk management plan would not be adequate to manage the Applicant's risk to the public are not revealed.

Decision

23. The Decision is marred by irrationality. The application for reconsideration is accordingly granted.

Timothy Lawrence
23 July 2021