

[2021] PBRA 13

Application for Reconsideration by Bousfield

Application

1. This is an application by Bousfield (“the Applicant”) for reconsideration of a decision of the Panel following an oral hearing on 4 December 2020 not to direct his release on licence.
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. This application has been allocated to me as one of the members of the Board who are authorised to make decisions on reconsideration applications. I have considered the application on the papers.
4. The documents provided to me were:
 - (a) The dossier considered by the panel, now numbered to 838 pages since it also contains:
 - (i) The Panel’s adjournment directions dated 14 December 2020;
 - (ii) Closing submissions from Counsel for the Applicant dated 10 December 2020;
 - (iii) Letter to the Applicant’s solicitor dated 10 December 2020 from Children and Young Persons Services; and
 - (iv) The decision letter dated 31 December 2020.
 - (b) The application for reconsideration, dated 21 January 2021 from legal representatives on behalf of the Applicant.
 - (c) Confirmation dated 29 January 2021 that the Secretary of State has no representations to make.

Background



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5. The Applicant is now 45 years of age. On 31 March 2009 he received an extended sentence of imprisonment of 14 years, comprising a custodial period of 11 years and an extended licence of 3 years for offences of s.18 GBH, robbery and attempted robbery, committed in March 2008 when he was aged 32 ("the index offences").
6. The Sentence Expiry Date ("SED") is given as 31 October 2022.
7. The index offences were committed with a co-defendant to obtain money for drugs as the Applicant had relapsed into drug use. The Applicant phoned for a minicab but, upon arrival at the destination, the driver was threatened with a knife and forced to hand over cash (£150) and a mobile phone. The second incident followed a similar pattern but the cab driver on that occasion grabbed the knife and, in the ensuing struggle, the co-defendant bit off part of the driver's ear. The Applicant then went around to the driver's door and proceeded to kick and punch him in the face, fracturing his eye socket such that he required specialist surgery for his injuries.
8. The Applicant was first convicted at the age of 16 and his lengthy criminal record for a variety of offences discloses a pattern of violent offending.
9. The Applicant has been released and recalled to custody on 4 occasions.
10. He was released in April 2014 and recalled in December 2014 having driven whilst disqualified on three separate occasions, eventually receiving a sentence of 12 weeks imprisonment. His criminal record also contains a conviction for ABH for which in November 2014 he received a community order.
11. The Applicant was re-released in September 2015 but recalled in February 2016 following the commission of further offences of theft, possession of an offensive weapon, driving whilst disqualified and without due care and attention and common assault for which he was sentenced to a total of 42 weeks' imprisonment.
12. The Applicant was released again in October 2016 but recalled in December 2016 following a relapse into drug use and an allegation of assault upon his sister which did not result in any criminal proceedings.
13. The Applicant was the subject of Executive Release on 12 October 2018 to Designated Accommodation ('DA') but was recalled on 12 December 2018 when Probation were made aware of an incident involving his partner and two year old son in a car park on 20 October 2020, eight days after his release, which was caught on CCTV ("the car park incident").



14. The Applicant has completed programme work in custody to address his risk and no further such interventions are recommended.

Request for Reconsideration

15. The application for reconsideration is dated 21 January 2021.

16. The grounds for seeking a reconsideration are as follows:

(A) Misdirection of Law

The Applicant submits that the Panel misdirected itself as to the legal test for release and the legal definition of serious harm.

(B) Irrationality

The Applicant submits that the Panel's decision is irrational as it made findings of fact without evidence to support them.

(C) Procedural Unfairness

The Applicant submits that the Panel made a finding of fact on a point that was never put to him or any of the professional witnesses.

Current parole review

17. It is unclear when the review was referred to the Parole Board for it to consider whether it was appropriate to direct the Applicant's release. The Panel was not invited to consider the Applicant's suitability for open prison conditions.

18. The Panel initially convened at the prison on 31 January 2020 and thereafter, several adjournments were necessary. At this face-to-face hearing the Panel heard from the Applicant and the Offender Supervisor (OS). Also in attendance were the Community Offender Manager (COM), 'A' (HMPPS instructed Psychologist) and 'B' (Psychologist instructed by the Applicant's legal representatives). In addition, the Panel considered CCTV imagery (just under 6 minutes in length) showing the car park incident at a shopping precinct on 20 October 2018.

19. As of 23 March 2020, in response to the coronavirus pandemic, the Parole Board suspended all face-to-face hearings for the foreseeable future. In the meantime, the Parole Board conducted remote oral hearings by telephone and video-conferencing. The case was deemed suitable for a remote hearing by video link and the parties were invited to make representations as to the mode of the hearing. Through his legal representative the Applicant indicated he was content to proceed with a remote hearing. The Secretary of State made no representations.



20. At the adjourned hearing on 7 July 2020 the Panel heard from the Applicant, a new Prison Offender Manager (POM), the COM, and both of the psychologists in attendance, 'A' and 'B'.
21. At the further adjourned hearing on 4 December 2020 the Panel heard from the Applicant, the POM, the COM and 'A'. 'B' was stood down at the Applicant's request.
22. All professional witnesses supported release save that, having initially supported release, the COM at the December 2020 hearing, in the light of the Applicant's recent custodial behaviour, opposed his further release on licence.

The Relevant Law

Parole Board Rules 2019

23. 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. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).

Irrationality

24. 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."

25. 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.

26. 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

27. 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.

28. 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.

29. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontested and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

30. In **Oyston [2000] PLR 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 prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

The reply on behalf of the Secretary of State

31. The Secretary of State had no representations to make in response to this application for reconsideration.

Discussion

32. I bear in mind that, where a Panel arrives at conclusions based on the evidence it has considered, and having regard to the fact that it saw and heard the witnesses, it would be inappropriate to direct a reconsideration unless it is manifestly obvious that there are compelling reasons for interfering with the panel's decision.



33.I find that the Panel had an in-depth knowledge of this case derived from a considerable dossier of written evidence together with that obtained in three hearings during which it heard from the Applicant on each occasion and viewed CCTV footage.

34.The Applicant has been legally represented throughout and the Panel provided a comprehensive Decision Letter ("DL") extending to 24 pages.

GROUND A: MISDIRECTION OF LAW

35.The Applicant submits that the Panel misdirected itself as to the legal test for release. This is a bold submission since the Panel correctly sets out the test and the presumption provided for in **R (Sim) v The Parole Board [2003] EWCA Civ 1845** on more than one occasion in the DL, confirms it is "*acutely aware that the Sim test applies*" (p.22) and in written final submissions (p.807 dossier) Counsel for the Applicant states:

*"The test to be applied in Mr Bousfield's case was correctly identified by the Panel Chair throughout the course of the oral hearings as that contained in the Court of Appeal decision in **R(Sim) v the Parole Board [2003] EWCA Civ 1845.**"*

I find there is nothing to suggest that the Panel misdirected itself as to, or failed to apply, the appropriate legal test for release.

36. The Applicant submits that the Panel misdirected itself as to the legal definition of "serious harm" when making its findings in relation to the car park incident and further that this misdirection has infected all the Panel's findings as to the Applicant's high risk of causing serious harm.

37.Since it was argued on behalf of the Applicant that there was no assault during the car park incident and that his recall was unjustified, the Panel obviously considered this issue carefully and heard a considerable amount of evidence on the point, viewed the CCTV footage and received written final submissions on behalf of the Applicant (which do not address the meaning of serious harm).

38.The Panel sets out its findings at some length, having correctly directed itself as to the proper approach to such an "allegation", and found that the recall was appropriate and necessary and that the Applicant "*employed aggression and violence against your partner and this is likely to have caused serious harm in terms of physical and/or psychological harm to your partner and son who will have witnessed the incident.*"

39.The Panel viewed the CCTV and heard the evidence and I am in no position to substitute a different opinion for theirs.



40. Further, even if (which I do not find) the Panel was entirely wrong to find that “serious” harm, whether physical or psychological, was likely to have been caused to his partner and her child, the Panel had before it a wealth of evidence to be derived from the index offences, previous and subsequent offending, the circumstances leading up to the three previous recalls, the Applicant’s custodial conduct and current risk assessments on which to base a finding that the Applicant posed a continuing risk of causing serious harm.

GROUND B: IRRATIONALITY

41. I do not believe I need to add greatly to what I have said above in relation to the untenable submission that the Panel made findings of fact as to the Applicant’s level of risk and harm without evidence to support them. The DL sets out in detail the reasons for the Panel’s findings which do not, by any means, rest solely on its findings in relation to the car park incident.

42. However, under this heading, I deal with an issue raised on behalf of the Applicant and described as a misdirection of law.

43. It is submitted that the finding that the Applicant’s risk could be managed in a DA is legally inconsistent with a finding that it was not satisfied that it was no longer necessary for the protection of the public that he remain confined.

44. At p.20 of the DL the Panel *“tentatively assesses that for the duration you are residing at a [Designated accommodation], it is possible that your risk can be managed.”*

45. However, it goes on to find that it *“is not satisfied that your risk is manageable for the periods that you would be away from the [Designated Accommodation] and after you have moved-on from there.”*

46. The Panel, I find, is here concerned to give a full account of its findings and the reasons for them. Given the history of the Applicant’s four periods on licence, including the car park incident which took place 8 days into his most recent licence period and while he was living at a DA, the Panel was of the “tentative” view that his risk might possibly be managed while actually at the DA itself but not during those hours of the day when he was at liberty to leave or after he had moved on, as he had done previously, to other less regulated and supported accommodation.

47. The Panel, as it rightly points out, had to consider the Applicant’s risk for the whole period up until 31 October 2022 and, therefore, given all the relevant evidence before it, I find nothing (whether legally or evidentially) inconsistent between the



narrow finding in relation to his risk whilst actually at the DA and the Panel's overall conclusion that his risk was unmanageable in the community during the period under consideration on the basis of the proposed Risk Management Plan ("RMP").

GROUND C: PROCEDURAL UNFAIRNESS

48. The Applicant submits that the Panel made a finding of fact in relation to his move-on accommodation and that his risk could not be managed beyond being in DA and that this point was never put to him or any of the professional witnesses.

49. I have already addressed the evidence available to the Panel in relation to the Applicant's manageability outside the confines of the DA. In addition, the Panel clearly gave careful consideration to the RMP.

50. As to move-on accommodation, the Panel records that this is "unconfirmed" on the basis of the information provided at pp. 620, 623 and 626 of the Bundle. It is unsurprising that the Panel, which had to consider risk for a period of around 22 months, did not find the plan reassuring.

51. There is no indication in the Applicant's submissions that he would have had anything to add to the evidence already before the Panel on this point and, indeed, in written closing submissions, the Applicant's Counsel argues for release on the basis of the RMP proposed.

52. In addition, if he had anything to add or anything important had been overlooked, the Applicant's representative had the opportunity to remedy this by asking more questions of the Applicant and the other witnesses. Indeed, the Panel's "probing" (DL p.18) revealed that the Applicant had not given any thought as to the possible implications for his accommodation at his partner's father's address were his relationship with his partner to break down.

53. Finally, I remind myself that the Panel starts from an informed position and a question need not be asked if a point covered in the dossier does not require amplification.

Decision

54. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair or involved a misdirection of law and, accordingly, the application for reconsideration is refused.

Peter H. F. Jones
10 February 2021



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