

[2021] PBRA 136

Application for Reconsideration by Dedman**Application**

1. This is an application by Dedman (the Applicant) for reconsideration of a decision, dated 14 May 2021, by a Parole Board Panel, following an oral hearing (conducted by video link on 10 May 2021), refusing to direct his release but to recommend that he be transferred to open conditions.
2. I have considered this application on the papers. These comprise of the dossier containing 278 pages, the application for reconsideration dated 31 May 2021, consisting of 4 pages of closely argued submissions, and the decision of the Panel dated 14 May 2021. In addition, the Risk Assessment Panel (RAP) was provided with a copy of an e-mail dated 11 May 2021, from the Prison Offender Manager (POM) clarifying factual aspects of an adjudication discussed during the hearing and raising factual aspects of two additional evidential matters. A copy had been forwarded to the Applicant's legal representative on that day and the decision was promulgated 3 days later. The Panel Chair, following the notification of the application, sent a further e-mail with additional comment and information, following which the Applicant's legal representative submitted further representations. All have been considered by the RAP.

Background

3. On 15 July 2016, the Applicant, having pleaded not guilty to a street robbery, whilst brandishing a knife, and to having a sharply pointed knife in a public place, was convicted by a Jury and sentenced to an extended determinate sentence totalling 9 years (6 years imprisonment and 3 extended licence period). His parole eligibility date (PED) was 14 January 2021, conditional release date (CRD) 14 January 2021 and sentence expiry date (SED) January 2027.
4. The offences were committed in daylight on 27 July 2015 and involved a planned robbery of a high valued ring and watch from one of two men as they emerged from a shop. The robbery was accompanied by threats to stab both men. At the time of the offences, the Applicant was on prison licence having been released from custody only some ten weeks previously.
5. The Applicant, described by the Sentencing Judge as a professional criminal, had a substantial criminal record including conspiracies to burgle and to acquire criminal property and joint enterprise robberies for which, in 2013, he had received a total custodial sentence of 78 months.

Request for Reconsideration

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6. The application is for the decision to be reconsidered both on the basis that it is irrational and was procedurally unfair.
7. It is not necessary to reproduce the application in full, but all sections have been considered and the aspects relevant to both issues are dealt with below.
8. The grounds for seeking a reconsideration are as follows:

Irrationality

9. That there was "*A Failure to take into account of relevant factors and/or taking into account irrelevant factors*" - in particular:
 - a) Misinterpretation of evidence surrounding the index offence and, in particular, "*his denial and apparent lack of insight*";
 - b) Undue reliance on the insufficiently evidenced view of both POM and Community Offender Manager (COM) that the Applicant could not be safely managed in the community and failure to examine the suggested "*differences in interpretation*" between them;
 - c) Incorrect reliance on the number of recorded adjudications and failure to give sufficient weight to the number dismissed or not proceeded with; and
 - d) Giving undue weight to the effect of the Applicant's denials of planning of the index offences and failure to give proper weight to his addressing of risk factors and to his "*overall progress in custody.*"

Procedural Unfairness

- a) Specifically referring to Rule 6 of the "*Prison Rules*" - that there was a breach of case management directions rules by giving the Applicant insufficient time to respond to matters concerning entries on his file in that his legal representative received the e-mail response only on 11 May 2021, no provision was made for time for response and the decision letter was issued on 14 May 2021 without additional notice. This, it was submitted, raised "*further doubt as to the fairness of the proceedings. Justice must be seen to be done as well as be done.*"

Current parole review

10. The case had been referred to the Parole Board in March 2020, the Board being asked to consider whether to direct release.
11. The Applicant, through his legal representative, applied for re-release but this was not supported in pre-hearing reports or in oral evidence by either the Applicant's COM or by his POM.
12. The Panel decision outlined the circumstances of the index offences and the Applicant's evidence in relation to it, his past criminal history which included robberies and conspiracy to commit serious offences and both positive and negative aspects of his custodial conduct. It outlined the evidence of the POM and COM and the basis for their recommendations that he should not be released and agreed with the formal risk assessment that he remained a high risk of serious harm to the

public. It concluded that despite completion of a training course addressing the tendency to use violence and there being no evidence of physical violence or illicit drug use in custody for a significant time, the Applicant lacked insight into factors underpinning his offending behaviour and/or did not take responsibility for it. It found that there continued to be high risk of his committing further violence, particularly a violent-acquisitive offence.

13. In the subsequent e-mail from the Panel Chair, it was acknowledged that, technically, 7 days should, perhaps, have been allowed for representations but said that none of the additional points made any material difference to the decision making.

The Relevant Law

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

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

Irrationality

16. 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".

17. 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. This test for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.

18. The application of this test has been confirmed in recent decisions on applications for reconsideration under Rule 28: **Preston [2019] PBRA 1** and others.

19. 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.

20. The relevant sections of Rule 6 of the Parole Board Rules 2019 (the Rules) are correctly set out in the application and provide that:

- i. A panel chair or duty member may be appointed in accordance with rule 4 to carry out case management functions and may at any time make, vary or revoke a direction.
- ii. The panel chair or duty member appointed under paragraph (1) may make any direction necessary in the interests of justice, to effectively manage the case or for such other purpose as the panel chair or duty member considers appropriate.
- iii. Such directions may in particular relate to:
 - a) the timetable for the proceedings;
 - b) the service of information or a report;
 - c) the submission of evidence;
 - d) the attendance of a witness or observer.

21. The Board must serve on the parties, and third party (if applicable), any directions given, varied or revoked as soon as practicable.

The reply on behalf of the Secretary of State

22. The Secretary of State (SoS) by e-mails dated respectively 11 June and 7 September 2021 indicated that no representations were made in relation to the application or to the additional comments of the Panel Chair made subsequent to the decision.

Discussion

23. In considering this application, the Reconsideration Assessment Panel (RAP) is concerned as to whether the original decision meets lawful standards and whether the Panel Chair's subsequent comments are material to that judgment.

Irrationality

24. In my judgment, the decision to refuse release cannot be said to meet the test of irrationality. The Panel, in that decision, has clearly set out both details of evidence received by it and the basis for its decision.

25. There is no rule or policy which automatically prevents a prisoner who maintains innocence from being released. The Panel must take as its starting point the assumption that the prisoner was rightly convicted but must focus on the risk factors and not the denial.

26. The weight to be given to specific aspects of evidence, including the respective numbers of proved/dismissed adjudications, is basically a matter for the Panel and, in the view of the RAP, it has properly examined the evidence, considered the risk factors and the decision cannot be considered, in any way, unreasonable.

Procedural Unfairness

27. This decision of the RAP is prefaced by an acknowledgment of sympathy with the concerns of the Applicant's legal representative at the short time between notification of the additional information and promulgation of the decision. It is unfortunate that no specific, reasonable, time was given for comment or

representations, and the Panel Chair acknowledges this to be the case. There is no provision in Paragraph 6 of the Rules for a specific timetable in these circumstances but the RAP considers it unrealistic to expect a legal representative, especially hampered by Covid restrictions, to be able to contact a client and obtain instructions in anything under 7 days, at the least. The issue now is whether or not, this failure so disadvantaged the Applicant as to lead to the danger of an unfair decision.

28. The RAP has carefully examined the details of the dossier and the decision in the light of the additional information and assessed the totality against the legal test for release. It is satisfied that, even if adequate time had been granted for representations prior to the promulgation of the report, the Panel's decision would have been unaffected.

29. In all other respects, no procedural defect is alleged or found.

Decision

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

Edward Slinger
24 September 2021