

[2021] PBRA 171

Application for Reconsideration by Jan

Application

1. This is an application by Jan (the Applicant) for reconsideration of a decision of an oral hearing panel dated 4 October 2021 not to direct release.
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 Decision Letter dated 4 October 2021;
 - Application for Reconsideration dated 1 November 2021; and
 - The Dossier, numbered to page 1536, of which the last document is the Decision Letter.

Background

4. The Applicant is now 55 years old. In July 2004, when he was 38, he received a discretionary life sentence for offences of arson committed during a campaign of harassment directed against people who had been involved in assessing his mental health. His Tariff Expiry Date was 8th August 2010.

Request for Reconsideration

5. The application for reconsideration is dated 4th October 2021. It is 28 pages long, including 2 pages of representatives from the Applicant itself. It is repetitive and confusingly structured, but the essence of the application is reasonably clear.
6. This is a highly unusual case, and it makes sense to set out the real issues as early as possible. The Applicant's primary risk relates to his complex mental health conditions. Appropriate treatment for his mental illness would be a protective factor, to the extent that effective treatment for mental illness would be central to an effective risk management plan. The psychiatrists who gave evidence said there was a high bar for transfer from prison to hospital under the *Mental Health Act* for treatment and rehabilitation and the Applicant does not satisfy those requirements.
7. In other words, it is not arguable that the Applicant meets the test for release into the community as that is usually understood: the oral hearing panel could not be



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



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885

satisfied that, if he were to remain in the United Kingdom, it was no longer necessary for the protection of the public that he should be confined.

8. However, the Applicant is subject to a deportation order, in respect of which all appeal rights have either been exhausted or not exercised. Indeed, he wishes to be deported. What the panel was therefore being asked to consider was the application of the release test to a risk management plan which involved his immediate deportation to the receiving country (as I will refer to it, because there is no reason for the country to be named in this document), where the evidence was that he would be detained in a psychiatric hospital for long-term assessment and treatment upon arrival and not released until it was considered to be safe for him to be so.
9. Risk of serious harm to the public includes people in the country to which deportation is proposed. Public safety is not limited to Britain but applies to public safety in any country outside its jurisdiction: ***R v Parole Board ex p White (1994) The Times 30 December***. Even if a prisoner is to be deported or removed immediately, a full risk assessment must be conducted. In the Applicant's case the panel focused on the risk to the public in the UK rather than the receiving country.
10. The fact that he is subject to deportation means that the Applicant cannot be considered for open conditions.
11. The grounds for seeking a reconsideration are expressed as follows:
 - (1) The wrong test was applied in relation to the risk to the public.
 - (2) The decision was irrational, because the bar was set impossibly high by insisting that the loss of UK licence conditions creates an unacceptably high risk to the UK public. *"On this logic [the Applicant] can never be released."*
 - (3) Inappropriate reliance on the (entirely academic) lack of recommendations for release into the community in the UK.
 - (4) Accepting the viability of the [receiving country's] Risk Management Plan but then failing to provide adequate, lawful reasons for rejecting it, particularly given the support given from expert witnesses.
 - (5) Recording inaccuracies or omitting central details in the decision letter which individually or cumulatively have had a material impact on the decision such as to warrant it irrational.
 - (6) Having failed to make a proper assessment on the basis of the threats and failing to make sufficient enquiry of their veracity or otherwise, declined to order a further psychiatric assessment of [the Applicant's] risk, and declined to make any further relevant enquiries, both of which were requested in the closing submissions.
 - (7) Failing to deal with the threats in accordance with the Parole Board's own guidance on Allegations.

12. These seem to me to be complaints of irrationality, as defined below, not of procedural unfairness. It may be that grounds (6) and (7) are intended to allege procedural unfairness, but that is not made clear.
13. The reference to threats in grounds (6) and (7) above arises because recently the Applicant told his Prison Offender Manager (POM) that if he was not released and ended his life, there would be retaliation from his family in the receiving country and elsewhere. He gave various explanations for this. He said his mother had told him this during a (remote) visit, and he had simply passed the message on. Later he began to accept that this may well have been an hallucination, because his visits were monitored and no-one else heard what he reported having been told.
14. It is also important to note that the Applicant told the panel that he did not directly commit one of the index offences of arson: *"I didn't do it personally. Somebody was willing to do that. He was a friend of a friend. He poured petrol on the front door ... I told him to send a message, don't burn down the whole house."*

Current parole review

15. The Applicant's case was referred to the Parole Board for consideration of release.
16. A 3-member panel of the Parole Board, consisting of a judicial chair, a psychologist, and a psychiatrist, heard the case remotely over three days from 27 to 29 July 2021. The Applicant was represented by counsel, attended by her instructing solicitor. The Secretary of State was not represented by an advocate and made no submissions. The panel heard evidence from the POM, the counsellor in charge of legal and international affairs of the UK Embassy of the receiving country (the counsellor), a psychiatrist who had prepared reports for the Prison Service, two forensic psychiatrists instructed on behalf of the Applicant, a forensic psychologist instructed by the Parole Board to prepare a Stalking Risk Profile, two forensic psychologists, one instructed by the Applicant, the other by the Parole Board, the Community Offender Manager (COM), and the Applicant.
17. The Release Plan being considered by the panel involved the Applicant being met at the airport in the receiving country and taken to the hospital where he would be sectioned and probably remain there for a considerable time. He would be assessed by a team of psychiatrists, community nurses, social workers and clinical psychologists.
18. The plan would be in three stages, the salient features of which I summarise as follows:
 - (1) Review treatment for the Applicant's various mental problems and provide therapy;
 - (2) A further stage in hospital to prepare for release into the community;
 - (3) Living in the community under supervision, initially in a supervised community placement with restrictions on employment, movement, travel both within and outside the receiving country, access to the internet and social media and contact with family.



There were other provisions in the risk management plan, which are fully set out in the dossier.

19. The counsellor explained in detail the legal provisions in the receiving country, which included a power of recall to hospital should the Applicant's condition deteriorate. Both police and the public prosecutor would have extensive powers of arrest in the event of concerns about his behaviour. There could be multi-agency co-operation about the Applicant's future between the two countries.

The Relevant Law

20. The panel correctly sets out in its decision letter the test for release as set out above.

Parole Board Rules 2019

21. 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

22. 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."

23. 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.

24. More recently, in **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with respect to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied."*

Procedural unfairness

25. 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.
26. 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.
27. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Other

28. 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 uncontentious 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.
29. 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."*
30. I should make it absolutely clear that the question for me as the Parole Board member considering this application for reconsideration is not whether I would have

decided the case differently, but whether the decision is shown to be flawed on either or both of the grounds: irrationality or procedural unfairness.

The reply on behalf of the Secretary of State

31. The Secretary of State has indicated he wishes to make no representations about this application. It is his decision whether to do so or not, but this is a case in which both the Oral Hearing Panel and I might have been assisted by some submissions from the Secretary of State.

Discussion

32. I will start by considering grounds (1) and (2), which are essentially the same complaint.

33. In the Conclusion and Decision section of the Decision Letter the panel said this:

"The panel was impressed with the [receiving country's] proposals and had no reason to believe they would not be adhered to. That would be a better proposition for you than remaining in prison in this country.

The panel noted the evidence from the psychiatrists that the [receiving country's] plan could effectively manage your complex mental health problems but could not be replicated in the UK and they jointly agreed that you do not meet the criteria for compulsory detention in hospital in the United Kingdom under the Mental Health Act 1983.

The problem is that the legal test the panel must apply is focussed on protection of the public from serious harm and for a life sentence prisoner this requires lifetime control, supervision, monitoring, licence conditions, offending behaviour work if necessary and the power of recall if risk increases. Once deported, you would no longer be subject to any of the constraints of a life sentence under which you had been released. This would defeat all the objects of a life sentence. The loss of these conditions would create an unacceptably high risk of serious harm to the public in the UK, particularly psychological harm. It has therefore not been necessary to consider the risk of serious harm to the [receiving country's] public.

Despite what has been said about communication and cooperation between the respective agencies and embassies, the fact of the matter is that by sending you to [the receiving country] all these public protection safeguards would be lost.

It would be entirely a matter for the [the receiving country's] authorities to decide when you are discharged from hospital and the extent and nature of subsequent management.

Even if there was communication between the authorities of the two countries, in the event of further offending, it seems most unlikely you would be returned to the UK."

34. The panel therefore accepted that the release plan was a good one and would be adhered to. What the panel concluded was that, even with such a plan, the absence of the lifetime control, monitoring, licence conditions and mandatory offending behaviour work if necessary, together with the power of recall, was insufficient to protect the UK public from the risk of serious harm the panel found to exist.
35. On the face of it, such a decision is exactly the kind of decision that an Oral Hearing Panel of the Parole Board is entitled to take, based on a lengthy hearing, consideration of all the evidence and arguments, and the invaluable opportunity to see and hear the witnesses, including the Applicant, as their evidence is tested. It is not a decision to be lightly overturned.
36. The complaint is twofold. First, it is said that the panel's assessment of risk to the UK public was "*procedurally flawed*", which amounts to an assertion that the panel applied the wrong standard to its risk assessment.
37. The way the issue is put is that the panel essentially required the Applicant to show that the risk should be eliminated, not that the risk is low enough for him to be released. The latter is said to be the proper test.
38. Reliance is placed on the way the panel expressed itself: "*However none of this can entirely eliminate the possibility of clever circumvention of these precautions by a determined perpetrator as you proved yourself to be in the past. There also exist the possibilities of access to a phone or sending letters. It would not be impossible for you to contact individuals in the United Kingdom against whom you had a perceived grievance past or future.*"
39. The Applicant submits that the only way to eliminate a risk entirely would be by his death.
40. In the case of ***Sturnham* [2013] UKSC 47** the Supreme Court upheld, with some comments, the decision in the earlier case of ***Bradley* [1991] 1 WLR 134**.
41. The Parole Board, when considering the appropriate test of dangerousness in relation to immediate release, must decide that the risk must indeed be substantial, which can mean no more than that it is not merely perceptible or minimal, and that it must be unacceptable in the subjective judgement of the Parole Board. The Parole Board must have in mind all material considerations, scrutinising ever more anxiously whether the level of risk is unacceptable the longer the offender has spent in prison post-tariff. See Paragraphs 24 and 28 of ***Sturnham***.
42. See also ***R (Brooke) v Parole Board* [2008] EWCA Civ 29; [2008] 1 WLR 1950**, per Lord Phillips of Worth Matravers CJ (as he then was) at [53]:
- "Judging whether it is necessary for the protection of the public that a prisoner be confined is often no easy matter. The test is not black and white. It does not require that a prisoner be detained until the Board is satisfied that there is no risk he will re-offend. What is necessary for the protection of the public is that the risk of re-offending is at a level that does not outweigh the hardship of keeping a prisoner detained until after he has served the term commensurate with his fault. Deciding whether that is the case is the Board's judicial function."*

43. Applying the test in **Sturnham** and **Brooke** to the way the panel expressed itself, I cannot hold that the way in which it approached the issue of assessing the risk to the UK public that the Applicant would present if released was irrational. It was a matter which received careful consideration by the panel, and which the panel explained carefully (which brings into play Ground (4), failure to give adequate reasons for not accepting the receiving country's risk management plan).

44. The panel focused on the threats referred to above, saying:
"It is impossible, in the absence of any corroborative evidence, to determine whether this is a real or imagined threat, but it has to be taken seriously unless and until it can be discounted. It causes anxiety because some of your harassment offences were committed by proxy and also because by mentioning these threats you have introduced thoughts or ideas of violence, admittedly distancing yourself from any direct involvement in them. The panel agreed that on the available evidence, these threats increased your risk of causing serious harm, and had they emerged in the community, if released, would have triggered immediate high levels of concern with consequent consideration of recall. This reinforces the need for the control element of the life licence."

45. It is therefore apparent that the panel carefully considered the evidence before it and concluded that the risk of re-offending was at a level that outweighed the hardship of keeping the Applicant detained at this stage. This was a conclusion to which the panel was entitled to come on the evidence, and which it explained appropriately.

46. The second basis for impugning the panel's approach is that the panel, when considering the risk to the UK public, failed to appreciate the centrality of the Applicant's mental health to his risk, and that the receiving country's risk management plan would treat that risk.

47. The problem with that argument is that the panel manifestly and expressly understood the centrality of the Applicant's mental health to his risk. See page 14 of the Decision Letter: *"The panel is satisfied that the condition of your mental health and the outstanding psychological treatment makes your detention necessary, whether in prison or mental hospital. You accepted that you were not ready for life in the community."* The panel considered with great care whether the receiving country's risk management plan, post-treatment, post-release from hospital, would sufficiently protect the UK public from the risk of serious harm. The argument on behalf of the Applicant overlooks the panel's view that even after treatment the Applicant would present a relevant risk. It was for the panel to decide whether the evidence established the contrary, and to assess the risk. The panel, on the evidence, and for the reasons it gave, decided that the risk of serious harm, even after treatment, remained so high that it could not be managed without the security offered by the recall provisions for a life prisoner that would be lost by his departure from the jurisdiction.

48. The third ground on which the decision is said to be irrational is *"inappropriate reliance on the entirely academic lack of recommendations for release into the community in the UK"*.

49. The panel focused entirely, and entirely properly, on the receiving country's risk management plan. There is nothing in this complaint.

50. The fourth ground of alleged irrationality alleges a failure to provide "*adequate, lawful reasons for rejecting the [receiving country's] risk management plan.*" I have discussed this above, and do not find anything in this complaint.

51. The fifth ground of alleged irrationality advanced relates to alleged errors of fact within the decision letter. For the approach to this, see the reference to *E* and *Alconbury Developments* above.

52. The specific alleged factual errors cited are:

i. Wrongly recording that the hallucinations (with regard to the threats as discussed above) started 18 months before the hearing, rather than 6 months;

ii. Failing to acknowledge that the Applicant's medication had changed on several occasions, not because of a change in his mental health, but because of concerns about the effects of his medication on his heart condition;

iii. Stating that the Applicant's offending included abusing all forms of communication, when there was no evidence of internet-related offending;

iv. Failing to record a named doctor in the receiving country as being responsible for the Applicant's risk, as well as overseeing his condition;

v. Recording the evidence of a witness incorrectly, as saying that the Applicant was complicit in the threats; and

vi. Failing accurately to record the Applicant's evidence. He did not say the arson was a moral mission: on the contrary, he said the arson wasn't a moral mission.

53. Neither separately nor together do these matters (assuming them to be correctly described as inaccuracies or relevant omissions) amount to material errors as discussed above. The decision letter was tightly focused, and the matters here complained of had little or no relevance to that focus. For example, the panel was concerned about what the Applicant's report of the threats had to say about his pattern of thinking (grievance, rumination, thoughts of violence) rather than their source.

54. The sixth ground of complaint is failing to make a proper assessment of the threats, failing to make sufficient enquiry as to their veracity or otherwise, and declining to order a further psychiatric assessment or further enquiries, as requested in the closing submissions.

55. The suggestion in the closing submissions as to a further assessment was put thus (in Paragraph 37):

"It is respectfully requested that if the decision on whether or not [the Applicant's] release can be directed in accordance with the Plan hangs on the question of

whether the changes in medication, [the Applicant's] mental illnesses, and/or stress levels could have resulted in the deterioration in his mental health we would respectfully ask that the Parole Board refrains from making a final determination but rather to adjourn pending a further assessment."

56. The panel's decision did not hang on the issues set out in the submissions. Therefore this ground of complaint is not made out.

57. The seventh ground of complaint is that the panel failed to deal with the threats in accordance with the Parole Board's Guidance on Allegations. The argument is that the panel was obliged to make a finding of fact (presumably as to whether these threats arose from the Applicant's mental illness or whether there was some objective reality to them). Making such a finding of fact, it is suggested, required an adjournment for a further mental health assessment.

58. The panel decided that, in the absence of any corroborative evidence, it was impossible to determine whether this was a real or imagined threat, but it had to be taken seriously unless and until it was discounted. It caused anxiety because some of the harassment offences were committed by proxy (see Paragraph 14 above) and also because by mentioning the threats the Applicant had introduced thoughts or ideas of violence, admittedly distancing himself from direct involvement in them. The panel considered that on the available evidence the threats increased the Applicant's risk of causing serious harm, and that had they emerged in the community after release would have triggered immediate high levels of concern with consequent consideration of recall. This, the panel thought, reinforced the need for the control element of life licence.

59. In the Parole Board's Guidance on Allegations *"the term 'Allegations' refers to conduct alleged to have occurred which has not been adjudicated upon."* The only conduct relevant here was that the Applicant had reported that threats had been made. There was no issue here that he had reported threats. There was no need in this case for the Panel to decide whether the source of the threats was the Applicant himself, either through delusion or for some other cause, or whether he was indeed passing on what he had been told. In either event, the panel's approach set out above was appropriate. It is certainly arguable that what is under discussion here does not fit the Parole Board's definition of allegations: *"Allegations may be of harmful behaviour and/or risky behaviour."*

60. If this was an allegation as defined the panel dealt with it appropriately in terms of the *Guidance*. In the words of Paragraph 6(c) of the *Guidance*, the panel made an assessment of it to decide whether and how to take it into account as part of the parole review. The panel was not obliged to make a finding of fact. There is nothing in this complaint.

61. In Annex A to the Application the Applicant himself challenges any definition of his activities as stalking by proxy; he says that he suffers from auditory hallucinations every day, and cannot tell them from reality; and he denies any form of proxy stalking, which he says would in any event be counter-productive for him. He goes on to say that if he committed suicide his family might be unable to contain their distress and antipathy towards the Ministry of Justice: in other words, he renews the threat. He says he does not agree with it, though he half-heartedly agreed with

the moral tone of his family's stance on his, and their antipathy to the Ministry of Justice.

Decision

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

Patrick Thomas QC
5th December 2021