

[2021] PBRA 27

Application for Reconsideration by Othman

Application

1. This is an application by Othman (the Applicant) for reconsideration of a decision of an oral hearing dated 25 January 2021. The application was made by his legal representatives and the outcome of the hearing was not to direct release, but to recommend transfer to open conditions.
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, the decision letter (the decision) and the application for reconsideration.

Background

4. The Applicant is serving a sentence of Imprisonment for Public Protection (IPP) imposed in 2005 for two counts of sexual assault. His tariff of 2 years and 6 days expired in November 2007. He was 25 years old at sentence.

Request for Reconsideration

5. The application for reconsideration is dated 17 February 2021.
6. The grounds for seeking a reconsideration are as follows:
 - (a) Irrationality
 - The panel failed to set out adequately and/or sufficiently its reasons for departing from the recommendation for release put forward by the Prison Psychologist;
 - That the panel failed to apply the correct analysis relevant to the test for release; and
 - That professional witnesses agreed that there was no core risk reduction work outstanding and that risk was not considered to be imminent.

Current parole review



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7. The Applicant is now 41 years old, and this is, according to the dossier, the ninth review of his sentence. The referral from the Secretary of State originally asked the Parole Board to consider only release (and to state continuing areas of risk), however in August 2020 a fresh referral directed the Parole Board to, failing any direction for release, advise the Secretary of State whether the Applicant was suitable for transfer to open conditions. The reasons for this change of referral is not relevant for this reconsideration application.
8. The Applicant's application was for release. A panel of three members heard his case on 22 January 2021. They considered a dossier of some 372 pages, which included reports from professionals, outcome of offence focused work and information about custodial behaviour. Also considered were two psychological risk assessments (PRA) dated April 2019 and December 2020, the latter was an addendum report undertaken by a Prison Trainee Forensic Psychologist under the supervision of a Senior forensic Psychologist. The panel took oral evidence from the Trainee Psychologist and the Prison and Community Offender Managers as well as from the Applicant, who was legally represented throughout the hearing.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 25 January 2021 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.

Parole Board Rules 2019

10. 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)).
11. 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**.

Irrationality

12. 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."

13. 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



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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.

14. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.
15. 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

16. The Secretary of State, by email dated 23 February 2021 indicated that no responses were made in relation to the Application.

Discussion

17. I will take all three stated grounds one at a time, but not in the order they were presented in the application.
18. The first issue I shall address is the complaint that all professionals agreed that there is no core work that needs to be undertaken by the Applicant and that risk is not imminent. The letter is clear that this is the evidence given to the panel, and by their decision, it is also clear that the panel agreed with them. Had the panel decided that core work needed to be undertaken and still recommended release or transfer to open condition *that* decision might well have been irrational. Core work should by and large be undertaken in closed conditions unless there are exceptional circumstances. The panel accepted that no further core work was necessary. Having made that decision, therefore, the options to either release or recommend open conditions were both available and the panel assessed open conditions were appropriate in this case. There can be no irrationality in relation to this part of the complaint.
19. The next complaint is that, with my interpretation, the panel did not justify or explain its reasons for 'departing' from the recommendation of the psychologist in training (the psychologist). I can see that evidence was taken from all three professional witnesses as to their recommendation, and the psychologist was the only professional who was satisfied that the test for release was met. This was explored with her at the hearing, and her responses recorded in the letter. The panel then considered the different recommendations and judged that, while the Applicant had made good progress, there were concerns about release at this time. They provided a full explanation of these concerns, which included that his risk needed testing in a less secure environments, and that there would be clear benefits to him going to open conditions which would enable his eventual resettlement into the community. In other words, the panel's decision was fully explained. It may not be what the Applicant wanted, but because one might disagree with a decision does not automatically make it irrational. While professional witnesses are important in providing evidence and recommendations to



any Parole Board panel, it is a matter for that panel to decide what weight or preference to give any evidence and recommendation, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above.

20. Finally, I consider the complaint that the panel did not correctly apply the test for release. No further particulars were offered with respect to this ground. As I have indicated above, the test was correctly stated. The reason for the panel's decision is explored in the concluding section of the letter. Significantly, the panel states that without resettlement (provided by being in open conditions), risk might increase. The letter evidences that the panel took into consideration all the positive evidence for release and went on to state that despite taking that into account, the test for release was not met. I cannot find any evidence of irrationality in its consideration of the test for release.

Decision

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

Chitra Karve
8 March 2021



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