

[2021] PBRA 37

Application for Reconsideration by DINNALL

Application

1. This is an application by Dinnall (the Applicant) for reconsideration of a decision of a Parole Board panel at an oral hearing dated 15th February 2021 not to direct his release but to recommend his 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 of 792 pages including the Decision Letter (DL) under review and the representations submitted on the applicant's behalf by his legal representative.

Background

4. The Applicant, who is now 36, was sentenced to an Indeterminate Sentence for Public Protection (IPP) in February 2008. He was 23 at the time of conviction. The tariff portion of the sentence expired in April 2011. He was first released on licence in April 2015. In January 2017 he was returned to prison for breaching his licence. The parole review the subject of this application was the 6th since he had been sentenced. In June 2018 a Parole Board panel recommended his transfer to open conditions. In December 2019 he was so transferred. This review had been fixed for hearing on 24th September 2020. That hearing was adjourned. In October 2020 the Applicant was transferred back to closed conditions.

Request for Reconsideration

5. The application for reconsideration is dated 5th March 2021.
6. The grounds for seeking a reconsideration are said to incorporate both procedural irregularity and irrationality. In summary they are:
 - a. The professional witnesses called by the hearing all recommended release;
 - b. The panel failed to take into account, alternatively to explain how it took into account, the recent good behaviour of the Applicant since December 2019;

- c. The panel referred frequently in the DL to “periods of poor coping” and “ongoing drug use”. There was no recorded drug use by the Applicant between December 2019 and October 2020. The lapses over 4 days in October 2020 were properly to be regarded as one isolated incident rather than a “period”;
- d. The panel failed to put proper weight on the fact that the Applicant had previously coped well with family problems – the fact that one of his children was “on the run” from the police, and in particular by the news, passed on some time after the event, that his grandmother, to whom he was close, had died;
- e. No clear reason was given by the panel to why the Applicant’s risk of serious harm could not be managed in the community. The professional witnesses had concluded that there would be warning signs of an increase in risk which could be managed appropriately;
- f. There was no evidence in the period since the Applicant’s return to custody in 2017 of his resorting to violence;
- g. The DL incorrectly described the degree of supervision available in the community as confined to telephone contact only, whereas the Community Offender Manager (COM) indicated that there would be both video link contact and one-to one support in the community. The concerns expressed related to the then current state of the Coronavirus situation in the prospective release area. The evidence was that in the event of a direction for release, 16 weeks would have to pass before a bed at suitable premises could be made available;
- h. The COM provided evidence in support of the robustness of the Risk Management Plan in the form of his having engaged in further intervention concerning substance misuse and having been willing to disclose information which might be detrimental to his case;
- i. Given that previous concerns as to the risk posed by the Applicant related to instrumental violence, the DL was in effect silent as to why the concerns it expressed about his relapse into drug use would increase that risk. The admitted lapse(s) in October 2020 did not result in any such behaviour; and
- j. Warning signs like those which were not picked up while the Applicant was in open conditions would be less likely to escape notice following release to premises in which he would be subject to curfew and daily reporting requirements.

Current parole review

- 7. The referral notice to the Parole Board is undated. The Applicant is now 36.
- 8. A panel conducted an oral hearing on 4th February 2021. It considered the dossier then numbering 768 pages and heard oral evidence from the Applicant and his Prison and his current and previous Community Offender Managers. The Applicant was legally represented.

The Relevant Law

9. The panel correctly set out in its decision letter dated 15th February 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)). This decision is therefore an eligible decision.

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. 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.

Procedural unfairness

13. 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.

14. 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; or,
- (b) they were not given a fair hearing; or,
- (c) they were not properly informed of the case against them; or
- (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.

Other



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



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info@paroleboard.gov.uk



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15. 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/s 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.
16. 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

17. The Secretary of State indicated that he did not wish to submit representations.

Discussion

18. With respect to the lengthy and carefully drafted grounds I can see no sign of an allegation of procedural unfairness, as defined in the cases referred to above and in particular the headings set out at paragraph 14 a-e above. There is no suggestion that the hearing itself was unfairly conducted or that some element of procedure was ignored or misapplied, or that the panel was not impartial.
19. What is in reality alleged is that the findings in the DL, either because they ignored certain important facts, or because they came to erroneous conclusions concerning others, led to an irrational conclusion for the reasons summarised above at paragraph 6 a-j.
20. In considering the grounds I bear in mind that the reconsideration panel cannot have the same opportunity as the original panel did to assess the evidence given by the witnesses as it was given at the oral hearing.
21. The mere fact – Ground 6a – that the professionals recommend a particular course and the DL declines to follow it cannot of itself make a decision irrational.
22. The fact that an Applicant has not committed acts of instrumental violence – Ground 6f – while out on licence, or since his return to prison in 2017, does not mean that a decision not to direct release in such a case is irrational.



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



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23. It is clear too that the panel took account of the fact that with the exception of the episodes in October 2020 the Applicant's recent behaviour in prison had been good – see e.g. the summary of the evidence of the Prison Offender Manager at paragraph 3 of the DL. – Ground 6b.
24. The panel's concern was that – for whatever reason – there was a realistic possibility that the Applicant would return to the taking of dangerous drugs. In the past that habit had resulted in the commission of a large number of serious offences against vulnerable people to obtain the money necessary to buy those drugs. The Applicant's transfer to open conditions had been delayed because of concerns over drug use and the episode in October 2020 which had resulted in his return to closed conditions were clear indications that he remained at risk of reverting to drug use if released, and therefore to the sort of behaviour which had led to the index offences which had involved the use of a knife on 4 occasions and two instances of serious injury.
25. The criticism is made that to describe the Applicant's recent problems as "*periods of poor coping*" or "*ongoing drug use and poor coping*", significantly exaggerated the recent episodes and amounted to an irrational finding. The dossier (Assessment dated 13 October 2020 at p683-738 and elsewhere) and intelligence reports (pp455-594) contain the following references to proven or probable relapses into drug use since his release on licence in April 2015:
- A positive drug test (class A) in May 2015. (pp620, 692)
 - The 12th November 2015 when he called his OM and seemed to be '*under the influence*', an inference supported by '*slurred speech*' and '*could hardly stand*' – pp 692, 702.
 - The '*probability*' that he has used psycho-active substances from May 2016 due to their effect on his physical and emotional functioning – p702.
 - A '*relapse*' in 15th December 2016 which resulted in his leaving his address and residing briefly at 2 different supervised premises later that month. – p103.
 - The incident leading to the decision to recall him to prison on 5 January 2017 when he was suspected of being under the influence – p103.
 - Between the activation of the recall and his arrest on 23rd January 2017 when he disclosed having used class A drugs. – pp102, 60.
 - July 2017 welfare checks '*evidenced that he was under the influence of (drugs)*' – pp 301, 518. Similar records at pp368 and 370.
 - September 2017 ... '*appearing to be under the influence of (drugs)...*' – p 510.
 - April 2018 adjudication for smoking drugs. pp145, 736
 - 27th May 2018 he appeared to be under the influence and his speech was slurred. A smoking pipe was seized. p482
 - December 2018 further adjudication for drug use. p145 – also pp571/573/576.
 - April 2019 Drugs information. p569.
 - August 2019 he had appeared to be '*under the influence*' during the previous 5 days - p552. Also, p557 intelligence concerning a "*confession that he had taken (drugs).*"
 - On 20th October 2019 he refused a random Mandatory Drug Test, p547. On 24th October 2019 it is reported that he had received distressing news concerning his daughter - p545.
 - 9th, 16th, 17 and 19 October 2020 when he appeared to be "*under the influence*" and admitted smoking drugs through a vape. He explained but did not seek to



- excuse this behaviour by reference to being informed that his grandmother had died.
- A number of these episodes contain references to his having received concerning news about members of his family. While it was the October 2020 incidents on which the hearing no doubt focused most closely because of its being comparatively recent and having provoked his return to closed conditions it is clear that poor coping and drug use had been a feature of the last several years. I find no irrationality in this ground – 6c.
26. The same applies to Ground 6d. While there had been encouraging signs of the Applicant behaving more maturely when faced with difficulties there had also been times when he had relapsed into drug use.
27. The professionals did indeed base their recommendations on their anticipation that there would be warning signs before the Applicant became a risk to members of the public. The panel however had to look beyond the limited period when, as suggested by the proposed licence conditions at p731, he would be residing at a supervised address to which he would report 4 times each day. The panel referred to the fact that warning signs had not been picked up previously – DL section 6 last subparagraph. The topic was dealt with again at section 7 of the DL, *"They noted that due.....without further testing."* and at section 8, *"The panel also noted.....until it was too late. As such.....being made."* I find no irrationality in the panel's treatment of this topic. (Grounds 6e and 6j.)
28. As to Grounds 6f & i. It is true that there had been no report of violence or threats of violence during his time on licence or temporary release from open conditions. However, when persons become addicted to drugs and cannot afford to buy them it is common knowledge that they frequently resort, as the Applicant had on 18 occasions during 2007, to violence. I find no irrationality in the panel's treatment of this topic.
29. Ground 6g. This ground is hard to evaluate since it would involve a close scrutiny of the evidence given at the hearing. I have therefore assumed that the point is a good one, namely that in addition to telephone contact there would be the opportunity for video link contact with the COM, and of course that by the time that a place at an approved address became available the COVID-19 pandemic measures may be different to what they are now and were in February 2021 when the hearing took place. However, the difference between video and telephone hearings is somewhat academic and it is clear that the principal focus was on the risk which the Applicant and thus the public would face were he to resort, as he had done regularly in the recent past, to abusing dangerous drugs and use violence to obtain the money needed to buy them. I find no irrationality of the kind summarised in paragraph 11 & 12 above in the panel's treatment of this topic.
30. Ground 6h. As to the first point, the DL deals with it in this way. *"To [the Applicant's] credit [he has] continued to work with the prison's Dart Team and completed further in cell packs. [The Applicant is] employed in the kitchens to good report and have a positive work ethic"*. As to the second, the grounds are silent on the particular facts detrimental to his interest which he disclosed and which would otherwise not have been discovered. There is no reference to such behaviour in the DL. I have looked for evidence of it in the dossier and found only the reference quoted above

at paragraph 25 when he disclosed the use of drugs between the date of his recall and his actual return to custody in January 2017.

31. In any event it is clear that the decision turned on the concern that the panel felt about the potential for the Applicant to relapse with the likely consequences of such a relapse into drug use caused by difficulties or problems which were likely to face him on his release and the risk that those responsible for his management would not be able to take appropriate action in time to prevent the risk becoming a reality. There was understandable caution within the panel bearing in mind the index offences, the release on licence, the recall, the delayed implementation of the Board's recommendation for transfer to open conditions, and the events following the deferral of the hearing in September 2020. The panel was bound too to examine the situation now faced by the country as it experiences the pandemic and the restrictions placed on ordinary life by the measures designed to limit its spread. While it would be unlikely that had the panel directed release there could have been a successful application for reconsideration by the Secretary of State for Justice, it is not possible to find that the DL in the case was "irrational".

Decision

32. 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.

Sir David Calvert-Smith
26th March 2021