

[2021] PBRA 41

Application for Reconsideration by Asher

Application

1. This is an application by Asher (the Applicant) for reconsideration of a decision of a panel at an oral hearing dated 22 February 2021 not to direct his release but recommend progression 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 (which includes the decision letter) and the legal representations in support of the application.

Background

4. On 4 January 2012, when aged 31, the Applicant was sentenced for offences of conspiracy to rob and conspiracy to burgle to imprisonment for public protection. On 20 November 2012, the Court of Appeal fixed the minimum tariff at 6 years 6 months less 285 days spent on remand. The tariff expired on 31 July 2017.

Request for Reconsideration

5. The application for reconsideration was received on 15 March 2021.
6. The application is based both on the grounds of procedural unfairness and irrationality
7. The grounds for seeking a reconsideration based on procedural unfairness are as follows:
 - *The decision letter stated that this had been the Applicant's third review; it is asserted it was his second review.*
 - *The panel decision stated the Applicant had a history of use of alcohol; it is asserted no evidence was presented to support that.*



- *The decision letter stated that the Applicant had a previous conviction for arson; he had not.*
- *The decision letter stated the Applicant was removed from a prison because of security concerns about aggression and the use of weapons. It is alleged there was no basis for that assertion.*
- *These factual errors are central to the question of risk and renders the decision procedurally unfair.*

8. The grounds for seeking a reconsideration based on irrationality are as follows:

- *The panel failed to apply any weight to the recommendations of the professional witnesses for release. The Applicant also repeats as evidence of irrationality, the factual errors referred to in paragraph 7 above.*

Current parole review

9. The case was referred to the Parole Board by the Secretary of State on 19 June 2019. The oral hearing took place on 8 February 2021 before a three-member panel including a psychologist which heard evidence from the Applicant, his Prison Offender Manager, a forensic psychologist in training and his Community Offender Manager.

10. The Applicant is now aged 40.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 22 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.

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. 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

14. 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.

15. 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.

Other

16. Sir John Saunders said in **Benson [2019] PBRA 46**,

"There are two matters which apply generally to all these applications. First, it is for the panel to assess the weight to be given to any piece of evidence, including the opinion as to risk given by the professional witnesses. It is for the panel to test the assessment and look at the reasons for it. So, even in the case where every witness is supporting release, it is for the panel to make their assessment taking into account all the evidence. The reverse is also true. If the panel disagrees with the evidence given by the professionals, it must give adequate reasons for doing so. Secondly, a decision letter is directed at the prisoner. While it has to descend to sufficient detail so that everyone, but particularly the prisoner, can understand the reasons for the decision, it is not necessary for every point which has been raised in the hearing to be discussed. What is necessary is that everyone is able to understand the reasons for the decision".

The reply on behalf of the Secretary of State

17. The Secretary of State did not make any representations in response to the application for reconsideration.

Discussion

18. Whether this was the second review or the third review, there is no indication this played any or any significant part in the panel's decision making.

19. The Applicant has a history of drug addiction and deep-seated psychological problem. There was also evidence of alcohol use. His pre-sentence report dated 19 December 2011, at page 56 of the dossier states,

"The records indicate that [the Applicant] has previously offended violently under the influence of alcohol, including the offence of wounding in 2005. There is a self report from [the Applicant] that he was consuming superstrength alcohol in January 2011. It is assessed as being a risk factor for violence".

20. I simply do not understand the suggestion that the panel was not entitled to refer to the history of alcohol use.

21. On the face of the matter, it is wholly unsurprising the panel referred to a conviction for arson, because the list of the Applicant's previous convictions records a conviction (among others) before the magistrates, for arson on 15 February 2000, for which he received the community service order of 100 hours. The conviction is also referred to in the judgement of the Court of Appeal, Criminal Division dated 23 May 2013.

22. The legal representations assert that this conviction had been added in error to the Applicant's record; the representations are silent as to whether this was pointed out to the panel.

23. For the purposes of this application, it is accepted that the conviction is recorded in error. However, between 17 November 1998 and 24 March 2011, the Applicant had 27 convictions for 66 offences, including two offences against the person, four drugs offences and three convictions for possessing weapons. In the circumstances, it is difficult to describe the arson conviction as "*central to the question of risk*".

24. The conviction is dealt with in the decision letter in this way,

"You are heavily convicted. In addition to a substantial number of theft and burglary offences, you have convictions for wounding, assault occasioning actual bodily harm, arson, and drug offences, and for carrying pointed or bladed articles.

These convictions show a pattern of aggressive and violent offending potentially linked to substance misuse. You are resistant to authority and have seen criminal behaviour as a routine and acceptable part of your way of life".

25. If the word "arson" is removed from the first paragraph, there remains a wealth of evidence from which the panel was entitled to draw the conclusion it did in the second paragraph.

26. It is alleged there was no basis for the assertion that the Applicant was moved from a prison for security reasons. That is not quite correct. The decision letter for the panel hearing on 5 February 2019 at page 82 in the dossier states,

"You moved to [a prison] but, due to security concerns relating to weapons and you being aggressive, you were moved before you entered the Therapeutic Community (TC) there".

27. The probation service assessment report at page 646 of the dossier also states,"

[The Applicant] then moved to [a prison] and, from looking at Probation records, his Offender Manager at the time... hoped that he would be able to take advantage of the psychological support of the Therapeutic Community (TC) at this



establishment. However, due to security concerns [the Applicant] was moved to another prison. This is extremely unfortunately as I assess that a TC would have been an ideal environment for [the Applicant] to have addressed his underlying psychological issues and the link between these and his offending behaviour”.

28. Again, the sentence referring to the move from prison for security reasons occurs in a passage of no less than seven paragraphs setting out numerous, relevant instances of antisocial behaviour or poor compliance. For the purposes of this application, it is not accepted that the panel erred when referring to the move; however, if an error was made, it cannot be described as central, determinative or even significantly influential in the decision-making process.

29. It is asserted that the panel placed no weight on the unanimous recommendations of the professional witnesses. The first observation is the panel was entitled not to follow those recommendations. The second observation is none of the recommendations was an unqualified recommendation.

30. The Prison Offender Manager would have preferred the Applicant to be released to accommodation with a regime designed and supported by psychologists to help people recognise and deal with their problems. Unfortunately, the Applicant had been found unsuitable for one such placement.

31. The psychologist conceded the advantages of progression to open conditions but had been concerned about the extent of support that would have been available to the Applicant. She said it was a difficult decision.

32. In her report dated 20 December 2019, the Community Offender Manager said,

“In my view, the risks could be appropriately managed in the community using the risk management plan, however it is a concern that re-release at this time, without having had the opportunity for a gradual resettlement through open conditions, could quickly overwhelm him and set him up to fail, particularly as support from external agencies is either being conducted remotely or is unavailable”.

33. She also observed,

“It is up to [the Applicant] to persuade and assure the Parole Board that he will be fully compliant with the licence conditions proposed within the risk management plan after release as well as being open and honest with his Offender Manager”.

34. Of course, the panel was obliged to give adequate reasons for departing from those, albeit qualified, recommendations. The panel did this very clearly in Section 8 to the decision letter. Essentially, the panel took the view the professional witnesses had placed too much emphasis on the relatively short period of good behaviour

(which the panel accepted was progress) prior to the hearing. The panel thought the witnesses had placed insufficient weight on the history of drug addiction, the disruptive behaviour in custody prior to the recent improvement and the fact that, although the Applicant was exhibiting some insight, he still needed extensive support, the availability of which was currently restricted in the community. The panel also thought the professional witnesses still needed to understand how to work with him.

35. It is not for this reconsideration panel to say whether it agrees or disagrees with the panel that had the inestimable advantage of seeing and hearing the witnesses. The questions are whether the panel at the oral hearing came to conclusions that were consistent with the evidence, reasonable and in respect of which it had given adequate reasons. In my view the decision letter was clear, comprehensive and balanced; it explains perfectly adequately the reasoning behind the panel's decision and on the information before it, the panel was entirely justified in coming to the decision it did.

Decision

36. 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.

James Orrell
8 April 2021