

[2021] PBRA 45

Application for Reconsideration by NORCROSS

Application

1. This is an application by NORCROSS (the Applicant) for reconsideration of a decision of the panel dated 5 March 2021 refusing to direct the release of the Applicant.
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 included the application for reconsideration, and the dossier which totalled 510 pages, and which included the decision of the panel dated 5 March 2021.

Background

4. The Applicant is serving an indeterminate sentence of imprisonment for public protection imposed on 12 June 2009 for an offence committed on 20 July 2008 of wounding with intent to cause grievous bodily harm with the minimum tariff set at 2 years and 4 months less time spent on remand.
5. He also received on the same occasion for offences which arose out of the same incident a concurrent determinate sentence for the offences of possession of a lock knife and possession of an imitation firearm with intent to cause fear or violence.
6. The Applicant was 29 years old at the time of the offences and 30 years old at the time of sentencing. He is now 42 years old.
7. The Applicant has 8 previous convictions for 16 offences. In April 1997, he received two concurrent terms of 3 years' detention in a Young Offender's Institution for offences of assault occasioning grievous bodily harm and of criminal damage with concurrent terms of one year for an offence of affray and 2 months for another offence of criminal damage.
8. In December 2004, he received two concurrent terms of 30 months' imprisonment for offences of burglary and a consecutive term of 6 months' imprisonment for possessing an offensive weapon.
9. He was originally released in February 2011 shortly after his tariff expired, but he has been recalled twice. Both recalls were the results of incidents involving violence



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with the victims being known to the Applicant. Since his recall in June 2015, there have been two failures by him in open conditions. In August 2017, he was transferred back to closed conditions on account of his use of substances and his breach of his temporary release on an unescorted hospital visit.

10. He was returned to open conditions in December 2018, but in July 2019, he was returned to closed conditions following reports that he had been sending indecent images (some clearly taken within the prison) and sexualised messages to a boy under the age of 16, 'A' from a mobile phone.
11. In closed conditions, the Applicant engaged well with his keyworker and he gained employment, becoming a mentor to other residents. He had enhanced Incentives and Earned Privileges status until 2 December 2019 when alcohol was found in his shared cell. For that matter, he received a proven adjudication, but he has maintained that the alcohol belonged to his cellmate who the Applicant stated had owned up to it.
12. The Applicant was later returned to open conditions in February 2020. His opportunity to progress through the ROTL programme has been very limited due to the restrictions imposed as a result of the COVID-19 epidemic.

Request for Reconsideration

13. The application for reconsideration is dated 25 March 2021.
14. The ground for seeking a reconsideration is that the decision dated 5 March 2021 not to direct the release of the Applicant is irrational because:

(a) *"the Panel heard evidence from the [prison] Psychologist who clearly stated the Applicant's risk levels could be managed in the community and this recommendation took account of all the evidence at the hearing and that was available to the Panel";*
(b) The psychologist was aware of (i) all matters raised during the Applicant's recent adjudication proceedings in which the allegations against him were not proven; and (ii) the Applicant's recent admission that he had smoked cannabis *"these [matters] were factored into her risk assessment"*.
(c) The Panel have not given due weight to [the psychologist's] professional recommendation and have decided to conclude that the Applicant *"poses a risk that is not manageable despite his Offender Supervisor and Psychologist supporting release"* and the fact that *"the Risk Management Plan was comprehensive."*

Current parole review

15. On 20 February 2019, the Applicant's case was referred to the Parole Board by the Secretary of State to consider whether or not to direct his release and if the Board does not consider it appropriate to direct the Applicant's release, it was invited to advise the Secretary of State whether the Applicant was suitable to remain in open conditions, and, if so, to comment on the degree of risk involved.

16. Two members of the panel convened to consider the Applicant's case on 27 November 2020, but his case was adjourned for the reasons set out in the adjournment directions dated 10 December 2020.
17. A three-member panel, which included a psychologist and a judicial member, convened on 22 February 2021 with the panel chair, the Prison Offender Manager and the Applicant attending in person at the prison while the remaining panel members, a legal representative and other witnesses attended by video link on account of the COVID-19 Regulations.
18. The panel was provided with a dossier totalling 445 pages and it included:
- (a) Previous Parole Board decisions made in August 2015, November 2016 and November 2018.
 - (b) The Judge's sentencing remarks of 12 June 2009.
 - (c) The reports from the Applicant's Open Conditions failure in August 2017 and July 2019.
 - (d) Information from the Police regarding the investigations into allegations that the Applicant had engaged in inappropriate sexual communications with a child, including an edited transcript of the Applicant's "chat" he engaged in on his phone.
 - (e) Current prison and probation reports spanning the timeframe of this review; and
 - (f) The Adjournment Directions dated 18 July 2020 and 10 December 2020.
19. The panel was not provided with any legal or personal representations or victim personal statements or any information which was not disclosed to the Applicant. The Secretary of State was not represented at the hearing on 22 February 2021 and he did not make any representations.
20. The panel also considered the information on the services of a specialist services provider which helps offenders with the transition back into the community, which was received on the day of the hearing and then added to the dossier.
21. Oral evidence was given by the Applicant, his Prison Offender Manager, his Community Offender Manager and the prison service psychologist.
22. The Applicant was legally represented, who sought a direction for his release.

The Relevant Law

23. The panel correctly sets out in its decision letter dated 5 March 2021 the test for release and the issues to be addressed when considering making a recommendation to the Secretary of State for the Applicant to remain in open conditions.

Parole Board Rules 2019

24. 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

25. 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."

26. 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.

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

The Panel's Assessment of Current Risk

28. The crucial issues for the panel concerned the risk posed by the Applicant in the community and whether it was necessary for the protection of the public that he should remain in custody.

29. An assessment of risk of reoffending showed that the Applicant was placed within the group of offenders who have a low risk of reconviction within two years while the probation service assessment report risk assessment predicted that the Applicant had a low likelihood of reconviction for both general and violent offending.

30. The Applicant's Community Offender Manager who had managed the Applicant's case for more than four years, was concerned by the Applicant's repeated failures on licence and in open conditions. He considered first that the Applicant lacked insight into his risks and second, he was concerned that the Applicant had only recently acknowledged to his COM that substance misuse was a risk factor for him. The COM was encouraged by the Applicant's improved insight as evidenced in the risk assessment by the psychologist and his engagement with his substance misuse worker. The COM explained that he was surprised to learn that the Applicant wished to consider going into a rehabilitation centre after spending time in a designated

accommodation as he had previously discussed such options with the Applicant to no avail.

31. In his evidence, the COM explained that he had raised the Applicant's risk of harm to children from "low" at the start of this review to "medium" when he was returned to closed conditions. More recently, he had raised the Applicant's risk of harm to children to "high" after having seen the evidence of the video and sexualised chat with 'A'. The COM explained to the Panel that there were too many "holes and gaps" in the Applicant's explanation and that he believed that the Applicant intended to meet 'A' on a temporary release, given that the Applicant had provided him with specific dates.
32. The COM had concerns about the Applicant's preference for younger males and considered that in the Panel's words "*there could be issues of power and control within relationships that [need] to be explored*". His conclusion was that he did not consider that the Applicant's risks could be safely managed in the community.
33. The Applicant's Prison Offender Manager explained that at the time of the hearing the Applicant was then considering a possible move on to residential rehabilitation, but that he had only recently been discussed with the idea coming from his substance misuse worker. No specific placement had been identified by the time of the Panel's decision. Nor was it known at that time whether the Applicant would be accepted or whether he would have the motivation to engage fully in a residential treatment programme.
34. The conclusion of the POM was that the Applicant's risk could be managed with the appropriate Risk Management Plan.
35. The psychologist carried out a psychological risk assessment on the Applicant in October 2020. Her conclusion was that there was evidence of a reduction in the Applicant's risk of violence towards others and within intimate relationships over the course of his time in custody and his engagement in therapy. Her assessment was that the Applicant did not pose a current risk of violence towards others but that he did exhibit the presence of antisocial and borderline personality disorders that have been functionally linked to the Applicants' past offending as well as being linked to his recalls and failures in open conditions.
36. The assessment of the psychologist was that there was no evidence to suggest that the Applicant had a specific sexual interest in children, and she assessed the risk of the Applicant sexually offending against children to be low to medium. Her conclusion was that the Applicant did not care who he was engaging with for sexual communications and that he was looking for non-discriminate but adult interaction. The psychologist acknowledged that the Applicant's promiscuous lifestyle could mean that he would come across underage boys inadvertently who were on dating/sex chat internet sites. She recommended that the Applicant be given "*some*



internet education to help [him] to protect himself from a repeat of the situation that occurred with [A]”.

37. The psychologist accepted that the Applicant’s breach of prison rules was *“part of [his] APSD and that [he gives himself] ‘permission’ to break the rules demonstrating impulsivity, and risk-taking behaviour”*. She identified a number of the Applicant’s *“protective factors including [his] increased self-control, the absence of violence for some time, [his] insight into [his] risks, [his] willingness to engage with professionals as well as with NA and AA, [his] empathy and [his] motivation to succeed and to lead a different life”*. She is supporting the Applicant’s risk under the proposed risk management plan.

38. The panel having heard the evidence made several findings in that it:

(a) accepted that although the Applicant did not look at sites that were specifically related to children, it had *“significant concerns that [the Applicant] continued to engage in highly sexualised communications with him (including exchanging sexually explicit videos/photos) despite him making references to his age, being at school studying for his GCSEs...particularly given that [the Applicant] had stated that [he] had several other adult male contacts available to [him] through similar sites”*.

(b) was not satisfied that the Applicant did not intend to meet A on a temporary release or that he would have walked away had he met him and discovered that he was under 18. It noted that the Applicant did not discourage A from calling him “Daddy” or telling him that were they to go to a hotel together, they would book in as “father and son”.

(c) concluded that while the Applicant was *“not likely to search specifically for sexual relationships with those who are under age, it is likely that [he] will not desist if the opportunity of such a relationship presents itself to [him]”*.

(d) *“considered that the persistent nature and frequency of the messages to [A] and the fact that [the Applicant was] engaging in sexualised chats on other sites indicates that [he was] sexually pre-occupied at the time...but did not want to disclose to the panel [his] current sexual thoughts or desires”*;

(e) *“shared [the COM’s] concerns about [the Applicant’s] sexual preference for younger males and considered there could be issues of power and control within relationships that [need] to be explored”*; and that it

(f) *“had concerns about [the Applicant’s] very recent breaches of prison rules which it considered evidenced the active presence of anti-social personality traits, poor thinking and decision-making skills and substance misuse which are all relevant to [his] risk of causing serious harm.”*

39. The panel explained that after having considered all the evidence and the closing submissions made on the Applicant’s behalf by his legal representative, it had concluded in relation to the application for the Applicant’s release that:

- (a) It was concerned by the Applicant's behaviour which had led to him being returned from open conditions to closed conditions in July 2019 as he had failed to comply with the prison rules and had behaved in a risky way which could have led to a child being placed at risk of sexual harm.
- (b) The Applicant had failed to comply with the terms of his licence on each of his two previous releases and that this conduct had led to him being recalled twice.
- (c) He had failed on occasions to comply with the requirement to abstain from using drugs including in March 2020 and more recently on 22 February 2021 when cannabis and syringes were found during a search of his cell. Although the Applicant denied any knowledge of the syringes, he admitted using cannabis after he had heard some positive news about himself. He was, however, unable to explain why he had behaved in such a poor and risky way just before his parole hearing which took place on 22 February 2021.
- (d) It had concerns about the Applicant's mobile phone use in that on 11 July 2020 and on 8 January 2021, another prisoner was found with the Applicant looking at a mobile phone in the Applicant's room in the Applicant's parole window.
- (e) It was concerned that the Applicant's sexual pre-occupation and current relationship had not been adequately explored with the consequence that the Applicant is unable to show that he is able to manage his need for sexual gratification appropriately and not to engage in anti-social rule-breaking conduct. These concerns had arisen since the Applicant had disclosed to the psychologist that he had been in an "on/off" relationship with a man with whom he was in love and with whom he had a sexually intimate relationship, but who was then in prison. The Applicant also explained that he would struggle if unable to see his partner.
- (f) All this conduct showed very poor decision making and a disregard for rules on the Applicant's part as well as raising concerns about his active risk factors in relation to substance misuse, thinking skills as well as compliance.
- (g) No risk management plan would be effective in managing the Applicant's risk on release unless he was willing and able to comply with instructions and conditions but the Applicant's recent conduct indicated that this was not yet the case.
- (h) In order for the Applicant's risk to be managed in the community it was necessary that the Applicant should be open and honest with his COM but the panel did not consider that to be likely; and
- (i) For all those reasons, the panel considered that it was necessary for the protection of the public for the Applicant to remain confined to open conditions and accordingly, it made no direction for his release.

The reply on behalf of the Secretary of State

40.PPCS on behalf of the Secretary of State confirmed by email dated 1 April 2021 that the Secretary of State did not wish to make representations in response to the Applicant's claim for reconsideration.

Discussion

41.In dealing with the grounds for reconsideration, it is necessary to stress two matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgment of the panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

42.The second matter is that when deciding whether a decision of the Parole Board was irrational, due deference must be given to the expertise of the Parole Board in making decisions relating to parole. So when a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.

43.The panel had the benefit of hearing the evidence of not only the prison psychologist but also of the POM and COM, who had managed the Applicant's case for more than four years. He had concluded for reasons carefully explained by him that he did not consider that the Applicant's risks could be safely managed in the community for reasons which he explained.

44.The panel was entitled on the basis of that evidence to conclude that it remained necessary for the protection of the public for the Applicant to remain confined and to make no direction for his release.

45.The Applicant has failed to put forward any material (let alone any compelling reasons) showing that why the reasons put forward by the COM and/or the reasoned conclusions of the panel were wrong.

46.Further, the Applicant has failed to put forward any reason (let alone any compelling reasons) why the evidence and/or conclusions of the prison psychologist should be preferred to that of the panel and/or of the COM. Indeed, this application falls a long way short of showing that 'it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel'.

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

Sir Stephen Silber
11 April 2021

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