

Application for Reconsideration by Nelson

Application

1. This is an application by Nelson (the Applicant) for reconsideration of a decision dated 19 March 2021 by a Parole Board Panel refusing to direct his release but to recommend his transfer to open conditions.
2. The review was by way of oral hearing on 10 March 2021, at which detailed evidence was given by the Applicant, his Offender Supervisor (OS), Offender Manager (OM) and a Prison Psychologist. The oral hearing was considered remotely by telephone link due to restrictions imposed as a result of the COVID-19 pandemic.
3. I have considered this application and the relevant papers comprising the dossier which contains 319 pages, the decision of the Panel, dated 19 March 2021, and the application for reconsideration, dated 5 April 2021, consisting a little over 3 pages of closely argued submissions.

Background

4. On 7 January 2008, the Applicant, having pleaded guilty to a charge of robbery and possession of a firearm, was sentenced to an indeterminate sentence of imprisonment for public protection with a minimum term of 3 years, 1 month and 18 days (the tariff) before he was eligible to apply for parole. The tariff term expired on 7 March 2011. In addition, he had pleaded guilty to an offence of burglary and, whilst commenting that a concurrent term of 18 months imprisonment would have been appropriate, the Sentencing Judge imposed no separate penalty. The Applicant was 26 years old at the time of conviction and is now 39.
5. The Applicant had a significant criminal record including, in 1999, being sentenced to a period in a Young Offenders Institution for two offences of robbery, committed whilst on bail and, during release from his current indeterminate sentence, committed further serious offences, in 2018 being sentenced to 4 weeks imprisonment for burglary and, also in 2018, sentenced to 2 years imprisonment for offences of robbery, attempted robbery and committing robbery whilst in possession of a firearm.
6. The main index offence involved robbery in a betting shop using an imitation handgun to coerce the cashier. The burglary was said to have been committed in conjunction with others and that he was in possession of a claw hammer with which he threatened a security guard. The Sentencing Judge made specific reference to the effects of the Applicant's substantial drugs use and to his offending being "*drugs driven.*"

Request for Reconsideration

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7. The statutory limbs of challenge are of irrationality of the decision and of procedural unfairness. The application for reconsideration, prepared by the Applicant's Legal Representatives, raises only procedural unfairness but, having regard to the details of the application which refers to factual matters, the Panel has further considered how far such matters might have relevance in relation to irrationality and considered the application on the basis that both limbs are challenged.

Procedural impropriety

8. The Applicant claims that the panel incorporated inaccurate and flawed information in the decision-making process, by way of inaccurate statements surrounding the Applicant's behaviour in open conditions and used *"the culmination of these inaccurately reported incidents to assess that [the Applicant's] risk is allegedly unmanageable in the community."*
9. The complaints related to two statements:
 - a) That the Applicant received an adjudication on 18 June 2020 after a fight with another prisoner; and
 - b) That the Applicant failed an MDT (Mandatory Drugs Test) on 26 May 2020, testing positive for opiates.
10. In written pre-hearing representations, dated 28 October 2020, the Applicant's Legal Representatives had stated that the suggestion, in dossier papers, that he had been in a fight was made in error and that he had not been involved in any physical altercations nor had he been adjudicated.
11. That the drug testing was voluntary and not mandatory and though it had tested positive for opiates, it had been confirmed that that was consistent with his prescription medication.
12. On behalf of the Applicant, it was, therefore, specifically submitted that: *"Given that both use of violence and use of substances are factors intrinsically linked to [the Applicant's] risk of serious harm, it cannot be said that the wholly inaccurate reporting of these events did not sway or alter the outcome of the decision letter."*
13. It is not necessary to reproduce the application in full, but all aspects have been considered and the issues of irrationality and procedural unfairness are dealt with below.

Response on behalf of the Secretary of State

14. The Secretary of State (SoS), by letter dated 14 April 2021, responded only with regard to complaint 9 a. above.

That:

"Following the above no further mention was made of the error either in subsequent reports or during the course of the oral hearing.

PPCS can confirm, following a check of our internal prison database (P-NOMIS) that [the Applicant] was adjudicated on 18 June 2020 for "using threatening, abusive or insulting racist words or behaviour."

The adjudication was later dismissed at a Governor's Hearing on 26 June 2020."

Current parole review

15. The case had been referred to the Parole Board on 2 June 2020, the Board being asked to consider whether to direct the Applicant's release or, in the alternative, to consider whether to recommend that the Applicant be transferred to open conditions.
16. The Panel ultimately considered the dossier, then of 310 pages, together with a 6 page handwritten letter from the Applicant. The dossier included a Risk Management Plan (RMP) for implementation in the event of release being directed, a psychological assessment dated 20 August 2020 by a Prison Psychologist in training recommending release and reports from his OS and OM recommending that he remain in open conditions. These recommendations were repeated in evidence.
17. In its decision and its analysis of the Applicant's offending, the Panel considered not only the circumstances of the index offence and the offences committed while on release licence, but adopted the findings of a Panel decision in 2019, which in recommending a transfer to open conditions, commented as to their significance in that the Applicant himself had spoken of problems managing his finances and mental health and that he had asked to be recalled stating that he was at crisis point and prepared to commit a serious offence if not recalled. When arrested, he tested positive for opiates and cocaine, although, the 2019 Panel recorded, this was something he had disputed. The current Panel recited, in addition to the matters complained of, discipline problems including threats and aggression to prison staff, debt problems from substance use and a positive test for opiates and cocaine in December 2020, use of which he acknowledged. In his own evidence, the Applicant had accepted the use of heroin, saying that his well-being had sunk to the bottom and he had made "*a bad decision*".
18. It was with this background that the Panel came to its decision not to direct release, emphasising, in addition to the factual matters complained of, that substance misuse, in relation to which the Applicant had made admissions, was a historic risk factor and still not controlled by him and that his record showed that he was someone who could return to serious criminality very quickly and without warning signs.

The Relevant Law

19. The Panel correctly sets out in its decision letter the test for release.
20. Rule 28(1) of the Parole Board Rules provides that applications for reconsideration may be made in eligible cases either on the basis that the decision was (a) irrational or that it is (b) procedurally unfair. This is an eligible case.

21. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. For the avoidance of doubt, however, it is noted that this issue, also, was separately considered by the Panel.
22. In **R (on the application of 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"*.
22. 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 uses the same word as is used in judicial review demonstrates that the same test should be applied. This test for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.
23. 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."*
24. Procedural unfairness under the Parole Board Rules relates to the making of the decision by the Parole Board and an assessment is required as to whether the procedure followed by the Panel was unfair.
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.

Discussion

Irrationality

26. In my judgment, the decision to refuse release cannot be said, in any way, to meet the test of irrationality. The Panel, having clearly considered, with care, the documents in the dossier and the oral evidence, gave a clear and reasoned decision. The alleged incorrect findings in relation to two matters which, whether or not they had been incorrectly recorded, are, in my judgment, substantiality outweighed by the other risk issues appropriately summarised by the Panel.

Procedural Unfairness

27. The Applicant was represented by an experienced Legal Representative who had full opportunity to raise the correctness of the dossier entries and to put forward the Applicant's versions in evidence, questioning and in final submissions. There is no indication that was specifically done and in submissions the SoS specifically submits that there was no further mention of "the error" either in subsequent reports or during the course of the oral hearing. It cannot be said to be procedurally improper for the Panel, itself, to fail to record, specifically, its findings on two factual issues from the substantial amount of other relevant matters. It did, however, stress continuing risk issues from unchallenged substance abuse evidence and concerns about incidents of threatening and aggressive behaviour and his potential for rapid escalation of risk without prior warning signs. Furthermore, it clearly recorded its reasons for not accepting the recommendation of the Prison Psychologist.

Decision

28. For the reasons I have given, I do not find that the Panel's decision was irrational or procedurally unfair and, accordingly, the application for reconsideration is refused.

Edward Slinger
23 April 2021