

[2021] PBRA 87

Application for Reconsideration by Clarke

Application

1. This is an application by Clarke (the Applicant) for reconsideration of a provisional decision by the Parole Board under Rule 25(1) of the Parole Board Rules 2019 (the 2019 Rules) that the Applicant was unsuitable for release (the Decision). The letter by which the Decision was communicated is dated 19 May 2021 (the Decision Letter).
2. I have considered the application on the papers comprising:
 - (a) A dossier of 195 numbered pages;
 - (b) The Decision Letter; and
 - (c) Written submissions by the Applicant's solicitors dated 2 June 2021 in which reconsideration is requested (the Applicant's Submissions).

Background

3. In November 2017, the Applicant was sentenced to an extended determinate sentence of imprisonment under which he would become eligible for parole in June 2021. The Conditional Release Date would be in March 2023 and the Applicant would be subject to an extended licence until March 2028.
4. The Applicant received that sentence after his conviction for offences relating to the sexual abuse of children and offences relating to the making and distributing of indecent images of children. The Applicant was aged 53 when he received the sentence and he is now aged 56.

Current parole review

5. The Decision was made on the Secretary of State's referral of the Applicant's case to the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release.
6. The Decision was made by a panel of the Board that considered the Applicant's case at an oral hearing in May 2021 (the Panel). The Panel was comprised of two Independent Members of the Board. The oral hearing was conducted remotely by telephone link due to constraints imposed by the coronavirus pandemic.

Application and response


7. The Applicant's submissions assert that the Decision is marred by irrationality and procedural unfairness.

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8. By an email dated 17 June 2021, the Public Protection Casework Section notified the Board that the Secretary of State offered no representations in response to the Applicant's reconsideration application.

The Relevant Law

9. 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.

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Irrationality

10. 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,

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"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."

11. 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.

12. 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. 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

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.

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Discussion

14. The Applicant's Submissions are made on three grounds.

15. Procedural fairness is asserted as the first ground, but the challenge is in reality to the rationality of the Panel's consideration of the available evidence relating to the Applicant's relationship with an adult female partner.

16. It is asserted that the Panel overlooked evidence that contradicted its consideration of whether the relationship with the partner would be 'protective', which I interpret as meaning that the Panel was not sure that the relationship would be a feature of the Applicant's case that reduced the likelihood of the Applicant causing serious harm to the public in the community. I do not consider that there was irrationality in the Panel's



consideration that the partner was uncritical of or did not appreciate the nature or extent of the Applicant's offending. That assessment was based on a report that the partner was shocked that it would not be approved for the Applicant to reside at her property while children were present. The Panel also found it significant that the Applicant had previously continued to offend while living with the partner. There is no contradiction between the account given by a probation officer that the Applicant's partner was shocked that it would not be approved for the Applicant to reside at her property while children were present and the account, by the same probation officer in the same document, that the Applicant's partner was aware that that restriction was a feature of the plan that was proposed to manage the Applicant's risk in the community.

17. The second ground is an assertion that there was irrationality in the Panel's consideration that there was evidence that the Applicant had entertained fantasies that had developed and become more sexually violent in nature over the period of his offending. It is asserted that the Decision Letter does not reveal the basis for that consideration, and that the consideration was unfounded. I disagree with each of those assertions; the rational basis for the Panel's consideration is found in the reference in the Decision Letter to comments by the sentencing judge regarding conversations the Applicant had had with a *"like-minded person"* on the internet.

18. The third ground asserts that it was irrational or procedurally unfair for the Panel to base its decision in part on its uncertainty that a recommended programme addressing sex offending could be made available to the Applicant in the community without further exploration of the issue. However, the Decision Letter reveals that the community probation officer witness had informed the panel that there were delays in the delivery of programmes, occasioned by the coronavirus pandemic, and that the Applicant would have to wait some time before he could undertake the programme in question.

Decision

19. The Decision is not marred by irrationality or procedural unfairness. The application for reconsideration is, accordingly, refused.

Timothy Lawrence
30 June 2021



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