

[2021] PBRA 89

Application for Reconsideration by Pemberton

Application

1. This is an application by Pemberton (the Applicant) for reconsideration of a decision of a panel dated 11 May 2021 not to direct release.
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 Decision Letter dated 11 May 2021;
 - The Reconsideration Application dated 2 June 2021; and
 - The Dossier, now numbered to page 502 of which the last 12 pages are the decision letter.

Background

4. The Applicant is serving an indeterminate sentence imposed in June 2006 for an offence of rape. The minimum term expired in August 2010. He was 31 when he committed the offence and is now 47. He was released on licence on 24 October 2018 and recalled following his arrest (for offences of which he was later acquitted) on 16 August 2019.

Request for Reconsideration

5. The application for reconsideration is dated 2 June 2021.
6. The grounds for seeking a reconsideration are as follows:
 - (1) Irrationality – the Oral Hearing Panel (OHP) failed to apply the test for release adequately; and
 - (2) Procedural irregularity – the OHP decided to rely on insufficient evidence in making a number of findings of fact.
7. Having thus succinctly set out the grounds for reconsideration, the application sets out the details, which are not so succinctly expressed. Doing the best that I can, I summarise them thus:



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- (a) The panel was wrong to find on the balance of probabilities that the charge of criminal damage which led to the recall was proved;
- (b) In any event, the charge of criminal damage did not demonstrate a risk of serious harm, and the proposed Risk Management Plan (RMP) was sufficient to protect the public;
- (c) There were allegations of previous domestic abuse within the Applicant's relationship with the victim of the criminal damage (JE), to which (I think the assertion is) the OHP should have given no weight;
- (d) The Applicant was convicted on his plea of guilty of an offence of assault occasioning actual bodily harm (biting a prison officer) on 23 February 2021 and sentenced to 18 weeks imprisonment. The OHP should not have concluded on the balance of probabilities that this assault was a response to being searched on suspicion of having received an illicit item from a visitor in prison;
- (e) The OHP did not direct a structured risk assessment of either sexual or violent risk. Nor did they request oral evidence from witnesses in respect of the recall allegations and suggestions of domestic violence in his relationship with JE; and
- (f) There was insufficient evidence to justify a finding that the Applicant posed a risk of serious harm or that it was necessary to detain him for the protection of the public.

Current parole review

- 8. The Secretary of State referred the Applicant's case to the Parole Board for consideration of release or a recommendation for open conditions. The OHP met on 5 January 2021, 22 February 2021, and 29 April 2021.
- 9. The Applicant was represented throughout the proceedings. The Secretary of State was not represented and made no submissions. The panel heard evidence from the Applicant's Prison Offender Manager, his Community Offender Manager and the Applicant. The first adjournment was for further information. The second adjournment was because the panel learnt at the hearing that the Applicant was due at court the next day for the ABH charge. The final dossier consisted of 485 pages, plus an email about the outcome of the court hearing.

The Relevant Law

- 10. The panel correctly sets out in its decision letter 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

- 11. 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)).

12. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

13. 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."

14. 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.

15. 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

16. 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.

17. 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.

18. The overriding objective is to ensure that the Applicant's case was dealt with justly.

19. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be



examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before it. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness. The Parole Board has no power to compel the attendance of witnesses. If either of the parties requires a witness to attend, then an application can be made. There is no indication on the papers that an application for the attendance of any witness was made by the Applicant and refused by the panel.

The reply on behalf of the Secretary of State

20. The Secretary of State has indicated that he does not seek to make any representations about this application.

Discussion

21. Although complaint is made of procedural unfairness, the matters detailed, whether taken separately or cumulatively, do not raise an issue of procedural unfairness as defined above. The issue here is one of irrationality, and specifically whether the OHP was entitled to make the findings of fact it did. Thereafter, the findings of fact having been made, it was a matter of judgement for the panel what effect they had on the fundamental question, whether it was necessary for the protection of the public that the Applicant remain detained. The fact that the Applicant disagrees with the conclusions reached by the panel does not of itself make those conclusions irrational.

22. The panel set out the background of the matters for which the Applicant was arrested and recalled. His evidence was that he went to JE's house, found the door open and items damaged inside. He went in, and on leaving cut himself, leaving his DNA at the scene. The original charge was of burglary, but that was reduced to a charge of criminal damage before the hearing. The principal witness against him, JE, did not attend the final Magistrates' Court hearing, because she had previously been kept hanging around waiting for an earlier hearing. The prosecution offered no evidence and the Applicant was acquitted.

23. The panel is obliged to consider allegations made against a prisoner, and to decide how to deal with them: **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**. The panel is entitled to find an allegation proved, on the balance of probabilities, notwithstanding an acquittal in a criminal court, which of course applies a different standard of proof. In this case, the panel carefully set out the basis for its conclusion: the Applicant was being sought by the police even before the damage was discovered; there was no damage to his daughter's bedroom, where he had paid for the furniture; he admitted being at the scene; the panel found his explanation for his injury hard to accept. Particularly bearing in mind that the acquittal was not the result of a hearing at which the court heard evidence and came to a verdict on the basis of it, but in any event, this was a conclusion to which the panel was entitled to come.

24. The panel inquired as to the basis upon which a restraining order was issued at the Magistrates' Court and was told that the police provided to the Court evidence of a

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history of domestic violence dating back to 2004/2005. This abuse was also documented by a Multi-Agency Risk Assessment Conference, first in 2009 and again in August 2019. On that basis the panel was entitled to accept that there was such a history. The fact that the Applicant, for whatever reason, did not contest the making of the order does not mean that the Magistrates' Court did not act on evidence when it made the order, and the Oral Hearing Panel was entitled to accept that there was an evidential basis for the order.

25. The Applicant gave an explanation of the events leading up to his biting the prison officer that led to him being charged with an offence of assault occasioning actual bodily harm on a prison officer. That explanation amounted to self-defence and was therefore inconsistent with his plea of guilty. The panel was therefore entitled to reject his account, and accept the version given by the officer, that the Applicant resisted being searched for contraband after a visit.
26. The panel exercised its judgement as to the effect of these findings, and other findings of which no complaint is made, in deciding the question whether the protection of the public required the Applicant's continued detention. It was the panel's responsibility to make its own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. It had to make up its own minds on the totality of the evidence that it heard, including the evidence from the Applicant. It would be failing in its duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if it failed to do just that. As was observed by the Divisional Court in **DSD**, a panel of the Parole Board has the expertise to do it.

Decision

27. 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.

Patrick Thomas
9 July 2021