

[2021] PBRA 93

Application for Reconsideration in the case of Snow

Application

1. This is an application by the Secretary of State for reconsideration of a decision made on 10 May 2021 by a Single Member Panel that it was no longer necessary for the protection of the public for Snow (the Applicant) to remain in custody and that his re-release was directed.
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, which are the decision of 10 May 2021, the application for reconsideration dated 27 May 2021, the response of the Applicant's solicitors dated 7 June 2021, the dossier totalling 172 pages as well as emails to and from the Applicant's solicitors seeking clarification of the Applicant's response to the application for reconsideration.
4. The single member Panel conducted a paper hearing on 10 May 2021 in which it considered a dossier of relevant documents which included the judge's sentencing remarks, a list of the Applicant's previous convictions. In addition, the Panel considered the Recall reports prepared by the Applicant's Community Manager when the Applicant was recalled and a written statement from the Applicant's employer.
5. The single member Panel also considered legal representations from the Applicant's solicitors which contended that his recall was inappropriate and that his immediate re-release should be directed.

Background

6. The Applicant was sentenced to imprisonment for Public Protection (IPP) on 6 December 2007 for sexual activity with a child x5.
7. The Applicant was ordered to serve a minimum period of 20 months' imprisonment less time spent in prison on remand. The Applicant's Tariff Expiry date (TED) was reached on 30 June 2009. During his sentence, the Applicant completed programmes to address his offending behaviour, including a training course



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addressing sex offending, a training course addressing better management of relationships and emotions, a training course addressing drugs or alcohol misuse and a training course addressing decision making and better ways of thinking.

8. The Applicant progressed to open conditions in March 2016 and while there he had secured employment in "a highly trusted position". He was released on IPP licence in mid-March 2020. Having completed his time in Designated accommodation, the Applicant moved into a property with multiple units, two of which the Applicant owned with the Applicant living in one of them and the other unit being rented out.
9. Concerns were raised after it emerged that the Applicant had reported that he had been acting as a caretaker at the property when the regular caretaker was taken ill with Covid 19. The Applicant was directed to cease fulfilling this role as his Offender Manager considered that it was inappropriate that the Applicant, a Registered Sex Offender, who was on licence, should be liaising with agencies about the placement of vulnerable people in the building. The landlord of the building was contacted and informed that the Applicant was prohibited from dealing with these agencies.
10. The Applicant was recalled when there were allegations that notwithstanding the direction that he should cease to act as the substitute caretaker, he had acted in breach of that direction as he had been letting people into the property and that he had access to CCTV screens and the computer system in the flats which contained information about the tenants.
11. The assumption was made that the Applicant had ignored the previous instruction to cease this work. In consequence he was recalled as an emergency because he had acted in breach of the good behaviour conditions of his licence as he had been undertaking a form of work which had not been approved.
12. Representations gave a different account of what had happened including that the Applicant had not represented himself as the caretaker of the flats and that he did not have access to CCTV monitors or to any personal information about any tenant. The landlord of the flats, who was fully aware of the Applicant's conviction, confirmed this in a statement and it was also stated that the police officer linked to block could confirm this information. There was also evidence that the Applicant had informed his supervising officer that he had let the social worker into the block, but that no warnings had been issued to the Applicant when he reported this.
13. The panel concluded that the recall of the Applicant was not reasonable in the light of this evidence.
14. There were no concerns about the Applicant's behaviour in custody after he was recalled, but the Panel recommended that he should complete a training course addressing sex offending programme in custody, but it was not clear when it might be available while it is a programme which is also available in the community.
15. The Panel agreed with the assessment that the Applicant fell into a group of prisoners who posed a low risk of reconviction using all measures, that he is in a group of offenders who pose a high risk of contact sexual offending and if he does, there would be a high risk of causing serious harm to children. The Panel "struggled"



to understand the contentions that the Applicant posed a medium risk of causing serious harm to a known adult if he reoffends.

16. The Panel concluded that the Applicant's compliance prior to recall would continue and that the conditions in the Applicant's risk management plan were sufficient to manage any risk that he posed in the community with the consequence that the Panel was satisfied that it was no longer necessary for the protection of the public that the Applicant should remain in custody. His re-release was directed subject to conditions.

Request for Reconsideration

17. The application for reconsideration is dated 27 May 2021.

18. The grounds for seeking a reconsideration can be summarised as follows:

- (a) It was procedurally unfair for the Panel not to direct or to adjourn the hearing for updated reports from witnesses before reaching its decision to re-release the Applicant and that this failure prevented the Panel from adequately exploring the legitimacy of the Applicant's recall (Ground 1); and that
- (b) It was irrational of the Panel to not to make directions for updated reports with the consequence that there has been an inadequate exploration and assessment of the evidence, including the risk posed by the Applicant on release with the consequence that it should not have decided to re-release him (Ground 2).

The Relevant Law

19. The panel correctly sets out in its decision letter dated 10 May 2021 the test for release.

Parole Board Rules 2019

20. 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)).

21. 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

22. 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."

23. 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 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.
24. 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

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.
26. 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.
27. The overriding objective is to ensure that the Applicant's case was dealt with justly.
28. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: *"there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."*
29. 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 them. 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 reply on behalf of the Applicant

30. It is contended by the Applicant's solicitors in respect of Ground 1 that:

- (a) Omitting to put information before a Panel is not a ground for procedural unfairness; and/or
- (b) In any event, even if (contrary to the Secretary of State's submissions) omitting to put information before a Panel is a ground for procedural unfairness, the Secretary of State has failed to establish that in this case there was any procedural unfairness in its failure to direct for further evidence.

31. As to Ground 2, the case for the Applicant is that:

- (a) The Secretary of State has failed to establish that (i) there was a duty on the part of the Panel to obtain updated reports or to produce adequate exploration and assessment of the evidence and risk and/or (ii) (even if there was such a duty) that the panel failed to comply with that duty.
- (b) In any event even if there was a failure to obtain updated reports or to produce adequate exploration and assessment of the evidence and risk, this does not show that the Panel's decision in this case was irrational in the light of the fact that it is settled law that a release decision can only be regarded as irrational if it 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.*" **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin) [116]**.

Discussion

32. 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 or her 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.

33. The second matter of material importance is that when deciding whether a decision of the Parole Board was irrational, due deference must be given to the expertise of the Panel in making decisions relating to parole.

Ground 1



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34. There are two separate main points made by the Secretary of State under this ground. The first is that it is contended by the Secretary of State that further evidence should have been sought by the Panel to explore the circumstances of the Applicant's recall and in particular the contention that he had been acting as a caretaker of the flats. It is submitted that the Panel should have made directions for the service of representations from the Police Officer and the Social Worker to fully explore the circumstances of the recall.
35. The critical issue is whether the Panel was entitled to conclude that the recall was not reasonable bearing in mind that the Applicant contended that he had not represented himself as the caretaker and that he did not have access to the CCTV monitors or to any personal information about any tenant. This formulation is consistent with the approach in the decision of **Williams [2019] PBRA 7 [11]** when it was stated that omitting to put information before a Panel is not *in itself* a ground for procedural unfairness.
36. Turning to the facts, there was substantial evidence to show that the Applicant had not represented himself as the caretaker and that he did not have access to the CCTV monitors or to any personal information about any tenant as these were matters which a caretaker would have had.
37. First, there was uncontradicted evidence from the building manager, who managed the block of flats through a management company. He explained that the Applicant did not at any time have access to the personal data of the residents of the flats or to the CCTV images which were only displayed in the caretaker's flat or to the computer in the office in the block of flats and which was used to control the door entry system. These were matters which the caretaker, unlike the Applicant, would have had access to.
38. Second, there was uncontradicted evidence from the social worker that the Applicant did not use or refer to the camera screens in the caretaker's office and he could not recollect if the camera screens were on. It is difficult to see what further evidence could have been obtained from the social worker and why the Secretary of State shows that it should have been obtained.
39. Third, the only evidence that the Applicant assisted a visitor to the block was when he had let a social worker into the block. The Applicant informed his supervising officer that he had done this, but he did not receive a warning which indicated that the Applicant was not regarded by the supervising officer of acting improperly as the caretaker. This evidence has not been contradicted.
40. Fourth, there was cogent evidence that the Applicant had not represented himself as the caretaker of the flats and no evidence to the contrary.



41. In all the circumstances, the Panel, as the designated fact finder, was entitled to conclude that there was adequate evidence to show that the recall of the Applicant was not reasonable as he had not represented himself as the caretaker and as did not have access to the CCTV monitors or to any personal information about any tenant.
42. It is important to repeat that due deference is due to the Parole Board as a specialist body with the consequence it is not correct to overturn a decision of the Panel unless 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.
43. In this case, there was no error or one of an egregious nature on the part of the Panel in deciding that that the recall was not reasonable in the light of the material before the Panel and the matters set out above.
44. The second complaint under Ground 1 is that there were no updated reports from the Community Offender Manager (COM) or the Prison Offender Manager as no directions had been made for them, although the production of such reports should have been directed.
45. The position is that the Panel had received the reports that were required to be considered for a review of the recall and they did not show any concern about the Applicant's custodial behaviour. These reports indicated that he had received no negative entries, no adjudications or that he had not been subject to a mandatory drugs test or found to have taken illicit drugs in prison. There was no suggestion of any concerns about the Applicant's conduct in those reports or that any updated reports would have shown any concerns.
46. In those circumstances, the Panel was quite entitled not to order further reports. Indeed, a further reason for that is that it is not suggested let alone shown that any further reports would have shown any concerns about the Applicant's conduct.
47. In those circumstances, the allegations in Ground 1 must be rejected.

Ground 2

48. It is contended by the Secretary of State that by failing to direct updated reports on the Applicant there has been an inadequate exploration and assessment of the evidence and his risk with the consequence that the Panel's decision to release the Applicant is irrational. In support of this contention, it is said that the decision to release is irrational in the absence of updated reports which would allow the Panel to make a fully informed decision on whether risk could be adequately managed in the community.
49. It is also submitted that to direct release of the Applicant on the basis that he meets the test for release on licence without canvassing or thoroughly considering the licence conditions required to manage any risk posed in the absence of an appropriate Risk Management Plan renders the release decision irrational especially



as the COM assessed that the applicant presented a high risk to children and that contact sexual reoffending could increase quickly.

50. The Panel explained in relation to the risk posed by the Applicant on release that:

"there is nothing to indicate that the risk of further offending which would cause serious harm had risen. There are no outstanding charges or indications that there is any ongoing police action with regard to [the Applicant's] risk. It is considered that [the Applicant's] compliance prior to recall would continue, and provided that this is the case, the panel considers that the risk management plan is sufficient to manage any residual risk."

51. Nothing has been put forward to show or suggest that the Panel was not entitled to provide its own assessment and to reach those conclusions or that those conclusions reach the high threshold as set out in paragraphs 22 and 23 above for a finding that a decision of a Panel is "irrational".

52. Criticism is made that the Panel did not impose requirements that the Applicant should comply with a curfew or that he should "reside as approved". It is not clear why a curfew should have been imposed bearing in mind that all the alleged breaches occurred during daytime at the block of flats where the Applicant resided and there is nothing to suggest that he posed a risk at night-time.

53. The Applicant was obliged to reside at premises approved by the supervising officer as the conditions set out in the decision letter were expressed to be added to "the standard conditions of licence". Licence condition 5 provides that:

"[The Applicant] shall reside permanently at an address approved by the supervising officer and obtain the prior permission of the supervising officer for any stay of one or more nights at a different address".

54. The Secretary of State also refers to the Panel's comments that a training course addressing sex offending was likely to be available in the community before it was available in custody without directing reports to evidence this. The Panel, as the designated factfinder did not consider that this work had to be completed before release and a training course addressing sex offending is not stipulated in the licence conditions.

55. A further matter raised by the Secretary of State is whether the Applicant will comply with any offending behaviour work in the community in the light of his concerns about "over treatment". The Applicant has complied with all licence conditions before recall, including not only disclosing a developing relationship but also then ending that relationship when told to do so. The Panel was entitled to regard the Applicant as a person who would comply with licence conditions.

56. This conclusion like the other conclusions which the Panel reached cannot be regarded as irrational.

Decision



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57. For the reasons I have given, I do not consider that the decision was irrational/ procedurally unfair and accordingly this application for reconsideration is refused.

Sir Stephen Silber

5 July 2021