

[2022] PBRA 140

Application for Reconsideration by Bage

Application

1. This is an application by Bage (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 11 August 2022 not to direct his release.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are:
 - a) The Decision Letter dated the 11 August 2022;
 - b) A request for reconsideration from the Applicant in the form of representations from his legal representative;
 - c) The dossier, numbered to page 270, of which the last document is the Decision Letter. The panel had a dossier numbered to page 259. There was an update following the oral hearing from the Applicant's probation officer in the community. This update appears to have been provided following discussion at the oral hearing and clarifies the wording of a proposed licence condition. The Decision Letter makes no reference to this document, although I am not persuaded that it would have been a critical point in determining whether or not to direct the Applicant's release.

Background

4. The Applicant is now 62 old. On the 25 June 1991, when he was 31 years old, he received a mandatory life sentence following his conviction for murder (the index offence). The sentencing court sent a minimum term of 14 years before the Applicant could be considered for release by the Parole Board.
5. The background to the index offence is that the Applicant entered the home of his former partner through the loft space of an unoccupied adjoining house. He had been under the influence of alcohol and had been armed with a knife. His ex-partner and her partner (the victim) were asleep. The Applicant stabbed the victim forty times to the neck and chest and the victim subsequently died of his injuries. The Applicant had a history of previously assaulting his former partner and of threatening the victim. The sentencing Judge was satisfied that the index offence was premeditated.



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board

 info@paroleboard.gov.uk



@Parole_Board



0203 880 0885

6. The panel's review was the second referral to be made by the Secretary of State since the Applicant's last recall to custody. He had first become eligible to be considered for release by the Parole Board in March 2005. In June 2005, the Applicant was released at the direction of the Parole Board, and he remained in the community for several years until his recall in July 2012. The Applicant had developed a relationship which had lasted for three years, however he reacted badly when the relationship came to an end. The police were called to incidents of domestic abuse where alcohol was involved and the Applicant had made a number of threats towards his partner and her new partner, including a threat to stab the new partner. The behaviour reported at the time evidenced clear parallels to the index offence.
7. The Applicant was re-released at the direction of the Parole Board in August 2016 but he was recalled to custody in July 2017. The Applicant had been arrested and charged with offences committed against his new partner whom he had met when they worked together at a public house. The Applicant had been in a relationship with someone else at the same time and following the new relationship coming to an end, the Applicant was convicted of stalking/harassment and he received an eighteen month custodial sentence. The panel was told that the Applicant had felt rejected when the new relationship came to an end and it noted that his '*behaviour quickly escalated*'.
8. At the time of the oral hearing, the Applicant was in the open estate following the Secretary of State accepting an earlier recommendation by a panel of the Parole Board. The panel held an oral hearing on the 28 July 2022, producing its Decision Letter fourteen days later on the 11 August 2022. At the oral hearing, the panel heard oral evidence from the Applicant's probation officer in the community and the official responsible for his case in the open prison. The Applicant, who was legally represented, also gave evidence at the hearing. Although witnesses had supported the Applicant's release, the panel did not agree. However, the panel did recommend to the Secretary of State that he should remain in an open prison.

Request for Reconsideration

9. The Applicant's grounds for reconsideration are that the panel's decision was irrational and procedurally unfair, in that:

Irrationality

- a) The panel created its own evidence which the Applicant was unable to challenge.
- b) Past Parole reviews by various panels have raised concerns about the safety of a former partner or any potential partner without any evidence being received from the former partner. The panel relied on its own assessment of a possible concern, ignoring the recommendations of witnesses who all supported his release.

Procedurally Unfair

- a) Individual specialist offence related work has not been evidenced as being available to the Applicant.

The Relevant Law

10. The panel correctly sets out in its decision letter dated the 11 August 2022 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 (as amended)

11. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

12. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

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.

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

Other

18. 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.*"

The reply on behalf of the Secretary of State

19. In correspondence of the 20 September 2022, the Secretary of State confirmed that he would not be making any representations.

Discussion

20. The Applicant's submission that the panel created its own evidence seems to centre on his earlier relationship in the community where he then began a new relationship, which came to an end and he was convicted of further offending and was recalled to custody. The complaint appears to be that the Parole Board has not asked for evidence or a view from the earlier partner about her safety. The Applicant also complains that the panel had established a risk to the earlier partner or future partners despite witnesses supporting release and considering the risk in the community to be manageable.

21. It is right to note that the probation officer and the prison had reviewed the risk to the earlier partner and had allowed ongoing contact with her during the Applicant's periods of temporary release from the open prison.

22. However, the panel was not obliged to follow the assessments or recommendations of witnesses. It was under a duty, having considered all the evidence available, to make its own assessment of risk. Having read the Decision Letter in its entirety, there can be no criticism of the panel's approach. It heard from witnesses, including the Applicant, noted the ongoing contact with the earlier partner and her view (expressed to the probation officer) that she had not ruled out a future intimate relationship. The panel was mindful of the history of relationship difficulties in this case, including the circumstances of the index offence. It also noted the Applicant's view at the oral hearing that he would not be abstaining from alcohol on release. Alcohol has been a clear risk factor in terms of the Applicant's offending behaviour.

23. In explaining the panel's decision, I can do no better than rehearse the detailed determination within the Decision Letter at paragraph 4.2 onwards:

"...

4.2 The index offence was the most extreme reaction to feelings of rejection in an intimate relationship. Both recalls occurred after an exaggerated response to the breakdown of an intimate relationship. On the second occasion, a criminal conviction resulted. The pattern of harassment, threats and excess alcohol consumption is self-evident. In 1991, in his report to the Lord Chief Justice, the sentencing judge said, "It is almost inevitable that any future relationship with a woman would sooner or later become stormy, violent and end in separation, again to be followed by jealousy." His prediction proved to be accurate.

4.3. The 2021 panel observed that infidelity within relationships, lacking understanding of healthy relationships, excessive alcohol use, and problems coping resulting in the use of controlling and aggressive behaviour were factors evident in the commission of the index offence and were a warning sign of an escalating risk prior to the last recall, which he failed to recognise, despite having completed offence focussed work. [a high intensity course exploring violence in relationships] in 2014 before the second release was the last time this was addressed]. That panel commented that he had completed some work to address alcohol use since recall, but none to explore his insight or skills in respect of intimate relationships and abusive behaviour.

4.4. That is still the case. He needs to understand why he became so angry and behaved so badly after such a short relationship which led to his last recall. Whilst there may be no formal intervention available, he would benefit from an individual psychological approach. Whenever in the community, [the Applicant] has almost always been in a relationship. It is highly likely that on release he will very quickly seek female companionship and enter into a new relationship. This means that the foregoing risks will be topical and ongoing.

4.5. The panel was troubled by his relationship with [the earlier partner] which apparently had been approved by the [probation officer] and the prison governor. Although not currently the case, they had previously been intimate and there is the prospect of them being so in the future, resulting in the potential to replicate a situation which could provoke his triggers and cause an extreme reaction, as past behaviour with other women has shown. This could place her at risk of serious harm. There may be other circumstances in which [the earlier partner] might withdraw her support, upon which [the Applicant] is highly dependent, which could destabilise him.

4.6. From his evidence, the panel decided that [the Applicant] had very little understanding around his behaviour leading up to the recalls, why he made those serious threats, how they affected the recipient, and what strategies he had in place to avoid a similar situation. He demonstrated few internal controls with the effect that the risk management plan was almost entirely dependent on external controls, which is not a happy situation as most successful plans rely on a

combination of the two.

4.7. An example of his lack of appreciation of how to manage his risk factors was demonstrated when he acknowledged excess alcohol consumption as a significant risk factor, yet expressed no determination to abstain, instead insisting he would be able to manage the extent of his drinking. This despite acknowledging that his behaviour can and did escalate quickly, fuelled by alcohol.

4.8 [the Applicant] has admitted to a lack of trust with previous [probation officers]. His current [probation officer] has only known him since February 2022 so their relationship is in its infancy. In the past, he has failed to confide in his [probation officer], for example by concealing his increasing alcohol consumption and relationship problems.

4.9. The panel noted that the [probation officer] felt that [the Applicant's] risk could be managed in the community. She said it came down to honesty and communication skills. The panel considered but rejected her conclusion. She had limited knowledge of [the Applicant] and past experience contradicts her optimism in that he has failed to disclose important information to her predecessors and there is no evidence to suggest things will be different in future. Also, she has not taken sufficiently into account his lack of internal controls. Nor has she attached the same importance as the panel to his statement that he does not intend to stop drinking altogether. The panel considered that risk of serious harm was imminent if [the Applicant] experienced relationship problems and began drinking.

4.10. On the face of it, [the Applicant] has complied with all the requirements of open conditions. His conduct within the prison and his exposure to the community in employment and on day and overnight temporary release has been entirely satisfactory and that is to his credit. However, he states he is not currently in an intimate relationship, and the panel must look deeper and consider the inevitable situation when he embarks upon a new relationship or reignites an old one. Its concerns are related above.

4.11. Having undertaken an independent and robust risk assessment, the panel reached the conclusion that [the Applicant's] risk is not manageable in the community and therefore it was necessary for him to remain confined for protection of the public and so did not direct his release.

..."

24. Given the nature of the Index Offence and previous recalls to custody, it would not have come as a surprise to the Applicant that the panel would be concerned about his behaviour in relationships, including any potential for a future relationship with his earlier partner. The panel was entitled to consider the potential risk, there is nothing to demonstrate it had, as the Applicant submits, 'created its own evidence'. There was nothing irrational about the panel's decision.

25. The Applicant's claim of procedural unfairness is because the panel determined a need for further work in custody to address identified risk factors when no such work is available to him. It should be noted that the panel recognised this and suggested an alternative way in which work might be offered to the Applicant.

26. The Applicant questions how he is *'meant to get over the latest obstacle that the Parole Board has placed in his way ...'*. I am afraid that is an argument for the Applicant to put forward to the Secretary of State. The panel determined that the Applicant was not suitable for release and that there was a need for further work to address identified risk factors. Whether that work is or is not available is not a matter for the Parole Board.

27. It would be irrational of a panel to direct release where a prisoner does not meet the test for release but because there is nothing available to him or her in custody in terms of addressing risk. The public are properly protected while the Applicant remains in custody and it is a matter for others to now find ways to address the concerns raised by the panel. There may currently be nothing on offer, however, with the benefit of the panel's independent assessment, those responsible for the Applicant's progress in custody will now be able to consider ways in which his level of risk can be reduced.

28. There was nothing procedurally unfair in the panel's approach to this case.

Decision

29. This was on any view a serious and troubling case. Two crucially important issues I must decide are first, whether I am satisfied that the conclusions reached by the panel were justified by the evidence and secondly, whether its conclusions were adequately and sufficiently explained.

30. I am satisfied that the decision not to direct release was fully justified on the totality of the evidence. In a thorough and carefully reasoned decision which sets out, in detail, the findings, assessments, operative reasoning and conclusions of the witnesses, and takes fully into account all of the evidence given to the panel, including that of the applicant himself, the panel in my judgment satisfied the public law duty to provide evidence based reasons that in my judgment adequately and sufficiently explained the conclusions it reached.

31. 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.

Robert McKeon
10 October 2022