

[2022] PBRA 143

Application for Reconsideration by Higginson

Application

1. This is an application by Higginson (the Applicant) for reconsideration of a decision, dated 30 August 2022, by a two-member Parole Board Panel, refusing to direct his release.
2. The review was conducted by video conference on 12 August 2022. Evidence at the hearing was given by the Applicant himself, the Prison Offender Manager (POM), and the Community Offender Manager (COM).
3. I have considered this application on the papers. These comprise of the dossier, the decision of the Panel and the application for reconsideration. I have also listened to a recording of the relevant part of the oral hearing as identified by the Applicant.

Background

4. On 17 December 2010, the Applicant, at the age of 44, was given an Extended Sentence of Imprisonment on charges of robbery and burglary, having been convicted after trial. He received a total of 15 years, comprising of a custodial period of 10 years and a licence extension period of 5 years, expiring on 2 July 2025.
5. The robbery was perpetrated against an elderly victim in her own home. Wearing a full ski mask, the Applicant followed her around her home and searching for items in her bedroom, forced her to sit down before grabbing her wrist, taking her handbag and escaping. The burglary was committed, some five weeks later, against a wheelchair bound female, also in her own home. He forced her back before stealing her bank card, jewellery, passport and cash to the value of about £1500. He then used the bank card to withdraw further money from her account. On both occasions, he had initially cut telephone lines.
6. The Applicant already had an extremely poor criminal record of around 31 previous convictions for 92 offences, since the age of 10, including many burglaries and robberies and had served frequent terms of imprisonment. He had a long history of non-compliance with Court Orders and, in the current sentence was three times recalled after release. The first in July 2015 was automatic release on his conditional release date and lasted until June 2019, the second on 15 June 2020 followed a paper hearing and lasted only a month, and the third on 15 September 2021 followed an oral hearing and lasted less than a week when the Applicant failed to comply with Approved

Premises sign-in requirements and numerous attempts to contact him failed. On all three occasions drugs or alcohol were suspected.

Request for Reconsideration

7. The application for reconsideration comprises a 4-page document, prepared by the Applicant's Legal Representative.
8. The function of the Reconsideration Assessment Panel (RAP) is limited to the reconsideration of the statutory limbs of challenge of irrationality or procedural unfairness. The application seeks reconsideration only on the grounds that the decision was irrational. It is not necessary to reproduce the application in full, but all sections have been considered and the aspects relevant to the issues of irrationality are dealt with below.
9. In general terms the application submits *"a number of points which "the Applicant has asked us to raise in relation to the reasonableness of the decision"*:
 - (a) Irrationality:
 - i) That the Applicant had not been assessed as suitable for any offending behaviour related programmes to address his outstanding risks, triggers, emotional management and personality traits and, accordingly, could do nothing in custody to reduce his risks.
 - ii) That the Panel directing release in September 2021 were confident that releasing him would not place the public at risk, notwithstanding that such risks were still outstanding and, accordingly, in the absence *"of any further serious offending behaviour on this recall and on (the Applicant's) previous two recalls".... "his risk of serious harm had not significantly escalated in any way and his risks were and still are manageable in the community"*.
 - iii) Although the Applicant accepted that his decision to abscond and remain unlawfully at large *"was a poor one"* and he expressed *"great and genuine remorse"* for his actions, it had been inappropriate, on release, to place the Applicant in Approved Premises which also housed registered sex offenders and that more should have been done to house him in *"more appropriate Approved Premises"*.
 - iv) That in the absence of *"any further serious offending behaviour on this recall and on (the Applicant's) previous two recalls".... "his risk of serious harm had not escalated in any way and his risks were and still are manageable in the community"*.
 - v) A further twelve months in custody until his next Parole Review was *"simply not necessary nor proportionate as there was little or no prospect of progression during this period"*.
 - vi) Programmes were available in the community.
 - vii) The Panel did not meet the strict test for release and referred only to lack of offending behaviour work completed and to the Applicant's lack of insight.
 - viii) The attention of the "decision maker" was drawn to s6 and Article 5 of the European Convention of Human Rights (ECHR).
 - ix) In response to an RAP request for further particulars, the Applicant's Legal Representatives indicated that *"The particulars are provided in the subsequent paragraphs. In particular the COM's evidence which was heard last, in which it*

was confirmed that (the Applicant) has not been assessed as suitable for any further programmes, the BBR programme not being suitable due to (the Applicant's) offending history and the fact that there was an absence of any further serious offending behaviour on each of (the Applicant's) previous recalls".

Response from the Secretary of State

10. The Secretary of State (Respondent), by e-mail dated 30 September 2022, indicated that no representations were made in response to the application.

Current parole review

11. The Panel considered a dossier described (probably incorrectly) as then being of 285 pages and, in a comprehensive 10 page decision, dealt in detail with the index offence, the circumstances of recalls and the Applicant's criminal background including poor response to supervision and trust in the community. It set out an extensive list of core risk factors and problematic personality traits making it "*hard to believe*" that he will be manageable and compliant if released. It also found that protective factors which might help to prevent further offending and causing serious harm were "*difficult to identify*".

12. The Panel indicated that, following recall, professionals had identified the need for further interventions to address risks and needs but that the Applicant had made it clear that he would not engage in interventions in custody. He had low motivation to complete further work. There was no support for release from professionals who were concerned by his approach to supervision and licence, identifying that core risk reduction work needed to be completed in custody. It was not, the Panel emphasised, for it to determine how best the needs were met but for the Respondent.

13. The Panel indicated concerns as to contradictions in the Applicant's evidence and his refusals to engage in interventions in custody, albeit indicating that he would engage within the community. It found him lacking in insight and self-awareness and externalising blame. It judged that while maintaining his innocence of the index offences, he struggled to identify any risks or positive pitfalls and offered no strategies to address issues or concerns or the disinhibiting effects of substance misuse.

14. The Panel concluded that, although the Applicant had completed some work to examine his behaviour and address his offending, treatment needs still remained. Core risk reduction work had been identified, work which needed to be completed within the security of closed conditions. He needed to be able to work openly and collaboratively with those responsible for monitoring and managing his risk, and risk of escape from open conditions was current. It stressed its findings that the Applicant was "*a poor historian*" and his self-reports unreliable leaving professionals "*baffled*" by his ability to say things and then deny them. Risk factors remained largely unaddressed and it found that his risk was unmanageable in the community and that it was necessary for the protection of the public that he remained confined.

The Relevant Law

15. 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, (c) contains an error of law. This is an eligible case.

16. **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".

17. 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.

18. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1 and others**.

19. The common law duty to act fairly, as applied in this context, is influenced by the requirements of article 5(4) as interpreted by the European Court of Human Rights. Compliance with the common law duty should result also in compliance with the requirements of article 5(4) in relation to procedural fairness. Article 6 is relevant to criminal trials but does not impinge on this duty.

Discussion

20. In my judgment, the decision to refuse release cannot be said to meet the test of irrationality. The Panel, having clearly considered, with care, the documents in the dossier gave a clear and reasoned decision, and adopted a correct test for its decision. When considering a substantial dossier and detailed oral evidence, the duty of the Panel is not to identify, with particularity, each and every aspect of relevant issues but to show that both positive and negative aspects of a prisoner's case have been examined and a fair decision taken in accordance with the test required. I am fully satisfied that this has been done. Reconsideration is not a re-examination of evidence.

Decision

21. For the reasons that have been given, the RAP does not consider that the Panel's decision was irrational and, accordingly, the application for reconsideration is refused.

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