

[2022] PBRA 156

Application for Reconsideration by Wynne

Application

1. This is an application by Wynne (the Applicant) for reconsideration of a decision of an oral hearing dated 27 September 2022 not to direct release or recommend transfer to open conditions.
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)) 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:
 - The Decision Letter dated 22 September 2022
 - The Application for Reconsideration dated 11 October 2022
 - The Dossier, which contains 313 numbered pages, ending with the Decision Letter

Background

4. In 2007, when he was 21 years old, the Applicant received a sentence of Imprisonment for Public Protection with a minimum term of 2 years for wounding with intent to cause grievous bodily harm. He played a leading role in an unprovoked attack on two young men. He attacked one of the victims, punching and kicking him to the ground and stamping on him, causing a broken jaw, a broken nose and other injuries. He had been drinking alcohol and taking drugs.
5. The Applicant had previous convictions, including for dwelling-house burglaries and (in 2000) two offences of wounding with intent. He was 14 when he committed the latter offences. He has many convictions for driving offences.
6. During his current sentence he has been convicted of further offences: escaping from lawful custody (January 2015); dangerous driving and allied offences (July 2020); and driving under the influence of drugs (January 2021).



7. The Applicant has been released on licence and recalled three times. He was released in July 2017 and recalled in November 2017, after he crashed a car while under the influence of alcohol, for which he was disqualified from driving. He remained unlawfully at large for 5 months. He was next released in March 2019 and recalled in June 2020, after he was arrested for dangerous driving following a police chase. He received a sentence of 10 months' imprisonment.
8. Finally he was released on 10 December 2021 and recalled on 16 December 2021. This latest recall came about after an incident in the Approved Premises (AP) where he was residing. The panel's conclusion about that incident was that the Applicant, to his credit, did not retaliate against a man who attacked him, but demonstrated poor decision-making by not going to his room when asked by AP staff to do so. The Applicant accepted to the panel that in the short period he was on licence on this occasion he had smoked weed, used crack and heroin and drunk vodka, all in the AP with other residents. He said he had disclosed his drug use to the AP staff and sought help.

Request for Reconsideration

9. The application for reconsideration is dated 11 October 2022.
10. I must summarise the lengthy grounds put forward.
11. The grounds for seeking a reconsideration are as follows:
 - (1) The panel placed too much reliance on the recall incident, and did not properly assess what took place.
 - (2) The panel failed to give adequate regard to the fact that the Applicant has not committed any violent offences since the index offence. The panel's conclusion that the Applicant "*continues to pose a substantial risk to others*" was not borne out by the evidence and is irrational.
 - (3) The panel failed to give adequate regard to the Applicant's good conduct in custody since the latest recall.
 - (4) The panel failed to give adequate regard to the Applicant's insight into his substance misuse as a risk factor. The panel failed to give adequate regard to evidence linking his substance misuse to his not being able to access medication for his Attention Deficit Hyperactivity Disorder (ADHD).
 - (5) The panel failed to give adequate consideration to the robust nature of the risk management plan.
 - (6) The panel applied the wrong test for release by not being able to substantiate that a lapse into drugs or alcohol at this stage would directly lead to an unacceptably high risk of serious harm to others.
 - (7) The panel's conclusion that the Applicant had further core risk reduction work to carry out in custody was not borne out by the evidence at the hearing. The conclusion is irrational.
 - (8) The decision not to recommend a move to open conditions was irrational in the circumstances, because the Applicant would not be unsupervised in the community for several months.
12. The only issue raised in the Application is irrationality.

Current parole review

13. The Secretary of State referred the Applicant's case to the Parole Board for consideration of release or, alternatively, a recommendation for a transfer to open conditions. The Applicant sought release.
14. A panel consisting of 2 independent members and a psychologist member of the Parole Board heard the case remotely, by video link. The hearing was adjourned on the day because the Community Offender Manager (COM) referred to a document which neither the panel nor the Applicant's representative had seen, because the Applicant proposed a release address which had not been assessed for suitability, and for other reasons.
15. The panel considered the dossier, which at that stage consisted of 298 pages, and in addition a further report from the COM and the Applicant's representative's submissions. The panel heard oral evidence from the COM, the Prison Offender Manager (POM), an Addictions Therapist (the Therapist) and the Applicant. The Applicant was represented throughout, and his representative asked questions of the witnesses as he thought appropriate and made written final submissions.

The Relevant Law

16. 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.
17. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.
18. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:
"The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."

Parole Board Rules 2019 (as amended)

19. 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)).

20. 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)).
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 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.

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.

25. In **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with respect to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied. ... [T]his approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury ... but it is preferable in my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion."*

The reply on behalf of the Secretary of State

26. The Secretary of State has chosen not to make any representations in response to the Application.

Discussion

27. Some of the Grounds for the Application need be only briefly discussed. Grounds (2) and (6), for example, are premised on the (manifestly incorrect) assumption that the Applicant's demonstrated tendency to breach his licence by driving after consuming alcohol and drugs does not pose a substantial risk of harm to others.

28. As to Ground (3), the panel acknowledged the Applicant's generally compliant behaviour in custody following recall, but of course had also to consider the behaviour on licence that had three times led to his recall. Good behaviour in custody does not necessarily transpose into good behaviour in the community.

29. Ground (8) relates to the decision not to recommend transfer to open conditions, which cannot be the subject of reconsideration.

30. Ground (7) refers to the panel's opinion that core risk reduction work remains outstanding. The panel based that conclusion on the fact of the recurring issues on release, which indicated that previous work may not have been of adequate intensity or entirely effective. That is a proper evidential basis for the conclusion the panel reached. It is not for the Parole Board to plan the Applicant's sentence, but it may be worth noting that the Applicant has refused to consider doing any further work except in the community.

31. As to Ground (5), the panel carefully considered the risk management plan (RMP), and found it to be insufficient to manage the Applicant's risk. It does not seem that any address was proposed for residence except that of his partner (E), who had been involved in earlier breaches of his licence and harboured him when he absconded, and that of a family member, who, when asked, refused to offer the Applicant accommodation. The panel pointed out that a placement at an AP would not strengthen the plan sufficiently, given the Applicant's rapid descent into drug use following his most recent release. The panel gave a clear explanation for its finding that the RMP was not robust enough. The fact that the Applicant disagrees with the panel's conclusion does not make the conclusion irrational.

32. The same applies to the remaining Grounds: (1) the panel's assessment of the significance of the recall events; and (4), the relevance of the Applicant's insight into drug abuse as a risk factor. These were matters for the panel to weigh, and it did so after considering all relevant evidence. The Application does not suggest otherwise.

33. More specifically, the panel's conclusion as to the recall events is summarised above. See Paragraph 8. The panel accepted that there were positive aspects to the Applicant's behaviour, but noted his refusal to co-operate when he was told to defuse the situation

and go to his room. The Applicant regarded this as assertive rather than aggressive behaviour: the panel thought it ill-judged. Be that as it may, the Applicant's use of a variety of drugs (and alcohol) so soon after his release was sufficient both to justify recall and to raise concerns about the future.

34. Again, the panel gave careful consideration to the evidence about the Applicant's insight into his substance misuse, particularly that of the Therapist, whose proposal was based on the assumption that the Applicant would reside in an AP if released. The Applicant's own evidence was that his future plans depended heavily on E. The panel concluded that the Applicant did not present as wanting to take responsibility for his own abstinence and conduct but rather as relying on others to do things for him, which is a recurrent pattern. These were evidence-based findings, and cannot be criticised as irrational.

35. In summary, the Grounds for Reconsideration advanced in the Application are either misconceived or amount to disagreement with the panel's conclusions, rather than establishing irrationality.

Decision

36. For the reasons I have given, I do not consider that the decision was irrational. and accordingly the application for reconsideration is refused.

Patrick Thomas KC
4 November 2022