

[2022] PBRA 164

Application for Reconsideration in the Case of Foster

Application

1. This is an application by Foster ("the Applicant") for reconsideration of the decision of a Panel of the Parole Board ("the Board") which on 26 September 2022, after an oral hearing on 21 September 2022, declined to direct his release. The decision was provisional because it was eligible for reconsideration under Rule 28(1) of the Parole Board Rules 2019.
2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.
3. 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.
4. I have considered the following documents for the purpose of this application:
 - The dossier provided by the Secretary of State ("the Respondent") which now contains 551 numbered pages;
 - The Panel's decision letter ("DL");
 - The undated Application for Reconsideration ("the Application") together with submissions in support

Background

5. The Applicant is now aged 30 and on 7 November 2012 received an extended determinate sentence comprising an 11 year custodial term and an extended licence period of 5 years for rape, false imprisonment and two counts of wounding with intent to cause grievous bodily harm ("the index offences").
6. The Applicant has a previous criminal record of convictions for 60 offences including robbery, ABH, assault, battery, assault PC, public order matters, criminal damage,



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possession of an offensive weapon, possession of drugs, aggravated vehicle-taking, burglary and theft.

7. The index offences were committed 5 days after his release on licence from a previous custodial sentence for battery. The Applicant gained entry to a flat and carried out unprovoked assaults on the two victims. He demanded money and made threats to kill them if they called the police. He threatened them with a pool cue and demanded that they stripped. He anally raped one of the victims whilst he was unconscious as a result of the assault. It appears that at the time of the incident he was under the influence of cocaine and had consumed a considerable amount of vodka.

Current parole review

8. The Applicant was released automatically on 11 June 2018. He was recalled on 9 July 2018 after failing to return to the Approved Premises and being found at an unapproved address.

9. Since his recall the Applicant has been sentenced as follows:

- In June 2019 to 16 months imprisonment for an offence of assault occasioning actual bodily harm on a prison officer committed in July 2017 prior to his release;
- In August 2020 to 24 months imprisonment for s.20 GBH following an assault upon a fellow prisoner in December 2018;
- In December 2021 to 40 weeks imprisonment for assaulting prison officers in December 2019 and March 2020;
- In January 2022 to 16 weeks imprisonment for assaulting a prison officer in December 2020.

10. This is the Applicant's fourth review since his recall to prison to decide whether or not to direct his release on licence.

11. The case was allocated to a Panel, which comprised two independent members of the Board and a psychologist member. The Panel was chaired by one of the independent members.

12. The Applicant was represented by his solicitor who sought a direction for release.

13. At the hearing on 21 September 2022 evidence was given by:

- a) A Senior Probation Officer as stand-in for the Prison Offender Manager ("POM");
- b) A Senior Probation Officer as stand-in for the Community Offender Manager ("COM");
- c) The Applicant

14. The professional witnesses are currently precluded from making recommendations to the Panel in relation to the statutory test for release.

Request for Reconsideration

15. Paragraph 3 of the Application states, "*The application for reconsideration is made on grounds relating to both irrationality and procedural unfairness, namely that the panel both included evidential errors and misrepresented the evidence presented in their decision delivered 26th September 2022.*"

These grounds will be discussed in detail below.

The Relevant Law

The test for re-release on licence

16. The test for re-release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the Panel in its decision. Indeed, nowadays, the test is automatically set out in the Board's template for oral hearing decisions.

17. Under Rule 28(1) of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.

18. 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 contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.

19. In this case the Applicant is serving an extended determinate sentence of imprisonment and a decision was made by the Panel at an oral hearing not to direct his release on licence. It is thus eligible for reconsideration.

Irrationality

- 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."

- 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

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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.

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

It is helpful to refer to decisions of the courts or reconsideration panels of the Board which identify three specific situations in which a decision of a panel of the Board may be regarded as irrational.

The first of those situations is where the panel has failed to give sufficient reasons for its decision. The importance of giving reasons was reiterated in **R (on the application of Stokes) v Parole Board [2020] EWHC 1885 (Admin)**. In that case the court cited the following explanation given by Lord Carnwath in **Dover District Council v CPRE Kent [2017] UKSC 79** for the need to give reasons in public law decision-making:

'I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the [decision maker] should be disclosed... It is to be noted that a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so to make effective the right to challenge the decision by judicial review.'

It follows that a panel of the Parole Board must provide sufficient reasons to explain its logic and how its conclusion follows from the evidence put before it. There should not be an "*unexplained evidential gap or leap*": see the decision of Mr Justice Saini in **R (on the application of Wells) v Parole Board [2019] EWHC 2710 (Admin)**.

This principle has been endorsed in a decision of a reconsideration panel in which HH Michael Topolski QC [now KC] directed a re-hearing because the panel had failed to give sufficient reasons for its decision. He stated: "*[The Panel] had to be satisfied that there was evidence of change and reduction of risk ... in my judgment it has not in a detailed decision pointed to evidence of a risk reduction in any key area. It can be said that given the circumstances that led to recall and the subsequent events in prison, the evidence pointed in a different direction ... the obligation upon the panel was to provide a decision that fully explained and fully justified their conclusions*".

Other situations are (1) where the decision is '*outside the range of reasonable decisions open to the decision-maker*' (this is the familiar 'Wednesbury unreasonable' test which has been applied for many years by the courts in public law cases), and (2) where '*manifestly disproportionate or inadequate weight has been accorded to a relevant consideration*' (see **R (Gallagher) v Basildon DC [2011] PTSR 731 at §§31, 41; De Smith's Judicial Review at §11-029.**)

The reply on behalf of the Respondent

20. By email of 14 November 2022 it was confirmed that the Secretary of State offers no representations in relation to the Application.

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Discussion

21. In dealing with the grounds for reconsideration, it is necessary to stress certain matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgement of the Panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration is entitled to substitute his/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.
22. The second matter of material importance is that when deciding whether a decision of the Parole Board was irrational, due deference has to be given to the expertise of the Parole Board in making decisions relating to parole.
23. Third, where a Panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the Panel.
24. I move now to consider in detail the grounds put forward by the Applicant and his arguments in support.

Under a heading **EVIDENTIAL ERRORS AND MISREPRESENTATION OF THE EVIDENCE** the Applicant raises two issues:

(A) IMPROVED CUSTODIAL CONDUCT

25. At para. 4(3) of the DL the Panel states: *"The panel were impressed by the insightful evidence of [the Applicant] and his ability to abstain from any violent conduct for 18 months which evidences that he has the capacity to manage his emotions appropriately. However the panel note that [the Applicant] is currently detained within a **Category B** prison and that his improved conduct has largely been during a time when pandemic restrictions have been imposed."*
26. The Applicant complains that the nature and extent of the restrictions imposed due to the Covid-19 pandemic at this time were not explored in evidence before the Panel.
27. Parole Board panels have become well aware since 2020 of the restrictions and regimes which have had, from time to time, to be put in place in prisons and their effect on prisoners and staff. There are indications within the written evidence (e.g dossier pp.291, 293) that at the prison where the Applicant currently resides and

where his conduct has shown an improvement, these were taking a conventional form and the Panel was entitled to assume, in the absence of evidence to the contrary, that the Applicant has been the subject of the customary restrictions imposed by a Category B regime and the necessary requirements of the pandemic.

28. The Panel also uses the qualifier "largely" and, in any event, if the Applicant's instructions were that the restrictions to which he was subject, as a result of his status and/or the Covid-19 regime, were unusually relaxed or out of the ordinary, it was open to him to provide those details in his own evidence or to have this elicited from the professional witnesses so as to enable his solicitor to make appropriate submissions to the Panel. There is no indication in the Application that the Applicant's evidence would, in fact, have been to such effect.
29. The Panel notes (para 2.4 of the DL) that, following his recall to prison, the Applicant continued to accrue adjudications (over 80) including being violent to staff and prisoners being threatening and abusive, destroying property, disobeying orders and endangering health and safety. The Applicant sought to link this behaviour (which he does not appear to dispute) to his lengthy periods of isolation.
30. It is correct that whilst at a previous prison establishment the Applicant spent considerable periods in segregation. However, this was not always the case and it would appear that this violent behaviour (which continued into early 2021), including the criminal offences for which he was sentenced following his return to custody, were not all confined to his time in CSU (the Segregation Unit).
31. I do not find any procedural unfairness in the Panel's handling of this issue nor, on the basis of the evidence before them, any irrationality in the findings at which they arrived.

(B) INTERVENTIONS

32. It is submitted on behalf of the Applicant that the Panel's finding at DL para 4.3 that he "*has not engaged in any interventions to reduce risk*" is a misrepresentation of the evidence. This is a bold submission while I note that it is acknowledged on behalf of the Applicant that no formal accredited interventions had taken place (Application para. 15).
33. The Panel was aware that the Applicant had undertaken 1:1 sex offender work within the Citizenship Programme which he completed, that it was the evidence of the POM that he continued to resist completing groupwork interventions in a prison environment and that there was core risk reduction work to be completed in relation to anger management and coping mechanisms although, in her opinion, that could be completed in the community. In addition, the COM noted that the Applicant had not completed any structured work around violence although 1:1 work had been completed in supervision sessions.

34. In my view, the Panel set out their concerns and conclusions with considerable clarity. They noted the lack of completion of any structured programmes to address the Applicant's risk of causing serious harm and the lack of interventions completed to address the risk of future violence. The Panel noted that the Applicant was a high risk offender who had not undertaken the necessary structured work and found that they could not be sure that the risk management plan would be capable of managing his risk of serious harm if released at the current time, particularly as his ability to manage himself in a less secure environment, had not, in their view, yet been sufficiently tested.
35. I find that the Panel took proper account of the evidence and views of the professionals, which it in no way misrepresented, and that, on the basis of the evidence before it, the Panel was entitled to come to the conclusion that the work which (it acknowledged) the Applicant had undertaken was insufficient to allow of his high risk of causing serious harm being safely managed in the community and that it was necessary for the identified work to be undertaken in custody prior to release.
36. I am satisfied that the Panel provided sufficient reasons for coming to their conclusions and decision and, in my view, there is nothing to justify a finding of irrationality or unfairness in this regard.

Decision

37. 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.

PETER H. F. JONES
19 November 2022