

[2022] PBRA 62

Application for Reconsideration by Lee

Application

1. This is an application by Lee (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 4 April 2022 not to direct his release.
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. These are the decision letter, the dossier, and the application for reconsideration. I have also seen the original application for reconsideration personally drafted by the Applicant.

Background

4. The Applicant was sentenced on 27 July 2017 following conviction for robbery, two counts of theft, dangerous driving, using a vehicle while uninsured, driving otherwise than in accordance with a licence, failing to provide a specimen for analysis, possession of a bladed/sharp pointed article in a public place, threatening with a bladed/sharp pointed article in a public place and affray. Sentences imposed for all offences apart from the robbery have now been served. The Applicant received an extended sentence of imprisonment for six years followed by an extended period on licence for four years in respect of the robbery.
5. His conditional release date is 22 December 2022. The panel was therefore concerned with the management of his risk until that date. At the date of the hearing (30 March 2022), this was just under nine months.
6. The Applicant was aged 42 at the time of sentencing. He is now 47 years old.

Request for Reconsideration

7. The application for reconsideration is dated 27 April 2020. It has been drafted and submitted by solicitors acting on the Applicant's behalf. The application notes that the Applicant had submitted his own application for reconsideration which was not accepted since it did not set out how the matters mentioned within it affected his prospects of release. I have read that initial application as reference is made to it within the application drafted on the Applicant's behalf.



8. The application submits that the panel's decision not to direct his release was irrational. No matters of procedural unfairness are raised. These submissions are supplemented by written arguments to which reference will be made in the Discussion section below.

Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State in March 2020 to consider whether or not it would be appropriate to direct his release. This was his first parole review.
10. The case proceeded to an oral hearing before a panel of two independent members and a psychologist specialist member on 30 March 2022. It was held by video conference. Oral evidence was taken from the Applicant, his Prison Offender Manager (POM), his Community Offender Manager (COM) and a prison psychologist. The Applicant was legally represented throughout.
11. None of the professional witnesses recommended the Applicant's release. The Applicant was seeking release. The panel did not direct the Applicant's release.

The Relevant Law

12. The test for release on licence is whether it is no longer necessary for the protection of the public that the Applicant should be confined. The test is automatically set out in the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019

13. 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)).
14. 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

15. 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."

16. 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.

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

The reply on behalf of the Secretary of State

18. The Secretary of State has submitted no representations in response to this application.

Discussion

19. It is submitted that the risk factors mentioned in the panel's decision have not been prevalent, and without their presence, it is irrational not to direct release.

20. The application goes on to list the risks noted in the decision: a lack of suitable accommodation, education and employment opportunities, relationship issues, the Applicant's lifestyle and associates, drug and alcohol misuse, and unhelpful thinking, behaviour, and attitudes. It further notes the panel's addition of emotional management as an additional risk factor.

21. It sets out several arguments all of which can essentially be taken as saying that each of the identified risk factors are not, in fact, present now and would therefore not be present in the community. It further argues that it was irrational of the panel to place weight on historical risk factors it claimed were no longer present.

22. It concludes by arguing that the panel had given no appropriate justification as to why the Applicant could not be re-released into the community and, as such, no other rational panel could have concluded as it did.

23. The decision notes there was no professional support for release and that the Applicant had not completed any accredited risk reduction work. While acknowledging the last instance of violence was some years ago, the decision notes the panel's concern at the capacity for, and imminence of, violence if the Applicant was under the influence of substances or placed in a situation of conflict.

24. The decision rightly acknowledged the relative short risk period under consideration but noted the panel's agreement with all professional witnesses that the Applicant presented a high risk of serious harm and that his risk could be imminent. While the risk management plan was robust and focussed on the Applicant's risk, the panel did not consider it would be effective. Again, it set out clear reasons for that decision.

25. It is submitted that the panel irrationally jumped to a conclusion that the Applicant was not ready to be released. The legal test for irrationality sets a high bar which, put simply, the legal test is not just 'would *another panel* have reached a different conclusion?' but 'would *every other panel* have reached a different conclusion?'. On the evidence I have seen, I cannot conclude that the panel's decision was irrational in law. Even if the Applicant's assertions that his risk factors are no longer present are true, three professional witnesses did not think he met the release test, even over a short

period. The panel had to decide whether it preferred the views of the Applicant, or the professional witnesses and it concurred with the professional witnesses. It is difficult to see how such a decision could be irrational, particularly given the panel's clearly articulated reasons for its decision. I conclude that the Applicant's submissions do not meet the high threshold required for a finding of irrationality.

Decision

26. For the reasons I have given, I consider that the panel's decision was not irrational. No matters of procedural unfairness were raised. Accordingly, the application for reconsideration is refused.

Stefan Fafinski
12 May 2022