

OFFICIAL-SENSITIVE

[2023] PBRA 89

Application for Reconsideration by Mote**Application**

1. This is an application by Mote (the Applicant) for reconsideration of a decision of a Panel of the Parole Board, dated the 4 April 2023, following a video-link oral hearing on 7 March 2023. The decision of the Panel was not to direct 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. This is an eligible case.
3. I have considered the application on the papers. These are the decision of the Panel, the application for reconsideration and the dossier (consisting of 681 pages).

Background

4. The Applicant was sentenced on 10 February 2017 to an Extended Determinate Sentence of Imprisonment for a total period of 10 years consisting of a 6 year custodial period and 4 years extension, on 2 counts of robbery and 1 of attempted robbery. His Parole Eligibility Date (PED) was 20 June 2022, Conditional Release Date (CRD) June 2024 and Sentence Expiry Date (SED) June 2030.

Request for Reconsideration

5. The application for reconsideration is dated 26 April 2023 and submitted by the Applicant's Legal Representative. It seeks reconsideration on the grounds that the decision is irrational and is illegal due to an error of law.
6. The grounds for seeking a reconsideration, are set out in considerable detail in 11 pages of closely argued submissions. It is not necessary to reproduce the application in full, but all sections have been considered and aspects relevant to procedural unfairness and error of law are dealt with below.
7. The Applicant submitted:

Irrationality

8. The decision was irrational in finding that the Applicant had not sufficiently addressed his triggers concerning his use of violence or developed his internal controls, for two reasons:
- I. That it failed properly to examine the reasons for his offending and the context in which it took place – in particular his drugs addiction and consequential debt to drug dealers, and to give proper credit for his positive and protective factors.
 - II. That *"there has been insufficient attention given to (the Applicant's) use of time and conduct whilst in custody."*
9. In relation to each of the two reasons considerable detail is given as to evidence, in particular that of the Applicant, and submissions made as to the Panel's suggested misinterpretation of that evidence. As indicated in Paragraph 6 above, all aspects of the submissions have been fully considered.

Error of Law (Illegality)

10. That the Panel's interpretation of **Johnson EWHC 1282** was wrong and, "therefore" the decision was unlawful. Notwithstanding that the Panel had adopted and based legal aspects of its decision on the, then, current, Guidance of the Parole Board, that guidance had been found incorrect in the case of **R(Dich & Murphy) v Parole Board [2023] EWHC 945 (Admin)** and "despite the panel concluding that risk could not be managed indefinitely, no attempts have been made to engage with the test as outlined in Johnson, nor have any attempts been made to address the causal link which necessitates continued confinement".

Response from Secretary of State (The Respondent)

11. The Respondent by e-mail dated 3 May 2023, indicated that no representations were made in response to the Application.

Current parole review

12. The Panel considered a Dossier, then of 634 pages and, after the conclusion of the oral evidence, received written submissions from the Applicant's Legal Representative, occupying some 7 pages containing 79 paragraphs, dealing with an extensive overview of evidence, risks and protective factors and submitting that the proposed Risk Management Plan (RMP), coupled with the Applicant's own relapse prevention plan would enable him to be managed safely in the community.
13. The case was referred to the Board by the Respondent on 9 September 2021 as an Extended Sentence Case Referral and the Board asked to consider whether to direct release. It was the Applicant's first Sentence Review. At the oral hearing, the Panel heard evidence from the Prison Offender Manager (POM), the Community Offender Manager (COM), two Constructive Conversations Facilitators (CCFs), a Prison Forensic Psychologist (AS), an Independent Forensic Psychologist (MD), an Acting Prison Governor (AP), an Imam (TM), and from the Applicant.

14. In its 17 page decision, the Panel dealt in detail with the Applicant's offending history which, including the index offending, had all been of serious criminality committed over a period of some 4 months and for all of which he had received meaningful prison sentences, two of the index offences being committed whilst on bail for others. Amongst the matters specifically considered by the Panel and in relation to which the Applicant, himself, had given evidence:
- i. It identified an extensive list of risk factors which went well beyond the drugs addiction and involvement as highlighted by the application and included difficulties in relationships (both intimate and non-intimate) and poor emotional control, lack of consequential thinking and poor problem solving and coping skills.
 - ii. It recorded that he had completed the Thinking Skills programme in 2019 and had, for a variety of reasons, not completed any accredited violent reduction work during his sentence. The opinion of the Psychological witnesses as to risk reduction varied between a finding of continued lack of insight into his risks and management of them, and an assessment that his insight into his violent offending was "*partial*".
 - iii. Concerns had been expressed about the Applicant's suggested extremist beliefs and attitudes but the view of TM had been that these related more to "*misconceptions*" in ideology and that non-accredited courses including a Constructive Conversations course delivered by the CCFs, for the first time, after one day training resulted in lack of concerns as to ideology or extremist views.
 - iv. Although the Applicant was said to have completed all in-cell workbooks on alcohol and drug prevention, wished to seek further help on release and suggested (as had the POM) that the Applicant's Muslim faith would act as a protective factor, he had, as recently, as April 2021, received an adjudication for being involved with a controlled drug. This was the most recent of a wide spectrum of adjudications in what was considered to be "mixed" custodial behaviour.
 - v. There had been a series of serious in-prison attacks upon the Applicant including stabbings. These had had a profound effect on him including development of "*acute severe anxiety against a background of Post-Traumatic Stress Disorder (PTSD)*". He had received limited assistance for mental health help in relation to possible autistic trends but, in January 2022, had been moved into a Health Care Unit which, although providing protection, was said both to limit the Applicant's access to programmes and interventions and to restrict his ability to demonstrate learning and coping skills in potentially risky situations.
 - vi. The Applicant, himself, had claimed to be a "*totally different person*" having "*wasted seven years of my life.*" He cited willingness to ask for help, management of conflict by withdrawal, a greater trust, greater victim empathy and knowledge of warning signs indicating increase in risk.
 - vii. The views of professional witnesses were examined:
 - a. The POM had reported on a "*vast improvement*" in behaviour and that, although a location transmission would be an ideal way of testing it was "*not essential*", as his risk was causing serious harm, she considered, prison specific and not imminent. She advised that the RMP was "*really robust*" with a lot of support and external controls.

- b. AS considered a pattern of the Applicant's feeling under threat remained unaddressed and was concerned that the Applicant placed over-reliance on avoidance as a coping strategy. He remained of the view that the Applicant had attempted to radicalise other prisoners and that periods of transition and exposure to peer influence might cause a turn to extremism.
- c. MD, who had not used any validated risk instrument to inform his assessment, considered that the Applicant displayed some features of autism and that he should be assessed for a neurodevelopment disorder. This issue was fundamental, "*probably underlying a lot of problems and risk in the index offences*" but probably would make no difference in provision in the community. He considered that core risk reduction work had been done "*partially*" and that further work was necessary around links between his relationship history and his risk. Although MD remained concerned about the Applicant's mental state he advised that, because the triggers were known, they could be managed and supervised by Probation and mental health provision was "*not essential.*"
- d. The COM spoke of her discussions with a psychologist attached to the National Security Division and believed the Applicant had outstanding needs in addressing his use of violence and his Post Traumatic Stress Disorder (PTSD). The psychologist had advised that 1:1 psychological intervention should be done although it was accepted that, in relation to extremism, no core risk reduction work was outstanding. The COM, nonetheless was confident that the Applicant would comply with the RMP and licence conditions and that professionals would be able to detect any escalation in risk or lack of honesty with them.

15. In conclusion, the Panel found that, although the RMP was as robust as could be designed, it was not capable of managing the Applicant's risk because it was over-reliant on external controls and the Panel having assessed the evidence and "*particularly that given by (the Applicant)*" assessed internal controls to be underdeveloped and coping skills limited to avoidance and isolation. The controls provided in the Health Care Unit could not be replicated to the same extent in Approved Premises. Although the Applicant had completed TSP and had engaged with the substance misuse team and with Constructive Conversations, the Panel echoed the concerns of professional witnesses that no specific violence reduction work had been completed. It was not satisfied that he had fully addressed the triggers to his index offences and his coping strategies were underdeveloped. The Panel was unable to assess whether his improvement in behaviour was attributable to his own coping strategies or whether the strong external controls provided in Health Care was mainly responsible. It was necessary for the Applicant, before the RMP could be considered effective "*indefinitely*", to develop his internal controls and accordingly the Panel did not direct release. In coming to this conclusion, it specifically found that there were no current extremism concerns and that no further work was necessary in that regard.

The Relevant Law

16. The panel correctly sets out in its decision letter the test for release, in accordance with the law as it then stood.
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. In the case of an extended determinate sentence, in considering whether only risks that might arise before the SED date or risks that might arise indefinitely after that date, the Panel was required to consider the latter.

Irrationality

18. 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."

19. 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.
20. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.
21. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: *"there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."* See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide *"objectively verifiable evidence"* of what is asserted to be the true picture.
22. 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."

Error of Law/Illegality

23. An administrative decision is unlawful under the broad heading of illegality if the panel: (a) misinterprets a legal instrument relevant to the function being performed; (b) has no legal authority to make the decision; (c) fails to fulfil a legal duty; (d) exercises discretionary power for an extraneous purpose; (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or (f) improperly delegates decision-making power.

24. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Discussion

25. I have carefully considered this application and am satisfied that there has been neither irrationality nor an error of law in the decision. The Applicant was represented by an experienced Legal Representative who, following the hearing, in a 7-page written submission fully outlined his client's case.

Irrationality

26. I find that the decision of the Panel was set out by way of a thorough and well-balanced examination of the issues and evidence and that its conclusions were set out clearly. Reconsideration is not a re-examination of the evidence.

Illegality

27. It is not suggested that, in law, the decision was incorrect, in accordance with the, then, Parole Board guidance as to the law either at the time of the hearing or the date of the decision notwithstanding that there was no formal review of the effect of the Johnson judgment. A reconsideration of the Panel's decision is limited to the decision as then promulgated and any challenge based on a change of law must be made elsewhere.

Decision

28. For the reasons I have given, I do not consider that the decision was irrational or incorporated an error of law and accordingly the application for reconsideration is refused.

E. Slinger
15 May 2023