

[2020] PBRA 67

Application for Reconsideration by Knott

Application

1. This is an application by Knott (the Applicant) for reconsideration of a decision of an Oral Hearing Panel dated 14 April 2020 not to direct his release or recommend open conditions.
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 dossier comprising 235 pages, the Decision Letter and the Application for Reconsideration.

Background

4. The Applicant is now 32 years of age. He was sentenced to a mandatory life sentence for murder on 5 October 2007.
5. The victim of the index offence was a 30 year old man who was not known to the Applicant. The Applicant had been drinking and had taken drugs. He was carrying two knives that evening and he used one of them to stab the victim three times during an incident in a public house.
6. The Applicant pleaded guilty on the day of trial. He was 19 years of age when he committed the index offence. His tariff of 13 years with the deduction of time spent on remand expired on 21 March 2020.
7. In August 2017 a panel of the Parole Board, following an oral hearing, recommended to the Secretary of State that the Applicant be transferred to open conditions. That recommendation was accepted by the Secretary of State and in November 2017 he transferred to open conditions.
8. The Applicant was then returned to closed conditions on 27 May 2018 due to allegations of rule breaking. Having received a warning, the Applicant was returned to open conditions on 30 April 2019, and he remained there until 4 December 2019 when he was returned to closed conditions for disclosing using drugs on an overnight release on temporary licence (ROTL), and testing positive during a mandatory drug test.



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Request for Reconsideration

9. The Application for Reconsideration is dated 30 April 2020 and was submitted by the Applicant himself.
10. The Applicant has set out his complaints in a detailed narrative. The grounds for seeking reconsideration are summarised as follows:
 - i. That the decision incorrectly identifies risk factors as including drug and alcohol misuse, a willingness to use weapons, poor consequential thinking and emotional management;
 - ii. That the Offender Manager supported release in their report and then changed their recommendation following the Applicant's return to closed conditions which was irrational;
 - iii. That there had not been any positives highlighted in his hearing in particular the lack of violence and weapons in custody, his remorse, the length of time he maintained his enhanced Incentive and Earned Privilege (IEP) status, the completion of offending behaviour courses and the completion of ROTLs; and
 - iv. That the decision was irrational as it was not a balanced assessment, it was instead based on one incident of relapsing which he has accepted responsibility for and a lack of motivation, which he disputes.

Current parole review

11. The Applicant's case was referred to the Parole Board by the Secretary of State to consider whether or not it would be appropriate to direct his release and, if release was not directed, to advise the Secretary of State on whether he continued to be suitable for open conditions.
12. An Oral Hearing was convened on 3 April 2020 and on that date the panel heard evidence from the Applicant, his Offender Supervisor (OS) and his Offender Manager (OM).
13. This case was considered during the COVID-19 pandemic and the subsequent restrictions when all face to face oral hearings had been halted. As a result, the hearing was conducted via telephone link.
14. The OS and OM did not support release, and both recommended that the Applicant remain in closed conditions to engage in core risk reduction work.

The Relevant Law

15. The panel correctly sets out in its decision letter dated 14 April 2020 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.



Parole Board Rules 2019

16. 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.
17. 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**.
18. Therefore, the Applicant's request for the Reconsideration Assessment Panel to reconsider the decision not to recommend suitability for open conditions is not within my power.

Irrationality

19. 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."

20. 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.
21. The application of this test has been confirmed in previous decisions on applications for reconsideration under Rule 28: **Preston [2019] PBRA 1** and others.
22. 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.

The reply on behalf of the Secretary of State

23. The Secretary of State did not submit any representations in response to this application.

Discussion

24. I will take each of the summarised grounds in turn, each of them based on the argument that the Panel’s decision was irrational.

Ground (i): That the decision incorrectly identifies risk factors as including drug and alcohol misuse, a willingness to use weapons, poor consequential thinking and emotional management.

25. The Applicant makes reference to risk factors identified in section 4 of the decision letter and details those that he submits are incorrect. It is important to clarify that the risk factors identified are those that primarily contributed to his index offence and past offending rather than those that have reappeared or indeed developed in custody. The decision letter goes on to identify the work completed by the Applicant to address his risk factors.

26. The Applicant disputes ‘drug and alcohol misuse’ as a risk factor in his case, relying on his custodial record which does not show any adjudications for alcohol or being drunk and asks that the Reconsideration Assessment Panel looks at the number of times he has failed a mandatory drug test, been adjudicated, warned for possessing drugs or other unauthorised articles. However, it is clear that the panel identify that alcohol and drug misuse contributed to his index offence and that is why it is a risk factor in its opinion. Given the Applicant was in the Learned Sentencing Judge’s words ‘fuelled by alcohol and drugs’ at the time of the offence and given the Applicant himself accepted alcohol was a risk factor for him during the hearing, I consider that the Panel’s assessment of those as a risk factor to be entirely justified. It is also worthy of note that since his previous parole review, the Applicant has a proven adjudication for possessing a small wrap of cannabis in April 2018, was placed on report having been found in possession of a green substance thought to be cannabis in May 2018, received a proven adjudication for failing to provide sample for drug testing in July 2019, admitted using cannabis during a overnight ROTL to designated accommodation and subsequently failed a mandatory drug test and admitted extensive use of cannabis during his time in custody to his OS and OM at a meeting with them.

27. The Applicant disputes ‘a willingness to use weapons and violence’ as a risk factor, again relying on the lack of violence and weapon use in custody. The index offence involved the Applicant deliberately taking two large knives out that night and using one to stab the victim multiple times. He also has previous convictions from November 2006 for possessing a pen knife, assaulting a police officer and assault occasioning actual bodily harm. I therefore conclude that the Panel’s inclusion of this risk factor is based on considerable evidence and could not be said to be irrational.



28. The Applicant disputes the inclusion of 'poor consequential thinking/poor emotional management' as risk factors. He indicates that he thinks that this is being used as an excuse for a particularly difficult family situation that he is dealing with. The Applicant goes on to say that he has taken responsibility for his risks and addressing them. Again, it is important to point out that these are risk factors identified as relevant at the time of his offending rather than having developed due to his difficult and upsetting family situation. The panel makes it clear within its decision that it has taken into consideration the work completed by the Applicant to address his risk factors.
29. Furthermore, the Applicant submits that these risk factors were not mentioned in his previous Parole Board decision. The dossier contains the previous decision dated 30 August 2017 which includes as risk factors 'drug and alcohol misuse, a willingness to use violence and weapons, poor consequential thinking and poor emotional control'. The Applicant is therefore incorrect in suggesting that they were not previously raised as risk factors.
30. For all the reasons outlined, the inclusion of these risk factors is neither a mistake of fact nor an irrational assessment of risk and accordingly, this ground fails.

Ground (ii): That the OM supported release in their report and then changed their recommendation following the Applicant's return to closed conditions which was irrational.

31. In the OM's report dated 9 September 2019, release was supported. At that point in time, the Applicant was in open conditions and had been there for almost 17 months. The Applicant is correct in his submission that the OM described it to the panel as "*one of the most positive reports [they] had written in [their] role as OM*".
32. By the time the OM completed their next report, the probation officer's report dated 25 February 2020, the recommendation had changed. The Applicant had been returned to closed conditions and the OM assessed him as '*unmotivated to address his drug misuse or thinking deficits that resulted in his return*'.
33. During the oral hearing, the OM maintained their recommendation that the Applicant was not suitable for release or transfer back to open conditions as he had further core risk reduction work to complete.
34. It is entirely open to professionals to change their recommendation after further developments, either in updated reports or during an oral hearing. However, the test for irrationality relates to the decision of the panel not the recommendation of a witness so I have to ask myself whether the panel's decision was irrational for giving weight to the OM's current recommendation.
35. It is clear from the decision letter that the recommendations and evidence of professionals were fully explored as well as all other evidence, including that of the Applicant. Both the OS and the OM made a similar assessment and



recommended the same outcome. The panel agreed with their assessments and provided logical reasons why. Accordingly, this ground fails.

Ground (iii): That there had not been any positives highlighted in his hearing in particular the lack of violence and weapons in custody, his remorse, the length of time he maintained his enhanced IEP status, the completion of offending behaviour courses and the completion of ROTLs.

36. When a panel of the Parole Board is making its risk assessment the focus is on public protection and because of that, there tends to be a focus on the likelihood of something negative happening.
37. The panel had access to the dossier which provides a great deal of information on the Applicant, both positive and negative. The panel highlights in its decision that it had taken into account the dossier.
38. The Applicant specifically submits that the positives were not highlighted in his oral hearing and during his narrative he quite rightly points out some of the positive aspects to his time in custody.
39. I have been provided with the decision of the panel that runs to 11 pages. The decision letter is not a document that exists to detail all the evidence heard in a hearing, it is there to provide the reasons for the decision. However, it would be right to say that if the positives were ignored then it would not be a balanced and fair decision.
40. I have considered the decision letter in detail. It makes specific mention of the significant offending behaviour work completed by the Applicant. It makes specific mention of the Applicant having largely maintained enhanced status since August 2018. It makes specific mention of the good progress in open conditions until the first overnight ROTL. It makes specific mention of the lack of evidence of violence or aggressive behaviour in custody. It makes specific mention of the author of the pre-sentence report forming the view that the Applicant expressed genuine remorse.
41. In addition, other positives are mentioned; the Applicant's vocational and educational work, winning a particular award in 2010, the positive feedback on his work in the prison servery, his previous engagement with the substance support team in open conditions, the support of his family and partner are all discussed within the decision letter.
42. The Applicant also had the opportunity to both give evidence and make submissions at the end of the hearing, which he did. This allowed him the opportunity to raise any positives that he thought had not been discussed.
43. Given the detail of the decision letter which sets out the reasons in full, I have not felt it necessary to listen to the recording of the hearing.



44. In conclusion, the decision letter provides a balance of both the positives and negatives. It cannot be said that positives were not discussed or taken into account. Accordingly, this ground fails.

Ground iv: That the decision was irrational as it was not a balanced assessment, it was instead based on one incident of relapsing which he has accepted responsibility for, and a lack of motivation, which he disputes.

45. The Applicant is understandably disappointed with the outcome of his hearing. He submits that he believes it has been based on his relapse into using drugs which he says only happened once and he has taken full responsibility for it. He also is concerned that the decision letter describes a lack of motivation on his part which he does not accept. In essence, the Applicant is saying that the decision was not balanced as it placed too much emphasis on one incident which makes it irrational.

46. The panel heard evidence that the relapse to drug misuse was not a one-off incident. It heard from the OS and OM who described the Applicant telling them that he had used cannabis throughout his sentence and had no intention of abstaining. Whilst the OS gave the Applicant credit for being open about using drugs, they linked use of cannabis to the risk of serious harm and considered work around his use to be core risk reduction work. The OM told the panel that the Applicant's accounts of using cannabis had varied but his refusal to stop using it, and to engage with an intervention to address it, had led them to consider work that addressed his thinking skills to be necessary, as well as relapse prevention work. The panel heard from the Applicant that he had used cannabis on his ROTL due to a difficult situation and had then continued using it for three to four weeks upon his return to his current prison. The decision letter describes varied evidence from the Applicant ranging from him saying he would continue to use drugs, to him saying he would stop if told not to.

47. It is fair to say that the Applicant's use of drugs and the subsequent return from open conditions were given weight by the panel. This is perhaps unsurprising given it formed the basis of the change in the OM's recommendation, it was a common theme in both occasions when the Applicant was returned from open conditions and the misuse of drugs were considered to be a key risk factor as identified by the Learned Sentencing Judge and by the panel. Such a focus does not render the decision irrational. The panel in its assessment found the Applicant to lack insight into the risks associated with cannabis use and it was concerned that he used cannabis on his first experience of overnight ROTL.

48. Additionally, the panel in its assessment found the Applicant to lack the motivation to address the concerns raised by the OM and OS. The Applicant disputes this and describes himself as having *'more motivation than I've ever had'*. The panel had the advantage of hearing the Applicant, as well as the OS and OM. The panel also had the advantage of an extensive dossier of reports. It would therefore 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. I do not find any such reasons to interfere. The decision is well reasoned and based on the evidence. Accordingly, this ground fails.



Decision

49. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.
50. The Applicant asks in his application whether I can consider an earlier review. He indicates that he expects to not have a review for 18 months and wishes for that to be shorter. In the referral dated 21 March 2019, as with all referrals, the Secretary of State specifically states that the Parole Board is not asked to comment on or make any recommendation about the next review. Whilst the panel did indicate that if progress was made, an early review could be considered, this was not within the remit of the referral. Consequently, I have no such power to indicate the time for the next review as that is a matter for the Secretary of State.

Cassie Williams
15 May 2020

